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FILED

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MAY - 8 2003

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 TO FILE AMENDED
)	PETITION FOR HEARING
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 permit the filing of an amended petition for hearing which is a Class Action Petition for Hearing. The proposed Class Action Petition for Hearing, Motion for Class Certification and proposed Notice of Class Action and Questionnaire are attached as exhibits A, B and C.

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
700 S.W. Higgins, Avenue 250
Missoula, Montana 59803-1429

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Attorney for Petitioner

IN THE WORKER'S COMPENSATION COURT OF THE STATE OF MONTANA

KELLY WILD and)
 MARK MATHEWS,)
 individually and on behalf of all)
 others similarly situated,)
)
 Petitioners,)
)
 vs.)
)
 MONTANA STATE)
 COMPENSATION INSURANCE)
 FUND, LIBERTY NORTHWEST)
 INSURANCE COMPANY,)
 and all other similarly situated,)
)
 Respondents.)

WCC Number: 2001-0286
 2001-0294

CLASS ACTION
 PETITION FOR HEARING

As set forth in ARM 24.5.301, Petitioners allege on their own behalf and on behalf of all others similarly situated:

1. It is an objective of the Montana workers' compensation system to provide, without regard to fault, wage supplement and medical benefits to a worker suffering from a work related injury or disease.
2. Class Members each suffered from an injury due to an industrial accident or occupational disease and were each denied the benefits of the workers' compensation system.
3. Class Members were each denied the benefits of the workers' compensation system based on the conclusive presumption found within section 39-71-401, MCA.
4. Class Members are entitled to the benefits of the workers' compensation system because they were, in fact, employees under the test set out by the Montana Supreme Court applying the applicable administrative regulations and statutes.
5. Class Insurers denied all benefits under the workers' compensation system to each Class Member based on the conclusive presumption found within section 39-71-401, MCA even though each Class Member worked for a named insured employer with a current policy of insurance.

Ex. A

6. The mediation procedure set forth in the Workers' Compensation Act has been complied with.

DESCRIPTION OF CLASS MEMBERS

7. Class Description for Claimants The class of claimants in this case is described as follows:
Each person injured due to an industrial injury or occupational disease and who was, in fact, an employee denied benefits because of an Independent Contractor exemption.
These persons will be referred to collectively as Class Members.
8. Class Description for Insurers The class of insurers in this case is described as follows:
Each insurer, agent or self insured employer who wrote insurance or adjusted claims in Montana at any time since 1996 and denied a claim based on an Independent Contractor exemption.
These insurers will be referred to collectively as Class Insurers.
9. Numerosity of Class. Class Insurers sell workers compensation insurance and pay claims throughout the State of Montana. The frequency and persistence of Class Insurers behavior is so widespread that joinder of all members of the class as active participants is impracticable.
10. Commonality of Questions. Questions of law and fact which are presented by this action are common to all Class Members and to all Class Insurers.
11. Typicality of Claims. Claims of Kelly Wild and Mark Mathews are typical of the claims of all members of the class. The defenses of the State Compensation Insurance Fund and Liberty Northwest are typical of all Class Insurers.
12. Adequacy of Representation. Kelly Wild and Mark Mathews are members of the class and have suffered a typical violation of the Workers' Compensation Act at the hands of the State Compensation Insurance Fund and Liberty Northwest identical to the violation alleged to have been committed against all Class Members by all Class Insurers. Kelly Wild and Mark Mathews have retained counsel experienced in class action litigation, in the workers compensation court and in insurance law to represent each Class Member against each Class Insurer.
13. Consistency of Adjudication. The class is large in number and widely disbursed throughout the state of Montana. The prosecution of separate actions by fewer than all members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the State Compensation Insurance Fund, Liberty Northwest and Class Insurers and which, as a practical matter, would dispose of the interests of the other class members not parties to this adjudication or would substantially impair or impede their ability to protect their interests.

