

IN THE WORKERS' COMPENSATION COURT  
OF THE STATE OF MONTANA

JEREMY RUHD, ) WCC No. 2002-0500  
Claimant, )  
vs. )  
LIBERTY NORTHWEST INSURANCE )  
CORPORATION, )  
Respondent/Insurer. )

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, that the proceedings in the  
above-captioned matter was heard before the  
Honorable Mike McCarter, at the offices of the  
Workers Compensation Court, 1625 Eleventh Avenue,  
Helena, Montana, on the <sup>28</sup>~~25~~th day of August, 2003,  
beginning at the hour of 1:15 p.m., before Laurie  
Crutcher, Registered Professional Reporter, Notary  
Public.

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A P P E A R A N C E S:

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APPEARING FOR LIBERTY NORTHWEST:

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ALSO PRESENT:

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MS. CAROL GLEED

MR. JAY DUFRECHOU



1 Whereupon, the following proceedings were  
 2 had:  
 3 \* \* \* \* \*  
 4 (Mr. Lauridsen not present)  
 5 THE COURT: This is the matter of Ruhd  
 6 versus Liberty Northwest. I don't have the file  
 7 anymore because it went to the Supreme Court. Did  
 8 it go to the Supreme Court just on the ruling that  
 9 I made that the common fund doesn't extend to  
 10 other insurers, or was there any other issue?  
 11 MR. ANGEL: They haven't had to identify  
 12 the issues yet. I don't think they set it out in  
 13 the notice of appeal.  
 14 THE COURT: But it was the appeal by the  
 15 Fisch, Frost and --  
 16 MR. ANGEL: Yes, and that's the issue  
 17 they're appealing. Actually they did identify it,  
 18 because they've got like eight issues. I remember  
 19 seeing that.  
 20 THE COURT: And it all deals with  
 21 whether or not they get attorney fees.  
 22 MR. ANGEL: Correct.  
 23 MR. MARTELLO: Judge, I wasn't listening  
 24 on that. What case are we talking about?  
 25 THE COURT: The Ruhd case, the FFR

1 attorneys, I granted them intervention, and then I  
 2 said they aren't entitled to common fund fees with  
 3 respect to other insurers other than the insurer  
 4 that's the defendant or the respondent in the  
 5 case. So they've appealed that, so I don't have  
 6 the file. But I don't think that that affects  
 7 what we do, how we proceed in this case. I guess  
 8 where are we in this case?  
 9 MR. JONES: Your Honor, I sent Geoff a  
 10 letter with our data that we have where we  
 11 identified permanent total cases. That's only  
 12 category that will be relevant. And we know we  
 13 have 18 according to the computer. Then there's a  
 14 category that includes temporary total that has  
 15 4,245 claims in it. And I was explaining to Geoff  
 16 that I've seen situations where someone is on  
 17 total --  
 18 THE COURT: And never been converted  
 19 over.  
 20 MR. JONES: -- even though we've  
 21 conceded perm total. So like any data, it's only  
 22 as good as the data that was put in the system.  
 23 So it would look like that the number of claims  
 24 that at the most could be involved would be the 18  
 25 plus 4,235. And this is a common fund claim,

1 correct?  
 2 MR. ANGEL: Slash class action. I tried  
 3 to get it in the alternative, I believe.  
 4 (Mr. Lauridsen enters)  
 5 THE COURT: With respect to Liberty  
 6 people.  
 7 MR. ANGEL: Yes.  
 8 MR. MURPHY: Could I ask the Court's  
 9 perception of that? He's asked for common fund  
 10 and/or class action. What's your perception of  
 11 the distinction, or is there a distinction we  
 12 should be paying attention to?  
 13 THE COURT: In cases like that, I don't  
 14 think it really matters, and my handling of the  
 15 cases in which class action is alleged is to  
 16 proceed in a manner similar to class actions, in  
 17 the sense that we try to identify the claimants  
 18 that are entitled to benefits, and get them paid,  
 19 but without following the class action rules with  
 20 respect to all of the technical hoops that you  
 21 have to go through, and without formal discovery,  
 22 and things like that.  
 23 My goal is if we identify a group --  
 24 call them a class, whatever you want -- of  
 25 claimants who are entitled to additional benefits

1 is to get the individuals in that class or group  
 2 identified and paid, and do it as expeditiously  
 3 and cheaply as possible, with the least amount of  
 4 pain.  
 5 So formally we're not tying into the  
 6 class action rules. It's similar to a class  
 7 action in that we have a specific group of people  
 8 who are entitled to specific benefits, and off we  
 9 go. So basically in the same manner that we  
 10 proceeded in Broeker and Murer.  
 11 MR. MURPHY: Have any of the insurers  
 12 objected to Geoff's request for class for the  
 13 alternative relief?  
 14 THE COURT: It's not in this case,  
 15 though. It's in the -- Which case is that?  
 16 MR. ANGEL: Matthews.  
 17 THE COURT: Matthews. In Matthews, he's  
 18 requesting the certification of a class not only  
 19 of claimants, but also of insurers, basically all  
 20 insurers, to force them to identify and pay  
 21 employees who have independent contractor  
 22 exemptions. And that's the notice that we're  
 23 sending out in that case to those insurers, so  
 24 that they can participate in the argument, if they  
 25 wish, to participate an argument as to whether or



1 not we've got a certifiable case.

