

Lon J. Dale, Esq.  
MILODRAGOVICH, DALE  
STEINBRENNER & BINNEY, P.C.  
Attorneys at Law  
P.O. Box 4947  
Missoula, Montana 59806-4947  
Telephone: (406) 728-1455  
Fax No: (406) 549-7077  
Attorneys for Petition Rausch

**FILED**

FEB - 6 2006

OFFICE OF  
WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

Monte Beck, Esq.  
BECK, AMSDEN & RUGGIERO, PLLC  
1946 Stadium Drive, Suite 1  
Bozeman, MT 59715  
Telephone: (406) 586-8700  
Fax No.: (406) 586-8960  
Attorneys for Petitioner Fisch

Stephen D. Roberts, Esq.  
ATTORNEY AT LAW  
1700 W. Koch St. Ste. 5  
Bozeman, MT 59715  
Telephone: (406) 586-3100  
Fax No.: (406) 585-0087  
Attorney for Petitioner Frost

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

ALEXIS RAUSCH, et al. )  
    Petitioners, )  
    -vs- )  
MONTANA STATE FUND, )  
    Respondent/Insurer, )  
and )  
JEREMY RUHD, )  
    Petitioner )  
    -vs- )  
LIBERTY NORTHWEST INSURANCE )  
CORPORATION, )  
    Respondent/Insurer. )  
\_\_\_\_\_ )

WCC No. 9907-8274R1

**PETITIONERS' RESPONSE BRIEF**  
**IN SUPPORT OF INTERIM**  
**ATTORNEYS' FEES**

COME NOW the Petitioners Rausch, Fisch and Frost (FFR Common Fund) and submit their Response Brief pursuant to the Court's December 6, 2005 Briefing Schedule.

## ARGUMENT

### I. INTERIM ATTORNEYS' FEES APPROPRIATE

#### a. Over Compensation Argument Lacks Merit

Briefs have been filed advocating that this Court not order the payment of any interim attorneys' fees until the final resolution of all claims for common fund fees. Several insurers filed briefs opposing interim fees. See Docket WC #306. The insurers listed in Docket #306 shall be referred to as the "Respondents" herein. Respondents have failed to cite any Montana legal authority in support of their wait-until-the-very-end approach to payment of common fund attorneys' fees in the FFR Common Fund. The two cases cited by Respondent are factually distinguishable from the case at bar and do not afford any guidance as to whether or not interim attorney fees are appropriate under the circumstances.

In *Flynn v. State Compensation Ins. Fund*, cited by Respondents, the claimant was receiving disability benefits from State Fund and successfully litigated a claim for social security disability benefits. Due to the claimant's success and the retroactive application of the social security disability award, State Fund reduced the claimant's disbursements to recover for overpaid benefits. The claimant brought suit against State Fund, arguing it was responsible for a portion of the attorney's fees he incurred to recover social security benefits based on the common fund doctrine. The Court agreed, finding that the Workers' Compensation Court erred when it denied the claimant's request for reasonable apportionment of attorney fees. *Flynn v. State Compensation Ins. Fund*, 2002 MT 279, ¶ 19, 312 Mont. 410, ¶ 19, 60 P.3d 397, ¶ 19.

In *Murer v. State Compensation Mut. Ins. Fund*, the claimants, through active litigation, created a common fund which directly benefitted an ascertainable class of absent claimants. The Court held that absent claimants had to contribute, in proportion to the benefits actually received, to the costs of the litigation, including reasonable attorney fees. *Murer v. State Compensation Mut. Ins. Fund* (1997), 283 Mont. 210, 224, 942 P.2d 69, 77.

*Flynn* and *Murer* merely stand for the basic principles of the common fund doctrine. They do not address the practice of courts to award interim common fund fee awards in appropriate situations, nor do they set forth reasons why an interim attorney fee award should not be determined in the current action. Interim attorney fee awards are appropriate in certain situations, such as where there is a long lapse of time between the filing of a complaint and the final determination of litigation. *Kuhn v. State of Colorado*, 924 P.2d 1053, 1059 (Colo. 1996). Such is the situation with the current

action. Waiting until a final determination as to all insurers to determine common fund attorney fees will require individual claimants to also wait until a final determination as to receipt of benefits that are rightfully theirs. A wait-until-the-end requirement is unjust. Thus, the award of interim attorney fees has been developed specifically to address this situation.

