

WORKERS' COMPENSATION COURT

Hearing No. 3577
Volume XVII

Helena, Montana
April 1, 2005

ALEXIS RAUSCH, et al.

vs.

MONTANA STATE FUND

and

JEREMY RUHD

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Lon J. Dale
Monte D. Beck
Stephen D. Roberts
Thomas E. Martello
Bradley J. Luck
Thomas J. Harrington
David M. Sandler
Brendon J. Rohan
W. Wayne Harper
Mark E. Cadwallader
Leo S. Ward
Thomas A. Marra
Larry W. Jones
Carrie L. Garber

WCC No. 9907-8274R1

ROBERT FLYNN and CARL MILLER

Rex Palmer

vs.

MONTANA STATE FUND

and

LIBERTY NORTHWEST INSURANCE CORPORATION
(Intervenor)

Bradley J. Luck
Thomas J. Harrington
Thomas E. Martello

Larry W. Jones

WCC No. 2000-0222

DALE REESOR

Thomas J. Murphy

vs.

MONTANA STATE FUND

Bradley J. Luck
Thomas J. Harrington

WCC No. 2002-0676

Re: Rausch, et al. v. Montana State Fund, et al.
Flynn, et al. v. Montana State Fund, et al.
Reesor v. Montana State Fund
Satterlee v. Lumberman's Mutual Casualty Co., et al.
April 1, 2005

CATHERINE E. SATTERLEE

Thomas J. Murphy

vs.

LUMBERMAN'S MUTUAL CASUALTY CO, et al.

Michael P. Heringer
Bradley J. Luck
Thomas J. Harrington
David M. Sandler

WCC No. 2003-0840

An in-person conference was held in the above-entitled matters on Friday, April 1, 2005, at 1:00 p.m., in the Workers' Compensation Court, Helena, Montana. The Honorable Mike McCarter, Judge of the Workers' Compensation Court, presided. The court reporter in this matter was Ms. Yvonne Madsen. The following attorneys appeared and participated in the conference: Leo S. Ward, David A. Hawkins, Carrie L. Garber, Thomas A. Marra, Rex Palmer, Brendon J. Rohan, W. Wayne Harper, Justin Starin (for Sydney E. McKenna), Mark E. Cadwallader, Lon J. Dale, Monte D. Beck, Stephen D. Roberts, Michael P. Heringer, Larry W. Jones, Thomas E. Martello, Thomas J. Murphy, Bradley J. Luck, Thomas J. Harrington, David M. Sandler, and Charles G. Adams. Richard H. Davenport, Vice President of Putman & Associates, also appeared.

One of the purposes of the hearing was to set a paradigm for handling the common fund cases. The following matters were agreed to by the persons attending or orally ordered by Judge McCarter.

1. The Court will issue guidelines concerning e-mail messages with the Court.
 - a. E-mails will not be docketed, filed, or retained. Drafts attached to e-mails will not be retained in the official Court file.
 - b. If an attorney wants a matter set out in an e-mail made a part of the record, then a formal motion or letter setting out the matter should be submitted for filing or a request made that the particular e-mail be filed and docketed.
 - c. When utilizing e-mails for correspondence purposes, the Court and counsel will "reply to all" to ensure all parties of record are copied with the e-mails.
2. The Court will issue guidelines on teleconference policies.
 - a. Telephone conferences will be initially scheduled with attorneys involved in the particular issue.

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- b. All other common fund attorneys will be notified and provided an opportunity to participate.
 - c. Parties will be notified of the subject matter of each conference so they can determine whether it is necessary for them to participate or not.
 - d. No court reporter will be obtained unless specifically requested.
 - e. If one party wants to tape record the telephone conference, that party will notify all parties participating in the conference. If there are objections to the tape recording, then a court reporter will be obtained.
3. Mr. Jones, on behalf of his clients Liberty Northwest Insurance Corporation, Liberty Mutual Insurance Corporation, and Liberty Mutual Fire Insurance Company [clients specifically identified in an aside with Ms. Garber] (Liberty), will:
- a. Conduct an initial review of its files of claimants identified as having potential *Rausch* entitlements within four weeks.
 - i. Liberty will promptly pay those with impairment ratings their impairment awards, withholding attorney fees.
 - ii. Liberty will prepare a list of the files they are making payments on.
 - iii. Those claimants without impairment ratings are to be referred to their treating physicians.
 - iv. If the identity of the treating physician is unclear, then Liberty is to consult with *FFR* attorneys.
 - v. If the treating physician declines to render an impairment rating, Liberty and *FFR* attorneys are to agree on a physician to do the rating.
 - vi. *FFR* and Liberty will arrange a time for the *FFR* attorneys to review the files.
 - vii. The *Rausch* confidentiality agreement shall be limited to healthcare providers and CRCs. Mr. Jones will redraft the confidentiality agreement and provide it to *FFR* attorneys by April 4, 2005.
 - viii. Mr. Palmer may be included in the *FFR* review upon execution of an appropriate confidentiality agreement so that *Flynn* claimants can be identified conjointly with *Rausch* claimants.

