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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

DALE REESOR,

Petitioner,

vs.

Liberty Ins. Underwriters Inc.
Liberty Insurance Corp.
Liberty Mutual Fire Insurance Co.
Liberty Mutual Insurance Co.
Liberty Northwest Ins. Corp.
LM General Insurance Company
LM Insurance Corporation
LM Personal Insurance Company
LM Property & Casualty Ins. Co.
Wausau Business Ins. Co.
Wausau Underwriters Ins. Co.
One Beacon American Ins. Co.
One Beacon Ins. Co.

Respondents.

WCC No. 2002-0676

**LIBERTY'S ANSWERING
BRIEF IN OPPOSITION TO
PETITIONER'S MOTION
TO COMPEL**

Attached is Petitioner's Discovery Request to Liberty Northwest for which Liberty requested a protective order in a previously-filed motion.

As Liberty understand's Petitioner's Motion to Compel he believes he is entitled to the information in the attached discovery request even though this Court has not declared this a common fund case and even though, assuming it is a common fund case, the Court has not directed insurers how to identify the relevant cases. Without Court guidance in the implementation process, a process it has followed on all prior common fund cases, the Petitioner's approach will guarantee confusion, recriminations and unnecessary duplication of effort. See the Murer common fund pleadings for an example of this.

DOCKET ITEM NO. 361

Petitioner implies in his Motion that a Reesor-type claim is like a unicorn in a field of horses that is easily identifiable and requires no real effort to single out from the herd. Nothing could be further from the facts.

Specifically at Interrogatory No. 1 at subparagraph "H" appears the following discovery request: "State whether you contend that the claimant's case is closed or final; and if the answer is yes, please state the rationale supporting your contention." This seemingly straight-forward request in fact opens a can of worms. Specifically this Court in Flynn/Miller v. Montana State Fund, WCC No. 2005-0222 ORDER SETTING BRIEFING SCHEDULE directed the parties to brief the issue of determining which cases were final, closed or inactive. Initial briefs have been filed and answering briefs are due February 27, 2006.

In Liberty's OPENING BRIEF REGARDING RETROACTIVE APPLICATION in Flynn it notes that in Dempsey v. Allstate Insurance Company, 2004 MT 391 and Schmill v. Liberty Northwest, 2005 MT 144, the Montana Supreme Court in its exposition of its new standard of retroactive application held decisions apply retroactively to cases pending on direct review or not yet final. Dempsey at ¶31. In other passages quoted in Liberty's brief filed in Flynn, the Montana Supreme Court held retroactive application did not apply to cases that were closed, settled or inactive. Therefore, before this Court in Flynn is the issue of how you determine in a worker's compensation case what is pending on direct review, not yet final, closed, settled or inactive.

Nevertheless, Petitioner in his above-quoted discovery request inquires about only closed or final cases. Liberty's position in Flynn is that a common fund claim cannot include cases not pending on direct review, and cases that are final, inactive, closed or settled. Until the Court decides this issue, how does an insurer respond to the above discovery request? Does it simply exclude all cases which it believes are not pending, final, settled, closed or inactive? If it does, and this Court in Flynn disagrees with the insurer's determination, the insurer has to go back and redo, in whole or in part, its review of its claim files to comply with the Court's determination if so ordered by the Court and the ruling is not stayed pending an appeal.

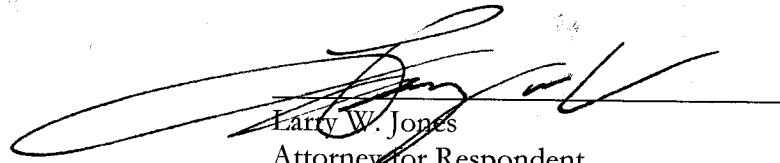
The same problem is encountered at Interrogatory No. 1 at subparagraph "I" which requests the following information: "Please describe the procedure(s) that the Liberty Northwest Insurance Group used to identify each of the listed claimants in response to this interrogatory. (For instance, if computer searches were used, please identify the database and query(ies); or if manual searches were used, please identify the location of the files and the search criteria)." Without the Court supervising the implementation of the search, by which Liberty means the parties have agreed to the appropriate search or the Court has ordered it, then the Petitioner is free to challenge the accuracy or scope of the search the insurer has initiated. Again, look at the pleadings in Murer and the disputes that occurred in that case regarding the search for the cases falling under that common fund claim.

In summary, in addition to the initial grounds for objection, the pending issue in Flynn leaves the whole common fund question (i.e., existence, nature of relevant case and

retroactive application) unresolved unless and until there is a determination of the meaning of pending on review, not yet final, closed, settled and inactive in the context of a workers' compensation claim.

For the reasons stated above, Liberty requests Petitioner's Motion to Compel be denied and that its previously-filed request for a protective order be granted.

