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Workers' Compensation Court

Mike McCarter
Judge

FILED

MAR 01 2005

March 1, 2005

OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

Mr. David M. Sandler
Attorney at Law
P.O. Box 7310
Kalispell, MT 59904-7310

Re: Rausch, et al. v. Montana State Fund
Ruhd v. Liberty Northwest Ins. Corp.
WCC No. 9907-8274R1

Dear Mr. Sandler:

I have your letter of February 22, 2005, concerning the telephone conference of February 17, 2005. That conference involved questions specific to Liberty Northwest, Western Guaranty Fund, and Fairmont Insurance Company.

As reflected in the minute entry, I did provide counsel information regarding the status of responses to the summonses and how we propose to disseminate those responses to counsel. The information was to bring them up to date, and is the same information which has been provided to you and all other counsel via the comprehensive minute entry for the conference. During the conference I did mention the status of the objections interposed to the summons by your firm and the fact that I was overruling the objections. In retrospect I should not have divulged that information prior to my actually signing the order. The order had been drafted and reviewed. I expected it to go out the day of the conference, however, it was not ready for my signature that afternoon and the next day (Friday) I was tied up with a physical and then a trial. The order was signed and sent out the next Tuesday (Monday was a holiday), which was the same day the minute entry was sent.

Mr. David M. Sandler
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The only matter discussed during the conference which might impact the insurers and self-insurers you represent concerned the confidentiality agreement. However, that agreement was negotiated between Liberty Mutual and petitioners' attorneys and approved by me for purposes of the impending inspection of Liberty's files. If other insurers object to the terms of the approved agreement when it comes to materials they are to produce, then they will be provided an opportunity to object to the agreement and to propose different terms.

Where a conference is requested concerning a matter which pertains only to a specific insurer, such as extensions of time for responding or difficulties regarding the providing of information responsive to the summons or other discovery orders, I am not convinced of the need or requirement for involving attorneys of other insurers. However, if you or any other attorney wish to participate in conferences involving questions specific to insurers you do not represent, or simply in all conferences, then I will be happy to include you.

Procedurally, I will have to figure out how to set up any future conferences. One possibility is to notify all counsel of any request for a conference, the name of the attorney requesting the conference, and the matters to be discussed, then ask that each counsel reply as to whether he or she wishes to be included. If the number of participants is limited and there is little or no prospect of discussion concerning specific claimants, then the conference could be held by telephone. If that process is unwieldy, or quick answers are needed, or the number of participants is too great, then the Court might simply have to pick a date and time for an in-person conference to be held in Helena and send out notice regarding the conference.

In addition, I wonder about having a court reporter for all conferences in this case. For conferences of general concern or affecting all parties, I have had a court reporter and have even been posting transcripts of the conferences on our WEB site. I have not done so in the informal conferences such as that held on February 17th since they do not involve matters of general application and counsel are simply seeking guidance from the Court rather than formal rulings. But if there is concern as to what is discussed and how it might affect future proceedings, it may be best to have all conferences reported.

I would appreciate your suggestions on how to proceed in the future. I am copying this letter to all attorneys who have entered appearances or expressed interest in this case and ask them for their input as well.

Finally, to make sure that all of us are on the same page regarding further proceedings and procedures in this case, and to attempt to identify what issues will need

Mr. David M. Sandler
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to be addressed in the upcoming months, I will be setting up an in-person conference to specifically discuss those matters.

Sincerely,

A handwritten signature in black ink, appearing to read "Mike McCarter". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Mike McCarter
Judge

MM:jb

Attachment: Minute Entry #3563; Sandler 2/22/05 Letter

c: Letter sent via e-mail and US mail to the *Rausch* Distribution List (see attached) on March 1, 2005.

Bockman, Jacqueline

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February 22, 2005

Judge McCarter
Workers' Compensation Court
P. O. Box 537
Helena, MT 59624-0537

Re: Rausch et al., v. Montana State Fund, et al.
WCC No. 9907-8274R1

Dear Judge McCarter:

By e-mail on Saturday, February 19, 2005, the Court notified us that a telephone conference in the *Rausch* case occurred on Thursday, February 17, 2005 at 1:00 p.m. In the Minute Entry stemming from that telephone conference it states that the Court would be entering an Order stating that the insurers we represent are parties to this action and that their objections would be overruled. Given the circumstances of this case, we would appreciate it if we could be notified of all future telephone conferences and given an opportunity to participate.

Thank for your attention to this matter.

Very truly yours,



David M. Sandler
Todd A. Hammer

WORKERS' COMPENSATION COURT

Hearing No. 3563
Volume XVII

Helena, Montana
February 17, 2005

ALEXIS RAUSCH, et al.

Lon J. Dale
Stephen D. Roberts

vs.

MONTANA STATE FUND

Greg E. Overturf
Thomas J. Harrington

and

JEREMY RUHD

vs.

LIBERTY NORTHWEST
INSURANCE CORPORATION

Larry W. Jones

WCC No.9907-8274R1

A telephone conference was held Thursday, February 17, 2005, at 1:00 p.m. in this matter. Counsel participating in the call were Lon J. Dale, Stephen D. Roberts, Greg E. Overturf, Thomas J. Harrington, Kelly M. Wills, and Larry W. Jones.

