

Geoffrey C. Angel
ANGEL LAW FIRM
125 West Mendenhall
Bozeman, Montana 59715
(406) 586-1926

FILED

FEB 14 2003

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

Attorney for Petitioner

IN THE WORKER'S COMPENSATION COURT OF THE STATE OF MONTANA

JEREMY RUHD;)	WCC Number: 2002-0500
)	
Petitioner,)	
)	
vs.)	REPLY IN SUPPORT OF
)	MOTION TO AMEND and MOTION
)	FOR REIMBURSEMENT OF COSTS,
LIBERTY NORTHWEST)	INCLUDING ATTORNEY FEES
INSURANCE CORPORATION;)	
)	
and)	
)	
RICHARD BARBER d/b/a)	
BARBER HOMES)	
)	
Respondents.)	

Jeremy Ruhd filed his motion to amend within the time allowed by the Workers' Compensation Court's Scheduling Order, Liberty Northwest did not demonstrate any hardship by the amendment and the motion to amend should therefore be permitted. *Rausch, Fisch* and *Frost* lack standing to monitor, administer, implement and defend the interests of Liberty Northwest' insured workers. *Rausch, Fisch* and *Frost* lack standing to confer jurisdiction upon the Workers' Compensation Court to litigate and enforce the proper and most beneficial application of the Supreme Court's decision for Liberty Northwest's insured workers. Liberty Northwest has raised questions regarding the timing, statutory cap, and scope of the Supreme Court's decision which must be answered through active litigation. *Answer Brief of Respondent, pp. 2, 3.*

There remains a question as to how the Rausch impairment award benefits classified as total disability benefits should be paid given the provision of the statute.

Id at p. 3. Jeremy Ruhd should be permitted to amend his Petition to promote the interests of Liberty Northwest's insured workers directly against the insurer's interests and monitor, administer, implement and defend the interests of those workers.

As stated by Liberty Northwest:

In holding your efforts created a common fund, it is unclear whether the Supreme Court limited that holding to State Fund claimants. Specifically I refer you to the following sentence: “The attorney’s incurred legal costs and fees in the preservation of that right and the common fund will benefit an ascertainable class of workers who were denied immediate payment of an impairment award **by the State Fund** which they are legally entitled to receive. *Slip Op. at p. 24 (emphasis added)*).

Brief of Respondent on Remand, Exhibit A.

Clearly and expressly the Supreme Court held that the common fund, not the holding, will benefit an ascertainable class of workers who were denied immediate payment of an impairment award **by the State Fund**. This expression by the Supreme Court of the scope of the ascertainable class of workers is consistent with the fundamental tenet of common fund cases applying this equitable doctrine based on concepts of quasi-contract and representation. “In *Means v. Montana Power Co.* (1981), 191 Mont. 395, 625 P.2d 32, we recognized that the common fund doctrine is ‘rooted in the equitable concepts of quasi-contract, restitution and recapture of unjust enrichment.’ *Means*, 191 Mont. at 403, 625 P.2d at 37.” *Murer v. State Compensation Mut. Ins. Fund*, 283 Mont. 210, 221, 942 P.2d 69, 76 (1997).

Rausch, Fisch and *Frost* created a common fund of State Fund impairment awards payable to a clearly ascertainable class of State Fund’ permanently totally disabled workers. Those workers must shoulder a pro rata share of the benefits conferred upon them by the work of counsel for *Rausch, Fisch* and *Frost* who sought to represent their interests against the State Fund. Because the State Fund has always maintained that permanently impaired workers are entitled to impairment awards the benefit conferred is the time value of money because of the earlier payment under that decision.

Similarly situated workers do not have to file against each individual insurer unless the insurer refuses to follow the holding in *Rausch* or applies that decision incorrectly under the controlling law. If the insurer refuses to pay an impairment award or pays it inconsistent with the Act then a separate Petition would be necessary because *Rausch, Fisch* and *Frost* lack standing unless the respondent/insurer is the State Fund. Liberty Northwest has already raised an issue regarding the proper application of the *Rausch* decision as it affects its insured workers. *Ruhd* can actively litigate this issue against Liberty Northwest.