Respondents point out that an award of interim attorney fees suggested by Petitioner would risk overcompensation of the attorneys to the detriment of claimants. However, the appropriate percentage of attorney fees to be awarded in workers' compensation actions has already been legislatively determined and cannot exceed twenty-five percent (25%). 24.29.3802 Admin. R. Mont. Thus, any risk of overcompensation is mitigated. Further, under the Petitioner's suggested method, the sum total of parts will equal the whole. By receiving interim attorney fees on an insurer by insurer basis, the Court will be constantly apprised of Petitioner's accumulated benefits which similarly mitigates any risk of overcompensation.

b. Interim Fees Determination Law of the Case

As a part of the FFR Common Fund, this court has already awarded interim fees. Pursuant to the Revised Settlement Stipulation filed March 28, 2003, Settlement Stipulation filed February 7, 2003, and Court Order of March 31, 2003, a procedure awarding interim fees was established as to the State Fund. FFR Common Fund fees have already been paid on an interim basis as a result of the State Fund settlement. It is unfair to other claimants if the determination of the common fund fees for their Plan I and Plan II claims are delayed until the end, when a process for interim, per insurer payments, has already been established.

c. Effective and Efficient Administration of FFR Common Fund Mandates Interim Per Insurer Common Fund Determinations

Interim fee determinations provide a mechanism for reviewing common fund determinations through an orderly and systematic approach. The claimants insured by the greater market share insurers are being reviewed first. When insurers with lesser market shares are reviewed, perhaps more than one insurer can be involved in the due process notice to unrepresented claimants. The concerns as to over compensation are resolved because no fees will be assessed greater than the statutory limits already established.

**CONCLUSION**

Interim fees for common fund representation in the *Rausch, et al.* common fund litigation ought to be allowed on a per insurer basis. By assessing mini-common funds for each insurer, several benefits occur: (1) workers will receive a faster resolution and, thus, receive their award sooner; (2) administrative supervision of the common fund will be simplified; (3) due process procedures for the unrepresented workers will be simpler; (4) the Court will be fully advised as to the fees being assessed and will constantly be

able to monitor any over compensation issues; and (5) review on a per insurer basis has already been authorized and has resulted in a manageable and efficient resolution of common fund issues.

DATED this 6<sup>th</sup> day of February, 2006.

Monte Beck, Esq.  
BECK, AMSDEN & RUGGIERO, PLLC  
1946 Stadium Drive, Suite 1  
Bozeman, MT 59715  
Telephone: (406) 586-8700  
Fax No.: (406) 586-8960  
Attorneys for Petitioner Fisch

MILODRAGOVICH, DALE,  
STEINBRENNER & BINNEY, P.C.  
P.O. Box 4947  
Missoula, MT 59806-4947  
Telephone: (406) 728-1455  
Fax: (406) 549-7077  
Attorneys for

Stephen D. Roberts, Esq.  
ATTORNEY AT LAW  
1700 W. Koch St. Ste. 5  
Bozeman, MT 59715  
Telephone: (406) 586-3100  
Fax No.: (406) 585-0087  
Attorney for Petitioner Frost

By:   
Lon J. Dale

**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that on the 6<sup>th</sup> day of February, 2006, a true copy of the foregoing document was served by mail to the following individual(s) by depositing a copy of the same in the U.S. Mail, postage prepaid thereon, addressed as follows, unless otherwise indicated below:

Monte D. Beck, Esq.  
Beck, Amsden & Ruggiero, PLLC  
1946 Stadium Drive, Ste 1  
Bozeman, MT 59715

Stephen D. Roberts, Esq.  
Attorney at Law  
1700 W. Koch St., Ste. 5  
Bozeman, MT 59715

Patricia Kessner  
Clerk of Court  
Workers' Compensation Court  
P.O. Box 537  
Helena, MT 59624-0537

By email to:

jbockman@mt.gov for distribution in common fund litigation pursuant to prior Court orders.



6654/5(ljs)

I:\WORLD\DOX\DOCS\CLIENT\FLA06654\005\brA00062136.WPD

## Bockman, Jacqueline

---

**From:** Lauri Shobe [lauris@bigskylawyers.com]  
**Sent:** Monday, February 06, 2006 5:08 PM  
**To:** Bockman, Jacqueline  
**Cc:** Lon J. Dale  
**Subject:** Rausch WCC 9907-8274R1 Response Brief

**Attachments:** RauschResponseBrief.pdf



RauschRespon  
Brief.pdf (212 K)

Please electronically docket per prior discussions with Lon Dale. Thank you.

Lauri Shobe,  
Legal Assistant

NOTICE: This e-mail may contain confidential or privileged material and is intended for use solely by the above-referenced recipient. Any review, copying, printing, enclosure, distribution, or other use by any other person or entity is strictly prohibited. If you are not the named recipient, or believe you have received this e-mail in error, please reply to the sender and destroy the copy you received. Thank you.

Milodragovich, Dale, Steinbrenner & Binney, P.C.

lauris@bigskylawyers.com

Lauri Shobe, Legal Assistant

P O Box 4947, Missoula MT 59806-4947

406-728-1455 Fax 406-549-7077