

RONALD W. ATWOOD, P.C.
RONALD W. ATWOOD
200 Oregon Trail Building
333 S.W. Fourth Avenue
Portland, OR 97204-1748
Telephone: (503) 525-0963

FILED

JAN 23 2006

Of Attorneys for J.H. Kelly, LLC

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

**IN THE WORKERS' COMPENSATION COURT
OF THE STATE OF MONTANA**

CASSANDRA SCHMILL,

Petitioner,

vs.

LIBERTY NORTHWEST INSURANCE
CORPORATION,

Respondent/Insurer,

and

MONTANA STATE FUND,

Intervenor.

WCC No. 2001-0300

**RESPONSE TO AMENDED SUMMONS
OF J.H. KELLY, LLC**

Pursuant to the Court's Amended Summons and Notice of Attorney Fee Lien of December 7, 2005, respondent J.H. Kelly, LLC files its Response.

The Amended Summons resulted from a Notice of Attorney's Fee Lien filed by Ms. Schmill's attorney, Ms. Laurie Wallace, claiming a lien with respect to benefits payable as a result of the Montana Supreme Court's decision in *Schmill v. Liberty Northwest Ins. Corp.*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290 (2003) (*Schmill I*).

1. According to paragraph 1. of the Amended Summons, *Schmill I* "held that it was a violation of the equal protection clauses of the Montana and United States constitutions to allow for apportionment deductions for non-occupational factors in the Occupational Disease Act but not in the

DOCKET ITEM NO. 163

Workers' Compensation Act and thus the Court struck section 39-72-706, MCA, as unconstitutional."

2. Paragraph 2. of the Amended Summons provides:

"2. Following that decision, the petitioner's attorney filed a notice of attorney fee lien, a copy of which is attached. In that lien notice, the petitioner's attorney claims an attorney fee lien upon the common fund of occupational disease cases in which an apportionment was taken prior to and including June 22, 2001, for dates of occupational disease occurring on or after July 1, 1987. The claimed lien extends to all Montana insurers and self-insurers. The lien is for 25% of the additional benefits due."

3. J.H. Kelly, LLC asserts the following defenses:

- (a) This is not a proper "common fund" case, for the reasons set forth in Justice Rice's dissent in *Flynn v. Montana State Fund*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397 (2002). As he lamented in the penultimate paragraph of his dissent: "* * * Arguably, the [common fund] doctrine is now applicable to virtually anyone deriving a benefit from a claimant's settlement or award. That was not, and is not, the purpose of the doctrine." See also the dissent of Justices Gray and Turnage in *Murer v. State Compensation Mutual Insurance Fund*, 283 Mont. 210, 942 P.2d 69 (1997) (*Murer III*) (Workers' Compensation Act does not permit creation of a separate equitable remedy regarding attorney's fees.) This defense is raised for protective purposes to preserve J.H. Kelly, LLC's right to challenge the common fund doctrine in future appeals before the Montana Supreme Court.
- (b) If *Schmill I* is to be retroactively applied, it should not be applied retroactively to cases that have become final or were settled prior to the decision's issuance. *Dempsey v. Allstate Insurance Co.*, 325 Mont. 207, 104 P.3d 483 (2004). See *Schmill v. Liberty Northwest Insurance Corporation*, 2005 WL 1332128 (June 7, 2005) (*Schmill II*) (expanding on *Dempsey's* "final or settled" language to mean "in the context of workers' compensation law").

- (c) *Murer III* held: "* * * Accordingly, the party who creates the common fund is entitled, pursuant to the common fund doctrine, to reimbursement of his or her reasonable attorney fees from that fund." (our emphasis).

This means that, even if the common fund doctrine applies and claimant's *Schmill I* counsel is entitled to compensation thereunder, payment of attorney fees is limited to "reimbursement" of Laurie Wallace's reasonable fees. Anything more would be a windfall to Ms. Wallace, and penalize the common fund class members by requiring more than payment of their fair shares.