14. Class Wide Relief. The State Compensation Insurance Fund and Liberty Northwest have acted or failed to act on grounds generally applicable to every member of the class thereby making appropriate an adjudication and award of benefits with respect to the class as a whole. In addition, Class Members seek declaratory relief which would affect all Class Members' rights.
15. Superiority of Class Action. The questions of law and fact common to the members of the class predominate over any questions affecting only individual members and a class action is superior to any other available method for fair and efficient adjudication of the controversy.
16. Modification of Class Action Allegations. As further information is gathered, Kelly Wild and Mark Mathews may modify the paragraphs in this section in an anticipated class certification motion and brief in support.
17. The following is a list of individuals who are potential witnesses for the Petitioner in this matter:
 - a. Class Members;
 - b. All medical providers of any member of the Class Members;
 - c. All witnesses set forth by the insurer or employer.

The following is a list of written documents relating to this case which may be introduced as evidence by the petitioner in this matter:

- a. Class Insurer's claims file for each Class Member;
- b. Class Members employment records for the time of injury employment;
- c. Class Members' medical records;
- d. Any records presented by the insurer or employer.

WHEREFORE, the petitioners Kelly Wild and Mark Mathews, individually and on behalf of Class Members, respectfully prays that this Petition be set for hearing and that the following relief be granted.

1. For a declaration that employees injured due to an industrial accident or occupational disease are entitled to benefits under the Acts.
2. For an order certify the class of plaintiffs' claims against the class of defendants.
3. For an order authorizing notification to the class of plaintiffs' and an order approving the questionnaire for each claimant to make a determination on the merits for each claim.
4. For all worker's compensation benefits due and owing under the Act, including reasonable attorney fees and costs, for the filing of this Petition pursuant to Montana Code Annotated section 39-71-101, et seq.

5. For attorney's fees and costs under the common fund doctrine.
6. For such other and further relief as this Court deems just and proper in this cause

DATED this 7th day of May 2003.

ANGEL LAW FIRM


Geoffrey C. Angel

DATED this 7th day of May 2003.

HUNT AND MOLLOY

James G. Hunt

DATED this 7th day of May 2003.

FOUST LAW FIRM

Lucas J. Foust

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IN THE WORKER'S COMPENSATION COURT OF THE STATE OF MONTANA

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KELLY WILD and)
MARK MATHEWS,)
individually and on behalf of all)
others similarly situated,)
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Petitioners,)
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MONTANA STATE)
COMPENSATION INSURANCE)
FUND, LIBERTY NORTHWEST)
INSURANCE COMPANY,)
and all other similarly situated,)
)
Respondents.)

WCC Number: 2001-0286
2001-0294

MOTION FOR CLASS
CERTIFICATION

Parties and Nature of Class Action

Kelly Wild and Mark Mathews suffered injuries due to an industrial accident in Montana and were denied the benefits of workers' compensation insurance because they had been issued a Certificate of Independent Contractor Exemption by the Department of Labor and Industry. Class Insurers failed and refuse to pay workers' compensation benefits based solely on the existence of the exemption without regard to whether the facts supported the presumption. Both Kelly Wild and Mark Mathews were engaged in the construction industry and were injured in falls from the roof of houses under construction.

In this action Kelly Wild and Mark Mathews seek to represent a class of similarly situated persons. Each Class Member suffered injuries due to an industrial accident or occupational disease and were denied the benefits of workers' compensation insurance under Montana's Workers' Compensation and Occupational Disease Acts. Class Insurers denied workers' compensation benefits to each Class Member who was employed by an insured employer based solely on an Independent Contractor exemption issued by the Department of Labor and Industry even though each Class Member was, in fact, an employee.