Mr. Jones will identify the claims adjusters or other file custodians for the other Liberty associated insurers, including Wausau Underwriters Insurance Company, within two weeks and request them to begin the *Rausch* identification process.

4. Generally speaking for all common fund cases, where an insurer can identify benefitted claimants, that insurer should make prompt payment of benefits due, less amounts withheld on account of attorney fee liens. Where there is a large insurer and

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benefitted claimants cannot be readily identified, the insurer's counsel and petitioners' counsel should consult with one another and cooperate in the identification process, obtaining Court direction as needed. In the *Rausch* case, if there is no impairment rating, then one should be requested from the treating physician. If the treating physician will not issue a rating, the insurer and the *FFR* attorneys should confer and agree upon a physician to do the rating. Disputes in the process can be referred to the Court for resolution.

5. I told counsel that I have gone through the *Rausch* responses received to date and there are not many TTD claims where it appears likely that the claimants are PTD and thereby entitled to impairment awards. A few claimants were paid in a lump sum after the *Rausch* decision came down and attorney's fees were withheld. My overall impression was that there are not many unpaid impairment awards for the claimants identified to date.

6. If the *FFR* attorneys contend that any pre-September 5, 2003 settlements are subject to common fund review, they shall notify the Court of their contentions within two weeks. (I will then set a briefing schedule.)

7. The Court will revise and circulate the summonses in *Flynn* and *Reesor* and the notice in *Satterlee* for final review by the parties.

8. Mr. Heringer, counsel for K-Mart, informed the Court that K-Mart may need more time to gather the information requested in the summons. Should they need additional time, K-Mart will file a formal request for an extension within the next two weeks.

9. Mr. Harrington, counsel for Western Guaranty, informed the Court his client may also need an extension of time. He will let the Court know on April 18th, the current deadline for responses due.

10. Mr. Davenport informed the Court that the companies for which Putman & Associates is a third-party administrator need additional time to respond to the summons. They will report to the Court on their progress, the problems they have, and the additional time they need by the current April 18th deadline.

11. Mr. Marra indicated that his clients, Target Corporation and St. Paul-Travelers, may need more time. He will also notify the Court if his clients cannot provide the information by April 18th.

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12. The Court will get a list of potential claimants of Putman's client insurers from the DLI and will provide the list to Rick Davenport. The Court can do the same for any other insurer who requests it.

13. The Court will contact Professor Dave Patterson and discuss with him Mr. Palmer's dilemma regarding claimants who are asking Mr. Palmer to represent them. Counsel present at the Court conference did not see any impediment to his representing claimants who request his representation, however, he will not solicit them.

14. The Court will issue its order in the *Rausch* matter regarding Northwestern Energy's defenses.

15. Hearing no objections to the contrary, service of responses to the summonses and other documents will be served via e-mail and the Court's WEB site. Documents containing confidential information will only be distributed to petitioners' attorneys subject to signed and Court-approved confidentiality agreements.

16. Mr. Palmer requested *Flynn* and *Miller* searches to be included in claimant reviews in other common fund cases. (In addition to that of the Liberty companies' reviews in *Rausch*.) I indicated that insofar as there is overlapping review and insurers want to avoid duplication of efforts, they are free to coordinate and cooperate with Mr. Palmer, again subject to confidentiality agreements and orders.

17. Regarding *Satterlee*, the notice to insurers will include all insurers who have provided workers' compensation insurance coverage since July 1, 1981, to appear and intervene so that they can participate in the briefing and argument of the petitioners' constitutional challenges.

Court adjourned at 4:00 p.m.

MIKE McCARTER
Judge

Minute Entry e-mailed to Global Common Fund List and Rausch Insurers/Adjusters List on April 5, 2005.