DATED this 6 day of February, 2006.


Larry W. Jones
Attorney for Respondent
Liberty Northwest Ins. Corp.

CERTIFICATE OF SERVICE

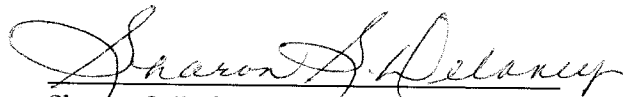
I hereby certify that on the 6th day February, 2006, I served the original of the foregoing LIBERTY ANSWERING BRIEF IN OPPOSITION TO PETITIONER'S MOTION TO COMPEL, by facsimile transmission and by first-class mail, postage prepaid, on the following:

Ms. Patricia J. Kessner (406/444-7798)
Clerk of Court
Workers' Compensation Court
PO Box 537
Helena, MT 59624-0537

and a copy of the same to the following:

Thomas J. Murphy (406/452-2999)
Murphy Law Firm
P.O. Box 3226
Great Falls, MT 59403-3226

Bradley J. Luck (406/523-2595)
Garlington, Lohn & Robinson
P.O. Box 7909
Missoula, MT 59807


Sharon S. Delaney

RECEIVED
DATE 2-14-05

Due 1/10/05 w/ 3 day ma

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Fax: 406-452-2999
Attorneys for Petitioner

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

DALE REESOR,)	
Petitioner,)	WCC No. 2002-0676
)	
vs.)	Discovery Requests to
)	Liberty Northwest
Liberty Ins. Underwriters Inc.)	and Associated Insurers
Liberty Insurance Corp)	
Liberty Mutual Fire Insurance Co.)	
Liberty Mutual Insurance Co.)	
Liberty Northwest Ins. Corp)	
LM General Insurance Company)	
LM Insurance Corporation)	
LM Personal Insurance Company)	
LM Property & Casualty Ins. Co.)	
Wausau Business Ins. Co.)	
Wausau Underwriters Ins. Co.)	
One Beacon American Ins. Co.)	
One Beacon Ins. Co)	
Respondents/Insurers)	
)	

TO: Larry Jones, Attorney for the Respondents/Insurers.

COMES NOW the petitioner, pursuant to Rule 24.5.323 and 24.5.324 of the Procedural Rules of the Workers' Compensation Court, and hereby asks the named insurance companies to answer the following interrogatories in writing and under oath, within twenty (20) days after receipt.

The information requested herein is not restricted to your personal knowledge, but includes information in the possession of your insurance

company employees, officers, agents, representatives, and attorneys, and extends to information which you or your attorneys can obtain upon reasonable inquiry.

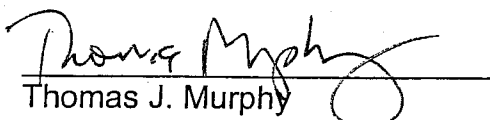
These interrogatories are continuing in nature, and the petitioner hereby asks that any additional information coming into the possession of the respondent/insurer or its counsel that would change the answer or answers in any way be promptly furnished to counsel for the petitioner no later than fifteen (15) days after receiving such information.

INTERROGATORY NO. 1:

Please identify all workers compensation claimants that may be entitled to additional PPD benefits pursuant to Reesor v. State Fund. Please consider this a request for the identities of potential Reesor claimants from 7/1/1987 through 12/22/2004. For each claimant identified please state:

- A. State the name and address of the claimant;
- B. State the date of injury;
- C. State the date of birth of the claimant.
- D. State the total amount of any payment made to that claimant;
- E. State the total amount of any additional Reesor benefit entitlement that is due to that claimant (if known);
- F. If you do not know the amount of the additional Reesor benefit entitlement due to the claimant, please state the PPD element(s) that is/are known and those that are not known;
- G. State the claim number;
- H. State whether you contend that the claimant's case is closed or final; and if the answer is yes, please state the rationale supporting your contention.
- I. Please describe the procedure(s) that the Liberty Northwest Insurance Group used to identify each of the listed claimants in response to this interrogatory. (For instance, if computer searches were used, please identify the database and query(ies); or if manual searches were used, please identify the location of the files and the search criteria).
- J. State the name of the Insurer for each claim

DATED this 12th day of December, 2005.

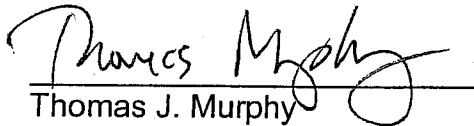

Thomas J. Murphy
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of December, 2005, a copy of the foregoing **Discovery Requests to Liberty Northwest Insurance Group** was served by mailing a true and correct copy of said document via first class mail to the attorneys at the address listed below:

Larry Jones
Jones & Garber Law Office
700 SW Higgins Ave #108
Missoula, MT 59803-1489

Attorney for Respondents/Insurers


Thomas J. Murphy