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American, Incorporated.

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 2001-0300

CATHERINE M. SCHMILL,

Petitioner,

v.

LIBERTY NORTHWEST INSURANCE CORPORATION,

Respondent/Insurer,

**RESPONDENT TECK COMINCO AMERICAN INCORPORATED'S
RESPONSE TO THE COURT'S SUMMONS**

Respondent Teck Cominco American Incorporated dispute the entitlement of Claimants, if any, insured by it pursuant to *Schmill* for the following reasons:

In ongoing conversation with counsel for other Respondents, as Teck Cominco has nothing substantive to add to briefs already filed, and in the interest of avoiding docket

congestion, Teck Cominco will join in Response to the Court's Summons filed by American Alternative Insurance Corp, *et al.* on the issues confronted therein and confine its argument herein to the issue of self-insured business entities, specifically Teck Cominco American, Inc.

Teck Cominco is a self-insured business entity and has operated in Montana as such throughout the term of its business dealings in Montana. Consequently, Teck Cominco must be dismissed from the subject litigation because it cannot be included within the traditional scope of common fund doctrine as set forth by the Montana Supreme Court in *Flynn* and associated line of cases. *See e.g., Murer v. State Compensation Mut. Ins. Fund*, 283 Mont. 210, 942 P.2d 69 (1997).

Teck Cominco is not an insurance company and as such occupies an entirely different posture with respect to compensation benefits than the balance of respondents herein who are insurance companies. Teck Cominco operated in Montana during the relevant time frame and may indeed have paid out compensation to injured workers that could be affected by the holding in *Schmill*. As noted to the Court in previous filings, Teck Cominco is investigating whether or not records relevant to the issue have survived several corporate reorganizations and changes in Teck Cominco's place of business.

However, notwithstanding the location of records, during the term of its Montana operations, Teck Cominco did not participate in any sort of group/common fund or in the State Fund; rather, Teck Cominco paid compensation benefits, if any, from its own corporate operating accounts. Of course Teck Cominco's corporate accounts are completely internal and are neither enriched or depleted by extra-corporate litigation. As such, Teck Cominco's compensation program may not permissibly be considered a "common fund" with respect to the holding in *Schmill* which is clearly rooted in the holding of *Flynn* which was specifically directed at the State Fund, or to any of the other "common fund" cases which are equally clearly directed at insurance companies in general.

Common fund doctrine allowing for attorney fees contributions from unrepresented parties benefitting from a favorable legal decision is firmly rooted in equity, arises from notions of quasi-contract, and is founded in the equitable remedy of restitution and recapture of unjust enrichment. *See e.g., Trustees v. Greenough*, 105 U.S. 527, 532-537 (1882); *accord Means v. Montana Power Co.*, 191 Mont. 395, 405, 625 P.2d 32, 38 (1981). Simply put, where a common fund is created and dispersed to parties

who were not part of the litigation and/or did not retain legal counsel, equity requires *pro rata* contribution to the attorney expense of the party responsible for creating the benefit. *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977) (“ . . . the doctrine is designed to spread litigation costs proportionately among all the beneficiaries so that the active beneficiary does not bear the entire burden alone and the “stranger” beneficiaries do not receive their benefits at no cost to themselves.”).

The Montana Supreme Court described a traditional common fund as follows:

Recently, in *Mountain West Farm Bureau v. Hall*, 2001 MT 314, 15-18, 308 Mont. 29, 15-18, 38 P.3d 825, 15-18, we summarized the elements of the common fund doctrine as follows:

- ▶ 1) an active beneficiary must create, reserve, or increase a common fund;
- ▶ 2) the active beneficiary must incur legal fees in establishing the common fund; and
- ▶ 3) the common fund must benefit ascertainable, non-participating beneficiaries. We enforce this doctrine because equity demands that all parties receiving a benefit from the common fund share in the cost of its creation (internal cites omitted).

Flynn v. State Compensation Ins. Fund, 2002 MT 279, ¶ 15, 312 Mont. 410, ¶ 15, 60 P.3d 397, ¶ 15.

In light of the Court’s holding, Petitioners’ attorney’s lien is ineffective as against Teck Cominco. Teck Cominco did not at any time participate in the State Fund or in any other insurance policy or program with respect to compensation benefits; it follows that any enrichment to the Fund or any other applicable insurance policy, attributable to Petitioners’ counsel did not in any manner affect claimants, if any, under Teck Cominco’s internal compensation program. Further, Petitioners neither offer proof nor allegation that Teck Cominco’s corporate operating accounts were enriched through their efforts or indeed, that any of Teck Cominco’s workers incurred legal fees of any description that might be relevant. Moreover, although Petitioners claim common fund attorney fees dating back to July 1974, Petitioners provide nothing that may be fairly construed as evidence that there are “ascertainable, non-participating beneficiaries” that participated in Teck Cominco’s worker’s compensation program. Teck Cominco’s worker’s

compensation program was at all times funded completely out of corporation accounts, and was not a "common fund."

The plain threshold requirement of a common fund is that it indeed be common. Assuming for illustration that Teck Cominco has made compensation payments that may be affected by the cited cases, it did so out of internal, corporate accounts, and any of said expenditures are considered line-item costs of operation; as such there is no tangible nexus whatsoever to commonality with any entity but Teck Cominco.

Dated and respectfully submitted this 24th day of February 2006.

GOUGH, SHANAHAN, JOHNSON & WATERMAN



KD Feedback

Attorneys for Respondent Teck Cominco American
Incorporated

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February 2006, a true and correct copy of the foregoing *Response to the Court's Summons* was electronically filed with the court and the following with a confirmation copy posted to the attention of:

Ms. Laurie Wallace
Bothe & Lauridsen, PC
PO Box 2020
Columbia Falls, Montana 59912