Similarly situated workers, not insured by the State Fund, should not have to pay twenty-five percent (25%) of their permanent impairment award to counsel for *Rausch, Fisch* and *Frost* merely because the Supreme Court found impairment awards were provided for within the Act. *Rausch, Fisch* and *Frost* sought to represent the interests of all similarly situated workers insured **by the State Fund**. That definition delineates the scope of the clearly ascertainable class who will share in the common fund of State Fund impairment awards and the principles of standing and jurisdiction would prevent a greater scope.

The value of the benefit conferred is based on the difference between payment at age 65, which State Fund has always agreed to do, and the payment today.

Similarly, every other insurer may escape the cost and burden of a petition seeking the payment of impairment awards by simply paying the impairment award which is payable under the Act.

It is commonplace that a beneficial decision will benefit all claimants. Something more should be required for the forfeiture of twenty-five percent (25%) of future benefits payable arguably under the scope of a beneficial decision.

Rausch, Fisch and *Frost* argue that every permanently totally disabled insured worker should tender to them a portion of the impairment award because it is paid after, or in reliance on, the *Rausch* decision. They go so far as to refer to the impairment award as a *Rausch* benefit. This logic results in absurd results. The advance payment of benefits after the *Ridley* decision could be called *Ridley* benefits. In a similar fashion, counsel for *Ridley* may seek a portion of all medical, wage loss and other benefits paid in Montana after the Supreme Court's decision in that case. Arguably, every advance payment made after the *Ridley* decision is paid in reliance on that case.

Stare decisis is the fundamental principle of the common law in America but should not be used as a means of obtaining a fee from every claimant or litigant who follows in the enforcement of a similar right. Common fund fees are payable from a common fund actually created through active litigation and payable only by those under principles of representation and equity. That fund is to be paid by the defendant.

In this case, Liberty Northwest refused to pay Jeremy Ruhd his impairment award. Jeremy Ruhd sought to defend his right to these benefits, and the similar right of all Liberty Northwest insured workers, to recover the impairment award. Jeremy Ruhd, through counsel, matched the collective efforts of *Rausch, Fisch* and *Frost* at each stage throughout the appeal. *Fisch* and *Frost* both settled prior to a decision by the Supreme Court. *Rausch* and *Ruhd* did not settle. *Ruhd* is in a situation to protect, preserve and increase the common fund of impairment awards to be paid by Liberty Northwest. *Rausch, Fisch* and *Frost* lack standing. Liberty Northwest has raised several questions regarding the proper method and timing of payment and those issues remain to be litigated.

For these reasons, *Ruhd* seeks an order allowing the amendment of his petition to allege claims on behalf of all those similarly situated and reimbursement of costs, and reasonable fees, after the remaining issues have been resolved based on the benefit conferred to Liberty Northwest's permanently totally impaired workers.

DATED this 16th day of February 2003.

ANGEL LAW FIRM


Geoffrey C. Angel

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 16th day of February 2003 a true and correct copy of the foregoing was hereby served, by depositing the same, in an envelope in the United States mail, first-class, postage pre-paid, addressed to:

Larry W. Jones
Liberty Northwest Insurance Company
700 S.W. Higgins Avenue, Suite 250
Missoula, Montana 59803-3602
Faxed to: (406) 543-0811

Lon J. Dale
620 High Park Way
P.O. Box 4947
Missoula, Montana 59806-4947
Faxed to: (406) 549-7077


Monte D. Beck
1700 West Koch Street, Suite 2
Bozeman, Montana 59715-4148
Faxed to: (406) 586-8960

Stephen D. Roberts
1700 West Koch Street, Suite 5
Bozeman, Montana 59715
Faxed to: (406) 585-0087

Bradley J. Luck
199 West Pine Street
P.O. Box 7909
Missoula, Montana 59807
Faxed to: (406) 523-2595

Greg E. Overturf
5 South Last Chance Gulch
P.O. Box 4759
Helena, Montana 59604-4759
Faxed to: (406) 444-6555

ANGEL LAW FIRM


Geoffrey C. Angel