Discussion was held regarding responses to the Summons which was served on the insurers on January 10, 2005. Of the fifty-seven insurers served, thirty-three have responded providing the requested documentation. Three unsolicited responses were received. A short period of time will be allowed for the remaining twenty-four insurers to appear before issuing another notice. I commented that the list of insurers which was provided by ERD may be an incomplete list. The deputy clerk will send counsel via e-mail a list of the insurers who have responded.

I proposed to disseminate the information provided by the insurers by copying the information in PDF format onto CDs and mailing the CDs to counsel. Counsel agreed to this method of service. It was agreed that the Court would wait until most of the responses were received from the insurers before forwarding to counsel.

Some insurers responded to the Summons by asking for additional time to respond. I will give all parties who request an extension up to and including April 18, 2005.

There was lengthy discussion regarding Kelly Wills' client, Western Guaranty Fund (Guaranty Fund), and the specific difficulties it has in providing the requested information.

Mr. Roberts opined that it is the responsibility of the insurer or Guaranty Fund to identify the claimants and not the claimants' attorneys' responsibility. Mr. Wills believes that the claimants bear the cost of compiling the information. Mr. Dale believes that responsibility falls on the insurer. I noted that the insurers must make reasonable efforts to identify the claimants, but am not sure of the extent of the effort that must be made. I further noted that it may be possible for the ERD to provide a list of claimants for mailing questionnaires to claimants rather than manually reviewing each file.

Mr. Wills stated that the Guaranty Fund pays only claims which were active at the time of insolvency, therefore has records only with respect to those claims. Claims which were closed prior to insolvency were retained by the respective liquidators of the insolvent insurers. Also, files which the Guaranty Fund closes are returned to the liquidators. Thus, these files are not in the Guaranty Fund's possession and requests for those files will have to be made to the liquidators. Mr. Wills advised that getting responses from the liquidators is difficult at best.

With respect to claims paid by the Guaranty Fund, Mr. Wills indicated that he has been advised that the Guaranty Fund's computer system does not record whether the claimant is permanently totally disabled. They may, however, be able to get a list of claims currently in their system.

The DLI generated a list of claimants who were designated as PTD or who received TTD payments for more than eighteen months for Liberty Mutual. It may be possible to have the DLI do the same for the insolvent insurers. Such list should pick up many if not most of the claimants entitled to *Rausch* benefits.

Mr. Wills also indicated the Guaranty Fund can determine which claimants are currently being paid PTD or TTD benefits by surveying its adjusters. He will also obtain further information concerning the computer database and the fields used therein so that we can look into whether some sort of search might be constructed which will identify qualified claimants.

None of us are sure whether the liquidators of the insolvent companies got the Summons. Mr. Wills will therefore obtain a list of the liquidators and their addresses and supply it to the Court so that further notice can be given to them.

Discussion was held on the Confidentiality Agreement drafted by *Rausch* counsel. I indicated that I would like the following language added to the end of paragraph 2: "and used by them solely for purposes of enforcing the common fund created in *Rausch* and *Ruhd*."

Mr. Jones questioned the inclusion of "expert witnesses" in the authorization to the *Rausch* attorneys and we settled on replacing that language with a reference to health care providers so that medical advice can be obtained concerning questioned impairment ratings.

Counsel and myself agreed that paragraph 3 of the draft Confidentiality Agreement can be removed.

Upon receipt of the final, signed Confidentiality Agreement, I will issue an order approving the agreement and authorizing Liberty Mutual to provide *Rausch* counsel with access to the files of claimants identified as possible beneficiaries of *Rausch* impairment awards. The agreement needs to be signed and the order issued prior to any files being reviewed.

Mr. Jones will go through his client's files and remove information that is privileged. His client does have computer information that has not been printed and at present it was agreed that it is unnecessary to do so. I noted that if the files are deficient, the parties can determine whether it is necessary to print and review the computer screens at a later date.

Regarding the issues Todd Hammer raised on behalf of his seven insurer clients, I informed counsel I will be entering an order stating that insurers are parties to the action and overruling Mr. Hammer's objections on their behalf.

I also informed counsel that insurers will not be required to appear by attorney if they are not objecting to furnishing the information required by the Summons.

Following the first conference call, a second conference call was held with Lon J. Dale, Stephen D. Roberts, Mr. Greg Overturf, and Larry W. Jones.

Mr. Roberts was concerned with the removal of attorney-client information from the file. However, Mr. Jones will prepare a privilege log, noting all documents and/or information redacted from the files. If *Rausch* counsel later feel a need for any of the documents, they may advise the Court and I will consider the scope of the privilege.

A third conference call was then held with Lon J. Dale, Stephen D. Roberts, and Robert F. James. After I summarized Mr. James' response to the Summons, Mr. James informed counsel that the only way to identify the claimants was to physically go through the files. His client did access information of what claims were paid out by a computer search. The most that was paid out was \$130,000. The researcher doing the search did not feel it rose to the level of a PTD claim. Mr. James indicated a few claims are still being paid, but they are just for medical payments. His client will attempt to identify *Rausch* claimants. I will issue an order granting an additional 180 days to respond to the Summons.

The conference calls ended at 2:20 p.m.

MIKE McCARTER
Judge

Minute Entry e-mailed to the *Rausch* Distribution List (see attached) on February 22, 2005.

Bockman, Jacqueline

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