

Bradley J. Luck  
Malin Stearns Johnson  
GARLINGTON, LOHN & ROBINSON, PLLP  
199 West Pine • P. O. Box 7909  
Missoula, MT 59807-7909  
Telephone (406) 523-2500  
Telefax (406) 523-2595

**FILED**

*JLB*  
OCT 17 2006

OFFICE OF  
WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

Attorneys for Intervenor Montana State Fund

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CASSANDRA M. SCHMILL,

Petitioner,

v.

LIBERTY NORTHWEST INSURANCE  
CORPORATION,

Respondent/Insurer

and

MONTANA STATE FUND,

Intervenor.

WCC No. 2001-0300

**RESPONSE TO SUMMONS**

COMES NOW the Intervenor, Montana State Fund ("State Fund"), and hereby files its Response to this Court's *Amended Summons and Notice of Attorney Fee Lien*, dated December 7, 2005. Responses to the Amended Summons were due by January 23, 2006. The State Fund had appeared and participated in this proceeding long before the issuance of the Amended Summons and did not recognize an obligation to re-appear in response to the Amended Summons. The State Fund consulted with Petitioner's Counsel, who requested the State Fund issue a formal response. This Response is filed at the request and with the consent of Petitioner's counsel.

DOCKET ITEM NO. 313

The State Fund does not dispute that some claimants are entitled to increased benefits pursuant to the Montana Supreme Court's decision in *Schmill v. Liberty NW. Ins. Corp.* ("*Schmill II*"), 2005 MT 144, 327 Mont. 293, 114 P.3d 204. However, the State Fund asserts that the class of entitled claimants must be limited by the following parameters:

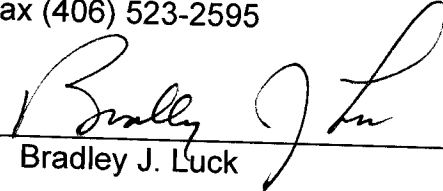
1. Deceased claimants are not entitled to an increased benefit award.
2. Pursuant to *Schmill II*, the common fund must not include occupational disease claims that were settled, became final, or were closed or inactive prior to April 10, 2003, the date the Montana Supreme Court decided *Schmill v. Liberty NW. Ins. Corp.* ("*Schmill I*"), 2003 MT 80, 315 Mont. 51, 67 P.3d 290. *Schmill II*, ¶ 17 ("[I]f an occupational disease claim was settled or became final prior to [the Montana Supreme Court] ruling in *Schmill I* then *Schmill I* does not affect whatever apportionment might have been deducted from the claim's award.").
3. For purposes of the preceding sentence, the definitions of "settled," "closed," "final," and "inactive" remain uncertain. This Court recently held a "settled" occupational disease claim is "a department-approved or court-ordered compromise of benefits between a claimant and an insurer or a claim that was paid in full." See *Flynn v. Montana State Fund*, 2006 MTWCC 31, ¶ 16 (Sept. 29, 2006) (quoting Mont. Code Ann. § 39-71-107(7)(a) (2005)). This Court held a "final" occupational disease claim is "a claim in which a final judgment has been entered by [the Workers' Compensation Court], provided the claim is not currently pending on appeal." *Flynn*, ¶ 25. However, the State Fund intends to immediately appeal this decision to the Montana Supreme Court, particularly in light of the Montana Supreme Court's recent, related, yet arguably inconsistent, holding in *Stavenjord v. Montana State Fund*, 2006 MT 257, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_, that, for purposes of that case, "'open claims' will encompass those which are still actionable, in negotiation but not yet settled, now in litigation, or pending on direct appeal." *Stavenjord*, ¶ 15.
4. A claimant's entitlement date shall be the date a claimant's occupational disease is first diagnosed as work related. See Stipulation Regarding Prospective Claims, *Stavenjord v. