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IN THE WORKERS' COMPENSATION COURT
OF THE STATE OF MONTANA

ALEXIS RAUSCH, AS CONSERVATOR
FOR KEVIN RAUSCH,

AND

CHARLES FISCH, INDIVIDUALLY
AND ON BEHALF OF OTHERS
SIMILARLY SITUATED,

AND

THOMAS FROST, INDIVIDUALLY
AND ON BEHALF OF OTHERS
SIMILARLY SITUATED,

PETITIONERS,

VS.

MONTANA STATE FUND, RESPONDENT/INSURER.

RESPONDENT,

ORIGINAL

FILED

AUG 20 2004

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

BEFORE: THE HONORABLE MIKE McCARTER

JULY 8, 2003
10:00 A.M.

WCC NO. 9907-8274R1, 2000-0023R1, 2000-0030R1

1 APPEARANCES:

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1 THE COURT: We will go ahead and get
2 started. This is matter of Alexis Rausch,
3 Charles Fisch, Thomas Frost versus State Fund,
4 these are consolidated matters, and it is
5 Tuesday, July the 8th. It's about ten minutes
6 after ten. This is the time that was set for
7 hearing on the attorney's fees.

8 Present for the attorneys representing
9 the claimants in this case is Steve Roberts; as I
10 understand it, you are going to set it for all
11 three attorneys, am I correct?

12 MR. ROBERTS: That's correct, Your
13 Honor.

14 THE COURT: For the State Fund, Greg
15 Overturf and Brad Luck are here, along with
16 Brad's sidekick Tom Harrington.

17 And there are two gentlemen here, and
18 could you identify yourselves for me?

19 MR. DECKER: Richard Decker from
20 Billings, Montana.

21 THE COURT: D-E-C-K-E-R?

22 MR. DECKER: Yes.

23 MR. BUHR: Henry Buhr, B-U-H-R, I am
24 from Philipsburg.

25 THE COURT: I understand Philipsburg has

1 a great candy store. What was your first name?

2 MR. DECKER: Henry.

3 THE COURT: All right. Mr. Decker, did
4 you drive over from Billings this morning?

5 MR. DECKER: Yes.

6 THE COURT: I was in Billings yesterday.
7 I went to Denver over the 4th of July.

8 The proposal in this case is for
9 attorney's fees to be awarded against impairment
10 awards that are paid to permanently totally
11 disabled workers.

12 And the attorney -- this is to request
13 -- the attorney's fees are due, because the
14 Supreme Court said they were due.

15 The question is the amount, is what I
16 have to determine today. The proposal is for
17 attorney's fees of 15 percent, if the worker is
18 under 60 years of age, ten percent if they are 60
19 to 61, five percent if you are 62 to 63, and over
20 63, then it's nothing on that.

21 Mr. Decker, how old are you?

22 MR. DECKER: I am 64 right now, I'll be
23 65 in October.

24 THE COURT: So basically, this wouldn't
25 affect you at all, because it would be nothing

1 taken.

2 MR. DECKER: The way I read the letter,
3 if I was 63 in September is it, which I was --

4 THE COURT: You would expect to be
5 affected, you would be five percent. How about
6 you?

7 MR. BUHR: I am 56.

8 THE COURT: You would be subject to the
9 15 percent.

10 All right. You two gentlemen are
11 probably the most important people I need to hear
12 from today, because the attorneys in this case
13 have basically reached an agreement as to what
14 they think was fair, and that's what they
15 reached. And I have to determine whether or not
16 that's fair or not. So let me hear, do you have
17 a preference as to who goes first? Let me hear
18 what your thoughts are.

19 MR. BUHR: Okay.

20 THE COURT: Mr. Buhr, do you want to
21 talk first?

22 MR. BUHR: I was injured on the 22nd of
23 March, 1995, and I have been on permanent total
24 disability. I am handicapped, I am in constant
25 pain, I am continuously broke.

1 I knew from the start that I would be
2 entitled to this impairment award, and I knew
3 also that at age 65 I would basically be forced
4 into retirement. And I counted on that
5 impairment award as sort of a severance pay.

6 I feel like these trial lawyers are just
7 greedy for windfall profits. They filed this
8 suit for me, payment of impairment awards and
9 won. I was never informed of the suit, I was
10 given no opportunity to elect to participate or
11 not, and I never authorized any of them to act on
12 my behalf.

