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HELENA, MONTANA

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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

**INTERIM ATTORNEY FEE LIEN
BRIEF**

COMES NOW the above listed Respondents ("Respondents"), and pursuant to this Court's order of December 6, 2005, hereby submit the following brief regarding the issue of interim attorneys fees.

BACKGROUND

In *Rausch v. State Compensation Ins. Fund*, 2002 MT 203, 311 Mont. 210, 54 P.3d 25, the Montana Supreme Court held that impairment awards were due to permanently totally disabled claimants, as well as permanently partially disabled claimants, upon receipt of an impairment rating. In addition, the *Rausch* Court held that its decision created a common fund and therefore, that the attorneys for Petitioners were entitled to attorneys fees from the class of claimants who benefitted from the decision.

On October 11, 2002, Petitioners' attorneys filed an attorney fee lien in the amount of 25% of all benefits due to claimants who benefitted from the *Rausch* decision but did not participate in its litigation.

On January 23, 2003, this Court issued a *Notice of Claim of Attorneys Fee Lien* to "[a]ll insurers and self insurers writing or maintaining workers' compensation coverage in the State of Montana on or after July 1, 1991." *Notice of Claim of Attorneys Fee Lien*, WCC No. 9907-8274R1, 1/23/03. The *Notice of Claim of Attorneys Fee Lien* advised recipients of the October 11, 2003, lien filed by Petitioners' attorneys.

On July 10, 2003, this Court issued an *Attorney Fee Order and Judgment* revising the 25% attorneys fee lien as follows:

...claimants' attorneys are entitled to fees in the amount of 15% of each impairment award paid in this case to a claimant under the age of 60 years; to 10% of each impairment award paid in this case to a claimant aged 60 or 61; and to 5% of each impairment award paid in this case to a claimant aged 62 or 63. The ages for purposes of this Order are as of September 5, 2002.

Attorney Fee Order and Judgment, 2001 MTWCC 16A-2, 7/10/03.

On January 10, 2005, this Court issued a *Summons* to various Montana insurers and self-insureds advising that, due to the holding in *Ruhd v. Liberty Northwest Ins. Co.*, 2004 MT 236, 322 Mont. 478, the common fund created in *Rausch* was global in that it applied to "all impairment awards due permanently totally disabled claimants [under *Rausch*] irrespective of the insurers liable for the awards and that the *Rausch* attorneys are entitled to common fund attorneys fees with respect to those awards." *Summons*, WCC No. 9907-8274R1, 1/10/05. The *Summons* ordered its recipients to continue to withhold the attorneys fees claimed in the *Notice of Claim of Attorneys Fee Lien*. The

Summons further requested its recipients to provide information with respect to their claimants entitled to *Rausch* benefits. *Id.* Alternatively, the *Summons* permitted its recipients to object to furnishing the requested information. *Id.*

On December 6, 2005, this Court issued its *Order Setting Briefing Schedule* in which the Court invited all parties to any common fund action to brief the issue of interim attorneys fees. This issue is, when should the Court order the insurers currently withholding attorneys fees pursuant to the summons, to pay such fees directly to the Petitioners' attorneys. As this issue has relevance to other pending common fund litigation, Respondents have elected to appear in this case for the purpose of briefing this issue.

ARGUMENT

I. THIS COURT SHOULD NOT ORDER THE PAYMENT OF THE WITHHELD ATTORNEYS FEES UNTIL FINAL RESOLUTION OF THIS CASE.

The common fund doctrine does not create any liability for litigation costs and attorneys fees in excess of those incurred in creating a common fund.

Generally, the common fund doctrine authorizes assigning responsibility for fees among those individuals who benefit from the litigation which created the common fund. The doctrine entitles the party who created the fund to reimbursement of his or her reasonable attorney fees from the common fund. ... We enforce this doctrine because equity demands that all parties receiving a benefit from the common fund share in the cost of its creation.