Ex. B

Class Members contend that Class Insurers were required to conduct an investigation into whether or not each was, in fact, an employee or an independent contract for a determination of each Class Member's entitlement to workers' compensation benefits. The Montana Supreme Court held in *Wild v. Montana State Compensation Insurance Fund*, 2003 MT 215 and *Mathews v. Liberty Northwest Insurance Corporation*, 2003 MT 116 that § 39-71-401(3), MCA, requires the employer to make inquiry and thereafter treat a worker as an Independent Contractor and not as an employee to satisfy and rely upon the exemption contained in § 39-71-401, MCA. Employees are entitled to the benefits of the workers' compensation system in Montana.

In 1983 the Legislature passed an amendment to § 39-71-401(3) which provided an irrebuttable presumption of Independent Contractor status for any worker who obtained and provided a Certificate of Independent Contractor Exemption to his or her employer. Since that time each Class Insurer has denied workers' compensation benefits to anyone who held a Certificate of Independent Contractor Exemption regardless of their status as an employee. Since that time each Class Member was denied benefits under the workers' compensation acts solely because of an Independent Contractor exemption. Class Members seek certification of a class of each person injured due to an industrial injury or occupational disease and who was, in fact, an employee denied benefits because of an Independent Contractor exemption.

Legal Analysis

Although the Workers' Compensation Court rules do not provide for class action certification, the Workers' Compensation Court applies Rule 23 of the Montana Rules of Civil Procedure to determine whether a class action is the appropriate method to implement a remedy. The Montana Supreme Court has previously approved the Workers' Compensation Court seeking guidance from the Montana Rules of Civil Procedure. See *Moen v. Peter Kiewit & Sons, Co.*, 201 Mont. 425, 434, 655 P.2d 482, 486 (1982); *Murer v. Montana State Compensation Mut. Ins. Fund*, 257 Mont. 434, 849 P.2d 1036 (1993)(approving of Rule 23 in context of determining whether to certify a class action). In a similar manner the Montana Rules of Civil Procedure were fashioned after the federal counterpart which guide the interpretation of state rules. *Id.*

I. Rule 23(a) prerequisites of numerosity, commonality, typicality and adequacy of representation

Rule 23, Montana Rules of Civil Procedure, establishes four prerequisites for every class action: (1) the class must be so numerous that joinder of each member is impracticable; (2) there must be questions of law or fact common between each member of the class; (3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; and (4) the representative parties must fairly and adequately protect the interests of the class. *Rule 23, Montana Rules of Civil Procedure*. The plaintiff bears the burden of establishing the four prerequisites. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). To determine whether the prerequisites of Rule 23(a) are satisfied a court must engage in a rigorous analysis though an extensive evidentiary showing is not required. *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975). A court must only have sufficient information "to form a reasonable judgment on each requirement." *Id.*

A court must accept as true the substantive allegations of the class claim and does not examine the merits of the case. *Id. at 901*. Kelly Wild and Mark Mathews seek to certify a class of similarly situated workers with the following characteristics:

Each person injured due to an industrial injury or occupational disease and who was, in fact, an employee denied benefits because of an Independent Contractor exemption.

Amended Petition for Hearing. It must be conceded that the prospective class meets the requirements of Rule 23(a)(1) and (2) regarding numerosity and common questions. The potential number of workers employed as employees and denied workers' compensation benefits under the irrebuttable presumption of § 39-71-401(3) is likely to be high. It is estimated that the number is hundreds each year given the issuance of over 20,000 Certificates of Independent Contractor Exemption issued since 1995. The numerosity prerequisite requires the class members to be so numerous that joinder is impracticable. *Rule 23(a)(1), Montana Rules of Civil Procedure.* Although mere allegations of numerosity are insufficient to meet this prerequisite a party need not show the precise number of members in the proposed class. *Evans v. U.S. Pipe & Foundry, Co., 696 F.2d 925, 930 (11th Cir. 19830).*

The prerequisite of commonality requires the existence of at least one question of law or fact common to each class member. *Rule 23(a)(2), Montana Rules of Civil Procedure.* One question that satisfies the Rule 23(a) commonality requirement as common to the members of the proposed class is whether each Class Insurer's decision to deny workers' compensation benefits based on the Certificate of Independent Contractor Exemption was supported in fact. This question alone satisfies the commonality prerequisite of Rule 23.