13 Now you are considering paying them 15
14 percent of my award money.

15 I don't feel I should be required to pay
16 anything. I don't think they started this action
17 without the expectation of being paid hundreds of
18 thousands of dollars belonging to disabled who
19 are subject to the whims of the court where they
20 have no voice.

21 A message needs to be sent to lawyers,
22 they won't be compensated for filing on behalf of
23 others similarly situated, unless they are given
24 a choice in participating.

25 I think it's high time this bar

1 association has some limits on the robbery of the
2 poor to line the pockets of the already rich
3 needs to end right now.

4 If the court requires to pay them, by
5 law, or by decree of the Supreme Court, a dollar
6 per person should be plenty, or in the case of
7 percentage, maybe a tenth of a percent. I count
8 on this money, and I had no choice in anything
9 that came down before right now.

10 THE COURT: You fully understand that
11 the doctrine, which is developed, is one, though,
12 that I have to follow, so I have no choice but to
13 award attorney's fees, as the Supreme Court has
14 affixed on it.

15 Their thought on this is basically that
16 the workers who are going to receive these
17 impairment awards have benefitted from the
18 efforts of the attorney.

19 Did you ever -- had you ever contacted
20 the State Fund previously to talk to them about
21 the impairment award?

22 MR. BUHR: I called the State Fund
23 attorney and talked to him after it came out in
24 the paper about the decision.

25 THE COURT: Even before that decision,

1 you felt you were entitled to it?

2 MR. BUHR: Sure. I knew that they did
3 that in 1995.

4 THE COURT: But you thought it would be
5 coming to you at age 65?

6 MR. BUHR: That's what I was told.

7 THE COURT: What happened with this
8 decision, they moved it up so you get it now
9 instead of age 65.

10 MR. BUHR: It all gets whittled away and
11 when I'm retired there is nothing, I am broke,
12 two-thirds pay. Every time this legislature or
13 work comp turns around, they are getting into the
14 pockets of the disabled, who have no ability to
15 do anything. They take half of my Social
16 Security money, they are just always doing it.
17 It's the workers that get the shaft here.

18 THE COURT: Is it your preference to
19 leave the impairment award to which you would be
20 entitled basically on account with the State Fund
21 rather than receive it right now?

22 MR. BUHR: Sure, just like it was, I was
23 happy. If I had been given a choice, I would
24 say, no, I don't want to participate. And I
25 believe the worker should have that choice.

1 THE COURT: Well, one thing that you
2 have done that the others haven't, you have shown
3 up here today. So today is sort of their option
4 to tell me what you are telling me, and that I
5 have to take into consideration.

6 You may be different from other work who
7 would be happy to gather it; if you are like me,
8 sometimes I don't want to receive the money
9 because I have a tendency to spend what I get.

10 MR. BUHR: Sure, like getting a tax
11 return, I hate having to pay it, when I get it in
12 April, it sure helps out. You kind of depend on
13 it, count on it.

14 THE COURT: Okay. I will ask counsel
15 here a couple of questions about your particular
16 situation, but let me hear from Mr. Decker now.

17 MR. DECKER: Okay. My situation is kind
18 of like that, I need the money, too. My
19 situation, I feel I didn't get any
20 representation, I shouldn't even be in this, I
21 don't think, because I am going to be 65 in
22 October, and they told me I had to wait until I
23 was 65 before I could get the money. Before I
24 get this money, I am going to be 65.

25 So the courts make their ruling on stuff

1 like this, but until the money is going to be
2 appropriated, I am going to be 65. I don't think
3 I should be subject to paying five percent of my
4 money.

5 THE COURT: Was it your understanding
6 you were going to receive it at 65?

7 MR. DECKER: Yes.

8 THE COURT: Did you have that
9 understanding before this litigation took place,
10 before the decision?

11 MR. DECKER: Yes.

12 THE COURT: Had you talked to a claims
13 examiner about that?

14 MR. DECKER: I didn't know anything
15 about this thing, until my attorney contacted me
16 this was going to happen, and he filed some kind
17 of thing, a motion that he thought it was an
18 excessive amount, he said something about it's
19 going to be paid early, like about one and a half
20 to three and a half percent, but now it's coming
21 so late, until this money is going to be coming,
22 I am going to be 65 already.

