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**FILED**

**FEB - 6 2006**

OFFICE OF  
WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF  
MONTANA**

**WCC No. 2005-1505**

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**ALEXIS RAUSCH, et al.**

**Petitioners**

**vs.**

**MONTANA STATE FUND**

**Respondent/Insurer**

**and**

**Jeremy Ruhd**

**Petitioner**

**vs.**

**LIBERTY NORTHWEST INSURANCE CORPORATION**

**Respondent/Insurer.**

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**LIBERTY NORTHWEST'S ANSWERING BRIEF**

The Court offered Liberty the opportunity in its Order dated December 6, 2005 to file a brief on January 9, 2006. Not wanting to try to anticipate the Petitioners' arguments, and thereby possibly discuss issues not raised by the Petitioners, Liberty chose to await the filing of the Petitioners' Brief and file, pursuant to the Court's Order, this Answering Brief.

**DOCKET ITEM NO. 317**

In principal, Liberty has no objection to an interim award of attorney fees after the retroactive application issue is finally resolved.

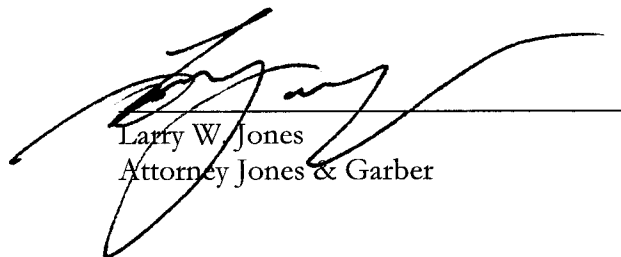
As noted by the attorney for the intervenor ASARCO, Inc., in ASARCO's brief there is an unresolved issue regarding the scope of common fund attorney fees generally. Specifically, this Court in Flynn v. State Fund, WCC No. 2000-0222, Amended Order Setting Briefing Schedule authorized the parties and intervenors to brief the issue raised by the Montana Supreme Court decisions in Dempsey v. Allstate Insurance Company, 2004 MT 391 and Schmill v. Liberty Northwest, 2005 MT 144. Specifically, these decisions address the retroactive application of Montana Supreme Court decisions; in the decisions the Court discusses limitations on retroactive application by reference to cases that are closed, pending on direct review, not yet final, settled, final or inactive.

Pursuant to the Court's Order, the petitioner and insurers in Flynn have filed opening briefs. Answering Briefs are due February 27, 2006.

Unfortunately, what has happened in the ever-evolving rules governing common fund cases is that until the above terms have been defined in a way that will allow parties to identify what cases fall in a common fund by the retroactive application of FFR and Ruhd, the assessment of final or interim attorney fees is simply impossible. That is, it may be that cases that were initially believed to have fallen under a common funding holding now may no longer do so because of the holdings in Dempsey and Schmill regarding limitations on retroactive application of a Montana Supreme Court decision.

With this uncertainty, Liberty's position is that until the issue in Flynn is finally resolved, including a possible appeal, there should be no further review of insurer files by common fund attorneys or resolution of the issue of payment of interim attorney fees. There is simply too much uncertainty to require insurers to take their time and resources to go through an exercise that may be futile in whole or in part because of what may be the final resolution of the issues being addressed in Flynn.

DATED this 3rd day of February, 2006.



Larry W. Jones  
Attorney Jones & Garber

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day February, 2006, I served the original of the foregoing LIBERTY NORTHWEST'S ANSWERING BRIEF, by first-class mail, postage prepaid, on the following:

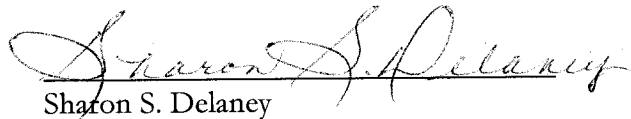
Ms. Patricia J. Kessner  
Clerk of Court  
Workers' Compensation Court  
PO Box 537  
Helena, MT 59624-0537

and a copy of the same to the following:

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