The prerequisite of typicality requires the existence of claims arising out of the same course of conduct. In the Ninth Circuit the test for typicality is "whether other members (of the class) have the same or similar injury, whether the actions is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon, 976 F.2d at 508.* Typicality does not refer to the specific facts from which a claim arose, to the specific relief sought, or differences between the claims and defenses. *Id.* As long as the named representatives' claims arise from the same course of conduct that forms the basis of the class claims and is based upon the same legal theory differences between the claims or defenses of the class and the class representatives will not render the names representatives' claims atypical. *Jordan v. County of Los Angeles, 669 F.2d 1311, 1321 (9th Cir. 1982).*

Kelly Wild and Mark Mathews are each entitled to workers' compensation benefits due to industrial accidents which arose during the course of their employment as employees although their employer had a valid Certificate of Independent Contractor Exemption issued by the Department of Labor and Industry. Both claims were initially denied by the insurer, State Compensation Insurance Fund and Liberty Northwest Insurance Corporation, based solely on the existence of the certificate and the conclusive presumption found at § 39-71-401(3)(c).

Each Class Member suffered from an injury caused by an industrial accident or occupational disease. More importantly each suffered similar harm by the Class Insurers in the form of a denial of benefits based upon the exemption and conclusive presumption despite their identity, in fact, as an employee for an insured employer. Each Class Member's claim is based upon conduct identical to Kelly Wild and Mark Mathews and they have been injured by the same course of conduct engage in by each Class Insurer. Kelly Wild and Mark Mathews claims are typical of each Class Member: refusal to provide workers' compensation benefits.

Rule 23 requires a showing that the named parties can fairly and adequately protect the interests of all class members. The adequacy of representation prerequisite consists of two requirements: (1) the name parties counsel is qualified, experienced and generally able to conduct the proposed litigation, and (2) the name parties have no interests antagonistic to the members of the class. *Securities and Exchange Commission v. Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2nd Cir 1992). Plaintiffs counsel are experienced in class action and workers' compensation litigation and are able to conduct this case in a well reasoned and orderly fashion. Neither Kelly Wild nor Mark Mathews have interests antagonistic to the class.

II. Rule 23(b)(3) prerequisite of predominate questions of fact or law and superiority of a class action

In addition to satisfying the prerequisites of Rule 23(a), parties seeking class certification must also show that the action is maintainable by at least one of the grounds under Rule 23(b). See *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Kelly Wild and Mark Mathews seek certification under Rule 23(b)(3), Montana Rules of Civil Procedure. That subsection provides that an action may be maintained as a class action if "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for th fair and efficient adjudication of the controversy." *Rule 23(b)(3), Montana Rules of Civil Procedure*.

For certification under Rule 23(b)(3) common questions must predominate over individual interests. *Amchem*, 521 U.S. at 623. The predominance requirement is far more demanding than the commonality requirement of Rule 23(a). *Id.* "Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy." *Zinser*, 253 F.3d at 1189 (quoting *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996)). Predominance is determined by weighing the significance of common issues and not by counting their numbers. *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 627 (5th Cir. 1999). Here common questions predominate over individual interests. The most significant aspect of this case is whether Class Insurers denied stacking benefits to some employees based on the irrebuttable presumption found in § 39-71-401(3), MCA.