23 So why should funds come out of -- money
24 come out of my funds, when I am already going to
25 be 65 before I receive it?

1 THE COURT: Who is your attorney?

2 MR. DECKER: Vic Halvorson.

3 THE COURT: We have heard from Vic, and
4 he has filed documents in this case.

5 MR. DECKER: He told me at this point,
6 the cost was so low, he wasn't going to
7 intervene. He told me to come up and voice my
8 opinion.

9 THE COURT: Okay. Well, I am going to
10 throw this at counsel here, is it -- I don't
11 have, I was looking at the notice we sent, I
12 didn't look at the agreement, does the agreement
13 provide for the percentages to be based on a
14 particular date?

15 MR. HARRINGTON: Yes, it does, Your
16 Honor. The date of the decision, Your Honor,
17 their age on the date of the decision, which was
18 September 5th.

19 THE COURT: September 5th of 2002.
20 Steve, what do you think about Mr. Decker's
21 circumstance, he isn't going to get it until 65?

22 MR. ROBERTS: Correct. That may have
23 been a previous suggestion, but the revised
24 settlement agreement indicates it's the date of
25 the attorney's fee hearing.

1 THE COURT: Oh, it's the date of the
2 attorneys' fee hearing.

3 MR. LUCK: Is the one signed agreement.
4 We better double-check that with the final
5 agreement, Your Honor.

6 THE COURT: Okay.

7 MR. LUCK: I think that got changed.
8 The final agreement was the date of the decision,
9 Your Honor, Tom is right.

10 THE COURT: Is this in paragraph one B.

11 MR. LUCK: Yes, very bottom of page two,
12 Your Honor.

13 THE COURT: My copy says based on the
14 age of the complainant on the date of the Supreme
15 Court decision.

16 MR. LUCK: Yes, that was the final
17 agreement. Greg was looking at a draft, Your
18 Honor.

19 THE COURT: All right. Let me kick this
20 back to Steve. If they were going to get it
21 anyway at age 65, I sort of changed the mix in
22 this case, because I think the State Fund's
23 original position, was they get it at age 65. My
24 problem was, why they'd get it at all, and the
25 Supreme Court reversed me on that.

1 MR. ROBERTS: And also, as you recall,
2 the State Fund's position on appeal was they
3 asked that your decision -- that they not be
4 awarded any impairment at all should be affirmed.

5 THE COURT: That's because I gave them a
6 crutch to use there.

7 MR. ROBERTS: Yes. I appreciate hearing
8 from Mr. Buhr and Mr. Decker. I would just like
9 to -- Mr. Buhr?

10 MR. BUHR: Yes.

11 MR. ROBERTS: I appreciate your
12 comments. Our goal for purposes in this case was
13 to help claimants, not to try to take from
14 claimants. I appreciate your thoughts. I am a
15 single practitioner in Bozeman, and I feel very
16 strongly that my job is to help the people that I
17 represent.

18 I appreciate all of your thoughts, and
19 on behalf of all the claimants' attorneys in this
20 case, who are Monty Beck, who is an attorney in
21 Bozeman, and Lon Dale, who is an attorney in
22 Missoula, I feel I can speak on behalf of them,
23 if you and Mr. Decker also, if they prefer to
24 wait until age 65, and they feel strongly about
25 that, we would have no objection to them waiting

1 until age 65, and we waive our fees entirely in
2 regard to you two gentlemen.

3 And, you know, as I said, our goal is to
4 try to help people, and if that would help you
5 the most, we would be happy to do that.

6 MR. BUHR: That would be fine.

7 THE COURT: My next question -- you just
8 answered it.

9 MR. ROBERTS: Yes.

10 THE COURT: What do you think about
11 that?

12 MR. LUCK: We are happy to do whatever
13 claimants' counsel wants to do and withhold the
14 payments until age 65, and not deduct a fee.