Flynn v. State Compensation Ins. Fund, 2002 MT 279, ¶ 15, 312 Mont. 410, ¶ 15, 60 P.3d 397, ¶ 15 (citations omitted). Thus, the attorneys fees which must be reimbursed to the active litigant are only those fees incurred by that litigant in the action creating the common fund. Moreover, each non-participating beneficiary is only liable for such fees in proportion to the benefit he has actually received. *Murer v. State Compensation Mut. Ins. Fund* (1997), 283 Mont. 210, 224, 942 P.2d 69, 77 ("Based on the facts in this case, we conclude that claimants, through active litigation, created a common fund which has directly benefitted an ascertainable class of absent workers' compensation claimants and, therefore, that those absent claimants should be required to contribute, in proportion to the benefits they actually received, to the costs of the litigation, including reasonable attorney fees.").

In addition to the case at bar, the Montana common fund cases consist of several other cases in which the common fund Petitioners' attorneys have asserted attorneys fee liens under the common fund doctrine. Those liens are asserted against the various benefits determined to be due workers' compensation claimants who did not participate

in the specific litigation creating their benefit. The amounts of the liens asserted are commonly 25% of the benefit due each non-participating claimant. *Amended Notice of Attorney's Lien*, WCC No. 2000-0222, 12/29/03 (Document # 73 on this Court's *Flynn* Docket); *Amended Summons and Notice of Attorney Fee Lien*, WCC No. 2001-0300, 12/07/05 (Document # 79 on this Court's *Schmill* Docket). In this case, the amounts of the liens asserted range from 5% to 15% percent of all benefits due all non-participating claimants. *Attorney Fee Order and Judgment*, 2001 MTWCC 16A-2, 7/10/03. However, this method of computing the lien amounts would invariably result in inaccurate payment of the attorneys fees incurred in the common fund litigation. Thus, this method would often result in a windfall to common fund Petitioners attorneys in violation of the common fund doctrine. An example is appropriate.

Assume \$25,000 in attorneys fees incurred in a particular common fund case which created a common fund of \$400,000 (i.e., the total benefits due non-participating beneficiaries equals \$400,000). Twenty-five percent of \$400,000 is \$100,000. Thus, the common fund attorneys would reap \$75,000 over and above their billed attorneys fees. Of course, this windfall comes at the expense of the non-participating beneficiaries, injured workers, who otherwise would distribute the \$75,000 amongst themselves. Of course, given a small enough common fund, it is possible that the attorneys would receive less than their billed attorneys fees. However, the point is that under no circumstances is an attorneys fee lien for an across-the-board percentage of benefits even remotely related to the amount of attorneys fees actually incurred in a particular common fund case and therefore, the amount of attorneys fees actually owed.

If the total number of non-participating beneficiaries (the parties liable for the attorneys fees) were known, we could simple divide the amount of attorneys fees by the number of non-participating beneficiaries to determine each non-participating beneficiary's liability. For example, assuming \$25,000 in attorneys fees and 500 non-participating beneficiaries, each beneficiaries liability would be \$50. However, while closer to the mark, this method still does not weight each non-participating beneficiary's liability "in proportion to the benefits actually realized." Thus, the appropriate method of determining each beneficiaries liability is to first determine the dollar amount of the common fund and each beneficiary's proportion thereof actually received. Then, the number of beneficiaries is divided by the attorneys fees. That figure will be the average liability for each non-participating beneficiary. That average liability is then multiplied by a factor above or below the average, indicating the proportional benefit received. The following example illustrates this method.

