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FILED

FEB - 3 2003

OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT FOR THE STATE OF MONTANA

JEREMY RUHD,

WC Court No: 2002-0500

Petitioner,

-vs-

LIBERTY NORTHWEST INSURANCE
CORPORATION,

Respondent/Insurer.

**ANSWER BRIEF OF COUNSEL FOR
RAUSCH, FISCH AND FROST RE:
CLAIMANT'S REQUEST FOR CLASS
CERTIFICATION AND HIS
ATTORNEY'S REQUEST FOR
COMMON FUND ATTORNEY FEES**

Comes now, the attorneys for Rausch, Fisch and Frost and herewith, pursuant to this Court's order of January 2, 3003, and submit their answer brief in response to the motion of counsel for Ruhd to amend his petition to seek class certification and common fund attorney fees.

I. THE MOTION OF PETITIONER RUHD FOR COMMON FUND ATTORNEY FEES SHOULD BE DENIED BECAUSE NO COMMON FUND WAS CREATED THROUGH THE EFFORTS OF RUHD'S ATTORNEY

Petitioner Jeremy Ruhd has moved this Court to allow him to file an amended petition as a class action to allege claims on behalf of all similarly situated claimants insured by Liberty Northwest and to receive common fund attorney fees.

Counsel for Petitioner Ruhd filed a brief in support of his motion to amend and motion for reimbursement of costs, including attorney fees. At page four of his brief, counsel for Ruhd set forth the three requirements for obtaining a common fund, and as a result, common fund attorney fees as follows:

1. A party (active beneficiary) must create, reserve, or increase a common fund.
2. The active beneficiary must incur legal fees in establishing the common fund.
3. The fund must benefit ascertainable, non-participating (passive) beneficiaries.

Ruhd Brief at 4 (footnote omitted).

Counsel for Ruhd did not satisfy the first or third prongs of the three-prong test, in that he did not “create, reserve, or increase the common fund,” and did not benefit anyone. Nor did any fund benefit “ascertainable, non-participating (passive) beneficiaries.” Therefore, the test for common fund attorney fees cannot be met and the need to file an amended petition to allege claims on behalf of all similarly situated claimants has not been met. As explained more thoroughly below, the motion to amend, therefore, is unnecessary and should be denied.

The common fund in this case was created through the efforts of the claimants’ counsel in *Rausch*, and the rights to all disabled workers were established through the Montana Supreme Court decision in that case. *See Rausch v. State Compensation Insurance Fund*, 311 Mont. 210, 2000 Mont. 203, 54 P.3d 25 (2002). While counsel for Ruhd has taken quotations out of context from the Montana Supreme Court decision in *Rausch*, in an attempt to isolate the holding only to the State Fund, the issues as framed by the Supreme Court in *Rausch* could not be more clear showing it applies to all permanent total workers.

The Montana Supreme Court did not confine the issues in *Rausch* to entitlement solely of claimants insured by the State Compensation Insurers Fund. Rather, the Montana Supreme Court in *Rausch* specifically framed the issues in that case as follows:

1. Did the District Court err as a matter of law when it concluded, pursuant to the 1991 and 1997 versions of the Montana Workers’ Compensation Act, that permanently totally disabled workers are not entitled to receive impairment

awards?

2. Is an impairment award due to a permanently totally disabled claimant upon the receipt of his or her undisputed impairment rating or upon retirement?
3. Should an impairment to a permanently totally disabled claimant be characterized as a total or partial disability benefit?
4. Are claimants' attorneys entitled to attorney fees pursuant to the common fund doctrine?

Rausch, 54 P.3d at 27.

Similarly, the Montana Supreme Court noted that the Workers' Compensation Court opinion from which the parties were appealing in *Rausch* was not confined in its scope to simply claimants insured by the State Fund. The Court in *Rausch*, rather, noted that "the Workers' Compensation Court concluded as a matter of law that permanently totally disabled workers are not entitled to impairment awards. . ." *Rausch*, 54 P.3d at 29.

The scope of the Montana Supreme Court holding in *Rausch* also applied to all permanently totally disabled claimants, and not just to those claimants insured by the State Fund. The Court held that ". . . [w]e conclude, therefore, that permanently totally disabled claimants are legally entitled to an impairment award for the loss of physical function to their body occasioned by a work-related injury pursuant to the recognition of such awards in § 39-71-710, MCA, and § 39-71-737, MCA. The Workers' Compensation Court's conclusion to the contrary is reversed." *Rausch*, 54 P.3d at 32.

As to the timing of when the permanently disabled workers compensation claimant was to receive his impairment award, the Montana Supreme Court also made clear that the decision in *Rausch* applied to all permanently totally disabled workers compensation claimants, and not just those insured by the State Fund. The Montana Supreme Court specifically stated that "[t]he primary issue presented to workers compensation court by the parties was when an impairment award should be paid to a permanently totally disabled claimant. . ." *Rausch*, 54 P.3d at 33. The court discussed this issue and concluded ". . . that an impairment award is due to a permanently totally disabled claimant upon receipt of his or her undisputed impairment rating." *Rausch*, 54 P.3d at 33.

Likewise, as to the issue of whether an impairment award to a permanently totally disabled claimant should be characterized as a total or partial disability benefit, the court in *Rausch* applied its holding to all permanently totally disabled claimants. The court stated that the issue was ". . . how impairment benefits to a permanently totally disabled claimant should be characterized. . ." *Rausch*, 54 P.3d at 33.