2 The first thing I'm going to do in that  
3 case, though, or those two cases, Matthews and  
4 Wild, is to determine whether or not we've got a  
5 class of claimants, or a common fund of claimants,  
6 and that's one of the things we were talking about  
7 this morning, is there really any difference, is  
8 there a difference between ascertaining a common  
9 fund and the beneficiaries of that fund, and what  
10 we would technically term a class. I'm not sure  
11 there is. I'm sure there's overlap, but I'm not  
12 sure there's any distinctions, and if there are  
13 any distinctions, we need to figure out what they  
14 are, and that's one of the things I was talking  
15 about briefing this morning.

16 MR. ANGEL: The primary distinction is  
17 the way they're treated, and I think in this case,  
18 Liberty is conceding the remedy needs to be  
19 administered. There's not all the defenses we  
20 have in Matthews and Wild.

21 THE COURT: As far as Liberty is  
22 concerned, we're not dealing with that.

23 MR. ANGEL: Right. That might be a  
24 broader brush than you like, but --

25 MR. JONES: We've conceded -- And this

1 and I'm sure we can agree on the definition.

2 THE COURT: Okay. So no prospective  
3 claim.

4 MR. JONES: On this particular case --

5 THE COURT: Resolve what is meant by  
6 prospective versus -- or who is in the prospective  
7 claim class.

8 MR. ANGEL: I think my recollection from  
9 the last hearing is that we had discussed doing it  
10 based on the date of the decision, and whether you  
11 were affirmed or reversed.

12 MR. JONES: This was a reversal, was it  
13 not, of FFR?

14 MR. ANGEL: It was.

15 THE COURT: So the date that I'm going  
16 to apply is going to be the date of the Supreme  
17 Court decision, but then the question is do we  
18 have the issues as far as dates of injury or  
19 entitlement.

20 MR. ANGEL: I think it would come down  
21 to the medical records, establishing when the  
22 person -- I think we do, but I think they're ones  
23 we could probably resolve most of them reviewing  
24 the files, and --

25 THE COURT: Does there have to be an

1 is Ruhd.

2 MR. ANGEL: I think it would be fair to  
3 say you've conceded that there are people out  
4 there that under the FFR that have to be paid.

5 MR. JONES: We know we have permanent  
6 total claimants, but I don't know if any of them  
7 have impairment ratings, and they may have been  
8 paid, and plus I think we do have the same issues  
9 as in other cases. I don't see why this one is  
10 truncated.

11 THE COURT: Permanent totals are going  
12 to have impairment ratings. They're going to have  
13 impairment ratings almost inevitably.

14 MR. JONES: What I mean, Your Honor, is  
15 the physicians haven't been asked to give one.  
16 Plus we have the retroactivity issue, all those  
17 same issues.

18 And what I would anticipate doing with  
19 Geoff is calling him and getting clear, as I'm  
20 going to be doing in these other cases, what the  
21 scope of the common fund claim is. By that, I  
22 mean one issue we can always clear up right away  
23 is whether there's a claim of prospective attorney  
24 fees.

25 MR. ANGEL: And define what that is,

1 impairment rating? Is that the date that  
2 governs?

3 MR. ANGEL: I would say MMI prior to the  
4 Supreme Court decision, that they're included.  
5 And if it's not, that MMI comes after.

6 THE COURT: Why don't you talk about  
7 that, and if we get into an argument about it,  
8 let's discuss it. I have a feeling that this is  
9 one of those issues that probably a lot of  
10 briefing isn't going to help.

11 MR. JONES: No. I think it would be the  
12 date of injury, how far back the Ruhd case, FFR  
13 would go.

14 THE COURT: If date of injury, then did  
15 date of injury before -- would the date of injury  
16 before the Ruhd decision would be the retroactive  
17 application?

18 MR. JONES: Well, they would be with  
19 statute what's interpreted in FFR. My  
20 recollection is there was a statute change in 1990  
21 or something like that.

22 THE COURT: 1991.

23 MR. JONES: So it seems like it would go  
24 back to 1991. Dates of injuries on the effective  
25 date of the statute in question would seem to be



1 the cut off point.