15 THE COURT: Mr. Decker, when are you
16 turning 65?

17 MR. DECKER: In October.

18 THE COURT: Is that okay with you? You
19 get it at age 65 and no fee?

20 MR. DECKER: Yes.

21 THE COURT: And, Mr. Buhr, you want to
22 do that too, wait until you are 65, and no fee?

23 MR. BUHR: Yes.

24 MR. ROBERTS: Would you prefer to get it
25 sooner with no fee?

1 MR. BUHR: No, I don't think so.

2 THE COURT: He thinks he will spend it.
3 I have been in his situation.

4 MR. BUHR: I know the situation, I am
5 living on nothing now. If I get a big chunk of
6 money, I mean my wife is -- I have got two kids,
7 a pregnant daughter, it's gone.

8 MR. ROBERTS: That's entirely up to you.

9 THE COURT: I am going to permit that
10 for these two gentlemen.

11 Just to address a couple comments you
12 made, Mr. Buhr, there was a benefit that did
13 accrue to him, in your case, you are not wanting
14 it, it doesn't really accrue to you. I see your
15 situation and your point, they do, too, that's
16 why they agreed to what they have agreed to.

17 But one thing in this case is that the
18 attorneys could have come in here and claimed the
19 full 25 percent on everything, and they didn't
20 try to do that, and I appreciate that, because I
21 probably wouldn't have approved that.

22 And they did reach a fee schedule that
23 did take into account the situations of the
24 claimants and the fact that at least prior to
25 this litigation, many of the claimants, many of

1 the workers were on track to receive it when age
2 65. And I threw the monkey wrench into it, part
3 of it's my fault, I take part responsibility.

4 MR. BUHR: May I comment, please?

5 THE COURT: Sure.

6 MR. BUHR: None of my comments, nothing
7 I said was directed at these attorneys as
8 individuals. It's just what I perceive in our
9 society, a real problem with this typical thing,
10 you know.

11 It's the millions that attorneys made on
12 tobacco settlements, the litigation that's going
13 on in the -- on the Second Amendment issue,
14 trying to break the gun industry with frivolous
15 lawsuits, it's just a perception that I have that
16 judges, legislators, many of which are attorneys,
17 trial lawyers, they are all members of this club,
18 the bar association, and I know you guys talk
19 back and forth when you are not in this chamber,
20 they probably knew you weren't going to go for 25
21 percent.

22 You know, again, I am not saying this as
23 a disparaging comment towards them as
24 individuals, but, you know, it's just a problem
25 that I perceive in our society.

1 I think that people in our situation
2 should have an opportunity to elect in or out of
3 a case like this in advance. What's the problem
4 with that, being out front and in the open.

5 THE COURT: One of the problems is that
6 entails making these into class actions, that
7 wasn't made into a class action in the original
8 thing, that can happen, in a true class action,
9 this case just never got into that posture,
10 because of the decision that I made.

11 So it sort of comes at the tail end,
12 rather than front end. You came and we are
13 giving you the opportunity to do exactly that.

14 MR. BUHR: I appreciate it. Thank you.

15 THE COURT: Okay. All right. With
16 those two revisions, I do think that the schedule
17 is near, and I will approve it, and we will allow
18 Mr. Decker and Mr. Buhr to opt out, and benefits
19 will be paid to them at age 65 with no deduction.
20 Okay.

21 MR. ROBERTS: All right. Anything else?

22 MR. BUHR: Do you need any claim number?

23 THE COURT: Do you have it?

24
25 MR. HARRINGTON: We have it. It's on

1 the list of included people.

2 THE COURT: Okay. We didn't have an
3 awful lot -- we have some claimants, what did we
4 have, 150, 160 in that pool?

5 MR. HARRINGTON: I think the included
6 pool ended up being 88.

7 THE COURT: Okay, 88. You will be easy
8 to identify. We will take care of you. Thank
9 both you gentlemen for coming. Thank you,
10 counsel.

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C E R T I F I C A T E1
2
3 STATE OF MONTANA)

4 : ss

5 County of Cascade)
67 I, CONNIE J. HEIMAN, do hereby certify
8 that: I was a duly appointed, qualified and
9 acting Official Court Reporter of the Worker's
10 Compensation Court of the State of Montana; that
11 I reported all of the foregoing proceedings had
12 in the above-entitled action, and the foregoing
13 transcript of testimony contains a full, true and
14 correct transcript of the said proceedings as
15 transcribed16 IN WITNESS WHEREOF, I have hereunto set
17 our hand on this 18th day of
18 August 2004.
19
2021
22 23 CONNIE J. HEIMAN
24 REGISTERED PROFESSIONAL REPORTER
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