Attorneys Fees Incurred:	\$10.00
Number of Non-Participating Beneficiaries:	10

% of total common fund received by each non-participating beneficiary

Beneficiary No. 1	.25
Beneficiary No. 2	.10
Beneficiary No. 3	.10
Beneficiary No. 4	.05
Beneficiary No. 5	.25
Beneficiary No. 6	.10
Beneficiary No. 7	.08
Beneficiary No. 8	.02
Beneficiary No. 9	.02
Beneficiary No. 10	.03

The average liability for each beneficiary is \$1.00 (\$10 attorney fees divided by 10 non-participating beneficiaries = \$1). Beneficiary No. 1's proportion of the common fund is .25 thus he would pay two-and-a-half times the average liability or \$2.50. Beneficiary No. 2's proportion is .10 so he would pay merely the average liability. Beneficiary No. 3's proportion is .05 so he would pay only one-half the average or \$.50. Adding up each beneficiaries weighted liability then results in the exact payment of the attorneys fees in the correct proportions owed by each beneficiary.

Beneficiary No. 1	\$2.50
Beneficiary No. 2	\$1.00
Beneficiary No. 3	\$1.00
Beneficiary No. 4	\$0.50
Beneficiary No. 5	\$2.50
Beneficiary No. 6	\$1.00
Beneficiary No. 7	\$0.80
Beneficiary No. 8	\$0.20
Beneficiary No. 9	\$0.20
Beneficiary No. 10	\$0.20
Total paid by all beneficiaries	\$10.00

Clearly, the above method is the only means of complying with the common fund doctrine because it is the only means that ensures accurate payment of attorneys fees based upon each non-participating beneficiary's proportional benefit. The method favored by the common fund Petitioners' attorneys certainly simplifies the computation of the attorneys fee lien. However, it does so at the cost of injured workers whose benefits would be reduced in excess of that required to reimburse the litigating claimant for his attorneys fees. In the event of even a modestly sized common fund, this unnecessary reduction of benefits would be significant. Thus, the method explained above is the only method allowable under the common fund doctrine because it mathematically ensures that the attorneys fees are correctly paid but only in the proportions owed by each non-participating beneficiary. Nobody gets short changed.

Moreover, recall that the insurers are liable to accurately pay the common fund benefits to the individual non-participating beneficiaries. Were the insurers simply to accept the Petitioners' attorneys' assertion of an across-the-board 25% lien, and immediately pay the same, they would expose themselves to significant claims by any non-participating beneficiary who the insurers short changed by deducting an excessive amount for attorneys fees.

For these reasons, the common fund attorneys fees cannot be paid until Petitioners have provided this Court, and the insurers, with the amount of their attorneys fees, as well as the total dollar amount of the common fund created in this case and from which the insurers can compute their claimant's proportional share. In its *Summons* of January 10, 2005, this Court required all affected insurers to provide it with information regarding their individual *Rausch* claimants. It also invited insurers to set forth any objections to providing such information. Thus, not until all of those objections are resolved and not until all the *Rausch* claimants have been identified and their benefits determined, can the attorneys fees be accurately and fairly paid.

WHEREFORE, Respondents respectfully request this Court to enter an order postponing the payment of common fund attorneys fees until such time as all issues in this case are resolved, Petitioners have provided the total amount of their attorneys fees.

Dated this 9th day of January, 2006.

CROWLEY, HAUGHEY, HANSON,
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By: 

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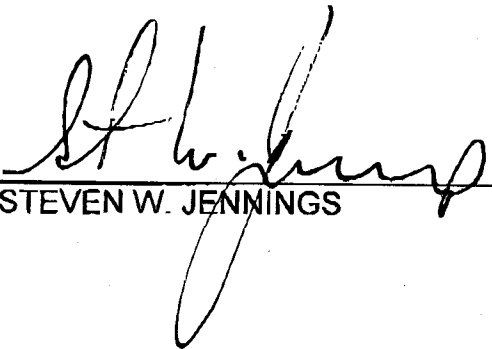
CERTIFICATE OF SERVICE

I, STEVEN W. JENNINGS, one of the attorneys for the law firm of Crowley, Haughey, Hanson, Toole & Dietrich P.L.L.P., hereby certify that on the 9th day of January, 2006, I mailed a true and correct copy of the foregoing document, postage prepaid, to the following:

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