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FILED

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OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT FOR THE STATE OF MONTANA

MARK MATHEWS,)	WCC Number 2001-0294
)	
Petitioner,)	MOTION FOR COMMON FUND/CLASS
)	ACTION ATTORNEY FEE LIEN
vs.)	
)	
LIBERTY NORTHWEST INSURANCE))	
CORPORATION,)	
)	
Respondent.)	

COMES NOW the petitioner Mark Mathews, by and through his counsel of record Geoffrey C. Angel, and moves the Court to provide notice to all insurers in Montana of counsel in the case at bar and *Wild v. Montana State Compensation Insurance Fund*, WCC 2001-0286 application of the common fund doctrine in the case at bar or alternatively certification of a class action for the administration of remedies consistent with the Montana Supreme Court's decisions in each of these cases. Each worker suffering from a work related injury or disease who was denied benefits because of the conclusive presumption of § 39-17-401(3) who may now benefit from the Supreme Court's decisions and hereafter receives workers' compensation benefits should contribute a pro rata share of the reasonable attorney fees based on the benefit each injured worker receives. This request is being made as an alternative to the request for class certification and provided as an alternative option for this Court's consideration.

Legal Analysis

As a result of the decision of the Montana Supreme Court in *Wild vs. Montana State Fund* Cause No. 02-198 2003 MT 115, and *Matthews v. Liberty Northwest Insurance, Co.* Cause No. 02-244 2003 MT 116 (decided on 4-29-03) Kelly Wild and Mark Matthews submit that a common benefit has been created, increased, and/or preserved for workers' compensation benefits for workers in possession of an independent contractor exemption form who now may receive workers' compensation benefits despite the irrebuttable presumption of § 39-71-401(3). Therefore, in accord with *Murer vs. State Compensation Mutual Insurance Fund*, 283 Mont. 210, 942 P2d 69 (1997), Kelly Wild and Mark Matthews ask this Court to apply the common fund

doctrine in this action as an alternative to the motion for class certification. Kelly Wild and Mark Matthews submit that the application of the common fund doctrine is an expeditious method to deliver workers compensation benefits to each employee including non-participating beneficiaries and as an alternative to the formal certification of a class action.

In *Murer*, several claimants initiated litigation as representatives of a class of injured workers seeking a higher workers' compensation benefit rate. Instead of certifying a formal class action to proceed the Court held that a common fund theory was more appropriate. The Court's application of the common fund theory was affirmed on appeal *Murer*, 283 Mont. at ___, 942 P2d at 72.

After remand, the ruling in *Murer* forced the insurer to increase benefits to a number of claimants who were not parties to the earlier litigation. *Murer* 942 P2d at 72. The *Murer* claimants again moved for class certification but this was unnecessary because the Court already had the power to supervise the plan to contact and pay the non participating beneficiaries insured by the State Fund. The Court's power to supervise these additional payments was inherent in the common fund action. In addition, as a part of the common fund action, the attorneys for *Murer* asserted a common fund attorney fee lien against these additional payments to the absent claimants.

Generally, the common fund doctrine "authorizes the spread of fees among those individuals benefitting from the litigation which created the common fund." *Mountain West Farm Bureau vs. Hall. Mut. Ins. Co. vs. Hall* 2001 Mt. 314 308 Mont. 29 38 P3d. 825. The common fund doctrine provides:

When a party has an interest in a fund in common with others and incurs legal fees in order to establish, preserve, increase, or collect that fund, then that party is entitled to reimbursement to his or her reasonable attorney fees from the proceeds of the fund itself.

Murer 283 Mont. at 222, 942 P2d. at 76

To receive attorneys fees under the common doctrine, a party must satisfy three elements: "First, a party (or multiple parties in the case of a consolidating case) must create, reserve, increase or preserve a common fund. This party is typically referred to as the active beneficiary. Second, the active beneficiary must incur legal fees in establishing the common fund. Third, the common fund must benefit ascertainable non-participating beneficiaries." *Mountain West Farm Bureau Mutual Insurance Company vs. Hall* 2001 Mt. 314 308, Mont. 29 38 P3d. 825. Kelly Wild and Mark Mathews meet each of these three prerequisites of the common fund doctrine.