4. J.H. Kelly, LLC wishes to advise the Court of the practical and logistical difficulties in determining whether it has any *Schmill I*-type claimants. Kelly became self-insured in Montana on approximately 1/01/92; Kelly has had four different third party administrators since that time; there have been 171 Montana claims. Determining which claimants are "*Schmill I*-type" claimants will require a search of Kelly's database to determine their identity, followed by a search of the archived files. It turns out the files are located in multiple locations.
5. J.H. Kelly, LLC can advise the Court at this time that it is aware of no current files that fall within the *Schmill I* category of affected claimants. If subsequently instructed to do so by the Court, Kelly will make a diligent search of its files but at this point believes that there are no additional benefits payable under the *Schmill I* decision, for the reasons stated above.
6. J.H. Kelly, LLC incorporates in this Response any and all defenses that are raised by any of the other Respondents/Insurers in this proceeding.
7. J.H. Kelly, LLC reserves the right to seek amendment of this Response as circumstances dictate.

WHEREFORE, having fully answered the Amended Summons and Notice of Attorney Fee Lien, J.H. Kelly, LLC prays for relief in accordance with the positions and defenses set forth above.

Respectfully submitted this 23rd day of January, 2006.

RONALD W. ATWOOD, P.C.

By:



RONALD W. ATWOOD, MSB #5959
of Attorneys for J.H. Kelly, LLC

CERTIFICATE OF SERVICE BY MAIL

I, Kimberley J. Wouters, hereby declare and state:

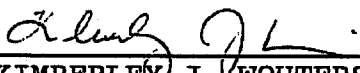
I am over the age of eighteen years, employed in the City of Portland, County of Multnomah, State of Oregon, and not a party to the within action. My business address is Ronald W. Atwood, P.C., 333 S.W. Fifth Avenue, 200 Oregon Trail Building, Portland, Oregon, 97204.

On January 23, 2006, I served the within **RESPONSE TO AMENDED SUMMONS OF J.H. KELLY, LLC**, on the parties in said caused by placing a true thereof enclosed in a sealed envelope with postage prepaid thereon in the United States Post Office at Portland, Oregon, addressed as follows:

Ms. Laurie Wallace
Bothe & Lauridsen
5 Hwy. 2 East
P.O. Box 2020
Columbia Falls, MT 59912

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED January 23, 2006 at Portland, Oregon.



KIMBERLEY J. WOUTERS
Legal Secretary

Ronald W. Atwood*

Sara Turner
Legal Assistant

Lisa Schowengerdt
Legal Assistant

* Licensed in Oregon,
Washington and Montana

Ronald W. Atwood, P.C.

Attorney at Law

200 Oregon Trail Building
333 S.W. Fifth Ave.
Portland, OR 97204-1748
(503) 525-0963

FAX (503) 525-0966

E-mail: ratwood@ronaldwatwood.com

January 23, 2006

VIA E-MAIL

Montana Workers' Compensation Court
1625 11th Avenue
P.O. Box 537
Helena, MT 59624

Re: *Cassandra Schmill v. Liberty Northwest Insurance
Corporation/Montana State Fund*
WCC No. 2001-0300

Dear Staff:

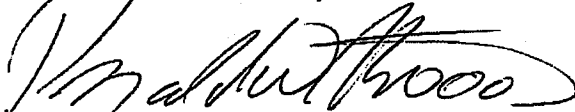
We have enclosed the RESPONSE TO AMENDED SUMMONS OF
J.H. KELLY, LLC for your review and consideration.

A true copy of the enclosed has been sent to Petitioner's
counsel, Ms. Laurie Wallace, and proof of service is attached
hereto.

Thank you for your time and attention to this matter.

Very truly yours,

RONALD W. ATWOOD, P.C.



RONALD W. ATWOOD

RWA/kjw

Enclosures

cc w/enc.:

Ms. Laurie Wallace (via U.S.P.S.)
Mr. Rick Davenport (via U.S.P.S.)
Ms. Barbara Jones (via U.S.P.S.)