As to the common fund question, which so interests the attorney in *Ruhd*, the Montana Supreme Court in *Rausch* clearly stated the class of workers which counsel in *Rausch* benefitted were all workers compensation claimants who were permanently totally disabled and received impairment awards. The Montana Supreme Court in *Rausch* specifically stated that “. . . [t]he attorneys representing Rausch, Fisch and Frost all engaged in active litigation which preserved the benefit of immediate impairment awards to permanently totally disabled claimants. . .” *Rausch*, 54 P.3d at 35.

Indeed, the Court’s holding in *Rausch* very specifically applied to all permanently totally disabled workers compensation claimants. The Court concluded that “. . . we conclude that permanently totally disabled claimants are entitled to impairment awards, which are due upon the receipt of the undisputed impairment rating. . .” *Rausch*, 54 P.3d at 35.

The common fund, which was created, therefore, was not confined merely to insureds under the State Fund, but was applicable to all permanently totally disabled workers compensation claimants entitled to impairment awards.

Counsel for *Ruhd*, who seeks common fund attorney fees, in stark contrast to the efforts of Counsel in *Rausch*, has not created, reserved, or increased a common fund over and above the common fund created in *Rausch*. Counsel in *Ruhd*, both for the petitioner *Ruhd* and for the insurer, Liberty Northwest Insurance Corp., have recognized and conceded in the pleadings in *Ruhd* that the holding in that case, and claimant *Ruhd*’s entitlement to an impairment award, is controlled by the court’s holding in *Rausch*.

The *Rausch* decision itself was decided on September 5, 2002, before counsel for *Ruhd* even filed his first brief with the Supreme Court in that case, four days later. There was simply nothing for counsel in *Ruhd* to obtain to benefit or increase any common fund, as the issues already having been decided by the Supreme Court in *Rausch*. Moreover, counsel for Liberty Northwest conceded in its response brief to the Montana Supreme Court in *Ruhd* that it owed impairment award benefits to *Ruhd*, based strictly upon the Montana Supreme Court’s holding in *Rausch*, and did not seek to distinguish its obligations from those of the State Fund in any way.

II. SIMILARLY SITUATED WORKERS’ COMPENSATION CLAIMANTS DO NOT HAVE TO FILE AGAINST EACH INDIVIDUAL INSURER

Counsel in *Ruhd* asks for common fund fees from all qualifying claimants whose insurer is Liberty Northwest. The logical extension of the argument of claimant’s attorney in *Ruhd* would require workers compensation claimants to file separate petitions to be entitled to their *Rausch* benefits for each individual Plan 1 Self Insured or Plan 2 Insurer. As this Court noted in its October 23, 2002 memorandum to all counsel in the *Rausch* case, there are approximately 600 workers’ compensation insurers in the State of Montana. The result would be that there would

have to be 600 separate petitions, depending on the individual insurer, and 600 likely separate claims for common fund attorney fees involving each individual insurer. This was neither intended by the Montana Supreme Court in *Rausch*, nor has any basis in logic or equity because no additional benefit is created for any enlarged common fund. The approach of counsel in *Ruhd* would necessitate 600 common fund cases, one for each insurer, and would provide each Plan 1 Self Insured and each Plan 2 Insurer an excuse not to pay *Rausch* benefits to its permanently totally disabled claimants until there was separate litigation and a separate court decision for each. Claimant counsel's attempts in *Ruhd* to obtain a common fund attorney fee would only benefit Liberty Northwest insured workers and would create unnecessary economic hardship and delay for claimants in each such case who were forced to re-litigate these issues.

III. RUHD WAS REMANDED IN LIGHT OF RAUSCH

The Montana Supreme Court in *Ruhd* remanded this case with directions that its decision in the *Rausch* case controlled the entitlement of benefits to the claimant in *Ruhd*. Counsel for Ruhd simply has not further benefitted any workers compensation claimant beyond the holding of the *Rausch* decision, has not increased any common fund beyond the Court's holding in *Rausch*, is not entitled to any common fund attorney fees. There is no merit for his motion to amend his petition to include similarly situated claimants.

It is also significant and interesting to note that counsel in *Ruhd* did not even file his petition as one on behalf of other claimants similarly situated, and did not file his motion to amend his petition to include similarly situated claimants until this Court had already issued its decision in *Rausch*, the *Rausch* decision had been appealed, and all briefs of all parties had already been filed with the Montana Supreme Court in *Rausch*.

IV. CONCLUSION

There are numerous decisions issued by the Montana Supreme Court which affect all injured workers receiving benefits under the Workers Compensation Act. This Court need only review the multitude of decisions by the Montana Supreme Court to realize that even though the issues framed involve individual claimants against individual insurers that the subsequent precedent applies to all plan participants under the Montana Workers Compensation Act.

A party must create, reserve, or increase a common fund to be entitled to common fund attorney fees. Counsel for Ruhd has neither created, reserved, nor increased the common fund beyond that previously created by counsel in *Rausch*. Having failed to meet the most essential prerequisite for establishing a right to common fund attorney fees, claimant Ruhd's motion to amend his petition to assert a class action and obtain common fund attorney fees should be denied.

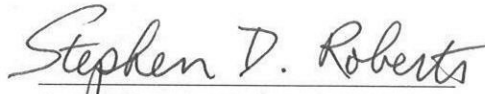
DATED this 31st day of January 2003.

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of January 2003, a true and accurate copy of the foregoing was served upon counsel listed below by U.S. Mail, postage prepaid:

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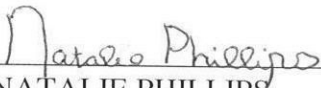
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