

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 17

WCC No. 2000-0222

WCC No. 2003-0771

ROBERT FLYNN

and

**CARL MILLER, Individually and on behalf of
others similarly situated**

Petitioners

vs.

MONTANA STATE FUND

Respondent/Insurer.

ORDER CLARIFYING GLOBAL LIEN

Summary: The Court previously notified all workers' compensation insurers of the global lien claimed by the petitioner's attorney in this case. Mr. Leo S. Ward, an attorney representing one of the notified insurers, questioned whether the amounts claimed in the lien were supposed to be sent to petitioner's attorney. A conference call was then held with Mr. Leo S. Ward and petitioner's attorney, Mr. Rex Palmer.

Held: The common fund lien notice in this case authorizes all Montana insurers who pay benefits to which the lien attaches to withhold the percentages set out in the lien, however, insurers should not remit those amounts to the petitioner's attorneys at the present time. Disposition of the withheld amounts will be determined after the Supreme Court determines whether common fund fees must be paid by all claimants who benefit the underlying decision in this case or only by those claimants who were insured by the respondent, State Compensation Insurance Fund.

Topics:

Attorney Fees: Common Fund. Where the Workers' Compensation Court has previously held that the common fund doctrine applies only to benefits owed to claimants insured by the respondent in the particular case, *Ruhd v. Liberty*

Northwest Ins. Corp., 2003 MTWCC 38, the Court will authorize all insurers affected by similar global claims for common fund fees in other cases to withhold the amounts of the attorney fees claimed, at least until such time as the Supreme Court finally determines the scope of the common fund doctrine. However, the withheld amounts should not be remitted to petitioner's attorney. Disposition of the withheld amounts will be determined after the Supreme Court's decision on appeal.

¶1 This Court previously served all Montana workers' compensation insurers with notice of the global lien claimed by the petitioners in the above entitled action. By "global", I mean that the lien is claimed with respect to all claimants entitled to benefits under the Supreme Court decision in *Flynn v. State Compensation Ins. Fund*, 2002 MT 279, irrespective of the insurer.

¶2 On February 24, 2004, the Court held a conference call with Mr. Leo S. Ward, who represents one of the insurers who received the lien notice, and Mr. Rex Palmer, the petitioner's attorney. Mr. Ward indicated that the language in Mr. Palmer's lien could be read as requiring insurers to remit the amounts claimed in the lien directly to Mr. Palmer. Mr. Palmer and myself agreed that was not the intent of the notice.

¶3 I have previously ruled in *Ruhd v. Liberty Northwest Ins. Corp.*, 2003 MTWCC 38, that a common fund lien extends only to claimants who were insured by the respondent insurer in the case out of which the lien arose, hence in this case it would extend only to the State Compensation Insurance Fund. However, my decision in *Ruhd* is on appeal to the Montana Supreme Court, indeed it has been scheduled for oral argument. In that light, the global lien claimed in this case puts insurers on notice that the petitioner's attorney claims a global lien and authorizes them to withhold the amounts claimed in the lien. In the event my holding in *Ruhd* is upheld, the amounts withheld will be remitted to the claimants. Should the Supreme Court reverse my holding in *Ruhd*, then the amounts withheld will be paid to the petitioner's attorney *to the extent approved by the Court*. I would still have to determine the appropriate amount of the common fund fees; the amount claimed in the fee is the maximum potential liability. If I were to fix the fee at an amount less than that maximum the difference would be paid to the benefitted claimants.

¶4 This Order shall be posted on the Court's WEB site and sent to all attorneys practicing before this Court. I appreciate Mr. Ward bringing this matter to my attention.

DATED in Helena, Montana, this 26th day of February, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Rex Palmer
Mr. Leo S. Ward