A court must consider the four factors delineated in Rule 23(b)(3) to determine the superiority of a class action. *Zinser*, 253 F.3d at 1190. Those four factors are (1) the interests of members of the class in individually controlling the prosecution or defense of separate actions, (2) the extent and nature of any litigation concerning the controversy already commenced by or

against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action. *Rule 23(b)(3), Montana Rules of Civil Procedure.*

Here it is unlikely that many individuals would choose to opt out of the class and pursue a claim individually and the class will likely represent the vast majority of the potential members. The name parties have challenged the propriety of the irrebuttable presumption found in § 39-71-401(3), MCA, to the Montana Supreme Court which held that such a provision violates public policy. The litigation of the legal foundation necessary to pursue these cases has been well developed and administered in a efficient manner. Each claim will necessarily be pursued through the workers' compensation court which could most efficiently administer the numerous claims through a single pursuit of claims, defenses by common counsel in all claims. The superior method for the individual claims is to administer them as a class action

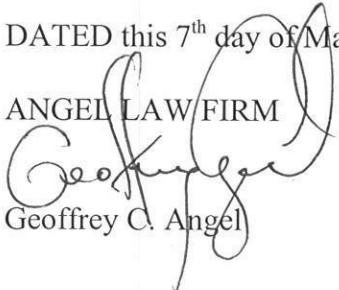
Kelly Wild and Mark Mathews have litigated and obtained a judgment from the Montana Supreme Court to support the claims for injunctive relief sought in the Class Action Petition for Hearing. The primary relief sought is injunctive and declaratory relief although Class Members also seek the workers' compensation benefits to which they are entitled under the Acts.

Conclusion

For these reasons Kelly Wild and Mark Mathews move this Court to certify this case as a class action as defined in the Class Action Petition for Hearing against the class of insurers defined therein. Order the Class Insurers to provide to counsel for petitioners a list of the names and addresses of all persons within the class definition. Order counsel for petitioners to thereafter file with the Court a proposed notice and distribution plan that provides to the class the best notice practicable. The notice and plan shall comply with Rule 23(c)(2). Order Class Insurers to file a response to the proposed notice and distribution plan. Order the counsel for petitioners to distribute the notice to the class members in accordance with the distribution plan and notify the Court of the identity of each class member.

DATED this 7th day of May 2003.

ANGEL LAW FIRM


Geoffrey C. Angel

DATED this 7th day of May 2003.

HUNT AND MOLLOY

James G. Hunt

DATED this 7th day of May 2003.

FOUST LAW FIRM

Lucas J. Foust

IN THE WORKER'S COMPENSATION COURT OF THE STATE OF MONTANA

* * * * *

This Notice is to advise you that you may be entitled to workers' compensation insurance benefits due to a prior injury resulting from an industrial accident or occupational disease. In order to determine your eligibility you need to complete the questions below and return this questionnaire no later than thirty (30) days from the day you receive this notice. The benefits you may be entitled to recover can include the medical expense you incurred for the treatment of your injury or injuries and indemnity benefits including any lost wages resulting from the injury or injuries and subsequent healing process until you healed.

During the period of time you had a Certificate of Independent Contractor Exemption did you suffer from a work related injury or disease that required you to seek medical attention or miss more than one week from work?

Yes No

At the time you suffered from a work related injury or disease were you engaged in an independently established trade, occupation, profession, or business? In other words, did you work for yourself?

Yes No

Were you free from the control and direction over the performance of your services? In other words, did you set your own work hours, control the means, manner and way you did your work?

Yes No

Were you paid on an hourly or on a contract basis?

Hourly Contract

If you were paid on a contract basis was it based in part upon the number of hours you worked?

Yes No

Did the person for whom you performed work at the time you first suffered from a work related injury or disease provide you with the tools or equipment required to perform your work?

Yes No

Could you be fired from the job at the time of your injury by another person?

Yes No

If so, who?

What business is this person associated with?

What is the name of the person for whom you performed work at the time you first suffered from a work related injury or disease?

I, the undersigned, declare under penalty of perjury that I have read and completed the forgoing and affirm that it is true and correct to the best of my knowledge and belief.

DATED this ___ day of June/July 2003.

Signature _____

Print name _____

Ex.C