First, Kelly Wild and Mark Mathews "created, increased and/or preserved" a common benefit for other independent contractors who obtained an independent contractor exemption form and were subsequently denied benefits based on the irrebuttable presumption found in § 39-17-301(4). Kelly Wild and Mark Mathews are therefore the active beneficiaries. Second, Kelly Wild and Mark Mathews incurred legal fees in establishing this common fund which will be based, in part, upon the sum of benefits incurred. Third and finally, the common fund will benefit

other ascertainable non-participating claimants. Therefore, the workers' compensation insurers in the state of Montana can offer no substantive argument that the *Murer* common fund doctrine cannot be applied in the case at bar.

In *Murer*, during the discussion about attorneys fees, the Supreme Court noted that as a result of its decision, the insurer became obligated to increase benefits to a substantial number of otherwise uninvolved claimants. *Murer* 942 P2d at 75. The Court noted that these benefits would not have been created, increased, and/or preserved after the Court's decision in *Murer*; or put another way, no such obligation by the insurer would have existed without the *Murer* decision. Therefore the Montana Supreme Court recognized that attorney's fees were properly awarded based upon the common fund doctrine. This result was not that innovative as the Court found that the common fund doctrine is "deeply rooted in American Jurisprudence." *Murer* 942 P2d at 76.

After discussing the common fund doctrine, the Court recognized:

application of the common fund doctrine is especially appropriate in a case like this where the individual damage from an institutional wrong may not be sufficient from an economic viewpoint to justify the legal expense necessary to challenge that wrong. The alternative to the doctrine's application is simply for the wrong to go uncorrected.

Murer, 942 P2d at 76.

The Court continued:

Based on these legal principles and authorities, we conclude that when a party, through active litigation, creates a common fund which directly benefits an ascertainable class of non-participating beneficiaries, those non-participating beneficiaries can be required to bury portion of the litigation costs, including reasonable attorney's fees. Accordingly, the party who creates the common fund is entitled, pursuant to the common fund doctrine to reimbursement of his or her reasonable attorney's fees.

Muirer 942 P2d at 76.

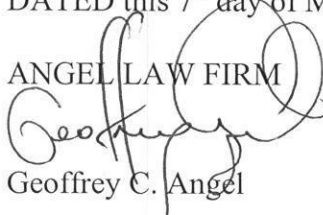
The Montana Supreme Court held that absent claimants were required to contribute in proportion to the benefits they actually received to the costs of litigation, including reasonable attorney's fees. *Murer* 942 P2d. at 77. Furthermore, the Montana Supreme Court has subsequently followed the *Murer* rationale in two other cases involving common fund attorneys fees. See *Rouche Fisch and Frost vs. State Fund*, 311 Mont. 210, 54 P3d. 25 (2002); *Flynn vs. State Fund* 2002 WL 31740520 312 Mont. 410 (opinion not yet released for publication). As in *Murer*, *Rouch et al*, and *Flynn* Kelly Wild and Mark Mathews engaged in complex and lengthy litigation that resulted in a legal precedent, which directly benefits a substantial number of independent contractors who were neither parties to nor directly involved in the *Wild* or *Mathews* litigation. See *Murer* 283 Mont at 223, 942 P2d at 76. In addition, Kelly Wild and Mark

Mathews “established a vested right on behalf of the absent claimants to directly receive immediate monetary claimants of past due benefit under-payments.” *See Murer 283 Mont. at 223, 942 P2d. at 76-77.* Since Kelly Wild’s active litigation created a common fund that directly benefits an ascertainable class of non-participating beneficiaries, those non-participating beneficiaries should be required to bear a portion of the litigation cost, including reimbursement of his reasonable attorney fees from that fund. *See Wild, 283 Mont. at 223, 942 P2d. at 76.*

For these reasons Kelly Wild and Mark Matthews should be entitled to common fund attorneys fees or alternatively consolidated for administration of a class action. The attorneys in this case have incurred legal costs and fees in the preservation of a common fund that will benefit an ascertainable class of workers who will receive the benefit “even though they were not required to intervene, file suit, risk expense, or hire an attorney.” *Murer 283 Mont. at 223, 942 P2d. at 77.* Accordingly, this Court should apply the common fund doctrine to the case at bar, this Court should supervise the payment of these additional benefits to absent claimants, and this Court should find that Kelly Wild and Mark Matthew are entitled to apportionment of their reasonable attorneys’ fees for the creating, increase and/or preservation of the common fund as between all non-participating passive beneficiaries.

DATED this 7th day of May 2003.

ANGEL LAW FIRM


Geoffrey C. Angel

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of May 2003 I served a copy of the foregoing on Respondent by first class mail, postage prepaid, and addressed as follows:

**Larry W. Jones, Senior Attorney
Liberty Northwest Insurance Corporation
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