2 MR. ANGEL: I guess my argument -- and  
3 this addresses I think what you're getting at --  
4 anybody that reached MMI and was permanent total  
5 before the date of the Supreme Court decision had  
6 an entitlement at that point. And so they're part  
7 of the common fund. They had an entitlement, but  
8 they weren't getting the money until the decision  
9 came down.

10 I think that's how probably you would  
11 define it, because those are the people that had  
12 an entitlement before the date of the decision,  
13 and just weren't going to get anything without it.

14 MR. JONES: And further defining the  
15 scope of such things as: If any of these cases  
16 had been litigated, any of these 18 had been  
17 litigated --

18 MR. ANGEL: I'm sure we can agree on  
19 that.

20 MR. JONES: And the settled cases, are  
21 they in this group, and so forth. And that's what  
22 I would talk to Geoff about. I think there's just  
23 a list of categories that we would just have to  
24 check yes or no, that will define the scope of his  
25 common fund claim.

1 THE COURT: Actually what you're going  
2 to do with regard to those 18 is just go through  
3 and figure out if there's a problem with it, and  
4 if there isn't, then you pay it. If there is a  
5 problem with it, then we've got to resolve it.

6 MR. ANGEL: There's lots of hypothetical  
7 issues, but I suspect Larry and I will be able to  
8 whittle it down to something pretty minor.

9 MR. JONES: Because if I have a  
10 litigated case in which, let's say the issue was  
11 permanent total disability, and it's fully  
12 litigated, and the issue of impairment award was  
13 never raised, I would argue it's res judicata, and  
14 could not fall into the FFR decision or into the  
15 common fund claim, so that -- plus Geoff and I --

16 MR. ANGEL: That's an argument.

17 MR. JONES: Geoff and I will have to  
18 decide what he would, on his wish list, like to  
19 see done with these temp total claims, and is  
20 there some thing he wants done on that by way  
21 of --

22 (Interruption)

23 MR. JONES: Your Honor, we can work  
24 through that, I'm confident.

25 THE COURT: On temp total disability, I

1 know what you're talking about. Is there some way  
2 just to cull those out, and find out whether or  
3 not -- Is there some simple way just to run  
4 through those?

5 MR. JONES: Well, the number of hard  
6 copy files is 4,235, some of which are temporary  
7 partial in that group, I'm told. That's just the  
8 way they're labeled. So is there a query? I'm  
9 going to ask our IT people that, if there is a  
10 way, but I'm concerned that -- I need to get with  
11 Geoff to see if he even wants us to do that.

12 MR. ANGEL: Yes. We were talking like  
13 in one of these -- I don't know if you would be  
14 -- I have cases where they haven't been converted  
15 to permanent total. I find that to be fairly  
16 common. So I guess the answer to the question is  
17 sure, even if it's us doing a manual search  
18 through 4,235 files. I think that something has  
19 to be done to review those and find out who's  
20 permanent total and not being paid.

21 THE COURT: Why don't you first find out  
22 what you can out from your IT people, Larry, and  
23 think about whether or not there's an easier and  
24 simpler way, because a lot of those aren't going  
25 to be permanent totals.

1 MR. ANGEL: I thought the easiest  
2 definition -- and I just want to throw this out  
3 -- just the idea of somebody on TTD for more than,  
4 say, two years, some period of time, statistically  
5 they're more likely to be perm total at that  
6 point.

7 MR. JONES: There may be a query.  
8 Again, I've got to talk to the IT people.

9 THE COURT: That might be one way to do  
10 it.

11 MR. JONES: But I'd like to first reach  
12 agreement with Geoff as to what he would like to  
13 see done, then we can see if we can do it.

14 MR. ANGEL: It looks like we have a  
15 framework to at least talk.

16 THE COURT: So why don't you talk about  
17 that. And is there anything else going on in that  
18 case? Do you want report back to me in how many  
19 weeks?

20 MR. JONES: Four weeks.

21 MR. ANGEL: Sounds good.  
22 (The proceedings were concluded  
23 at 1:35 p.m.)  
24 \* \* \* \* \*

25

## 1 CERTIFICATE

2 STATE OF MONTANA )

3 : SS.

4 COUNTY OF LEWIS &amp; CLARK )

5 I, LAURIE CRUTCHER, RPR, Court Reporter,

6 Notary Public in and for the County of Lewis

7 &amp; Clark, State of Montana, do hereby certify:

8 That the proceedings were taken before me at

9 the time and place herein named; that the

10 proceedings were reported by me in shorthand and

11 transcribed using computer-aided transcription,

12 and that the foregoing -14- pages contain a true

13 record of the proceedings to the best of my

14 ability.

15 IN WITNESS WHEREOF, I have hereunto set my

16 hand and affixed my notarial seal

17 this day of , 2003.

18 LAURIE CRUTCHER, RPR

19 Court Reporter - Notary Public

20 My commission expires

21 March 9, 2004.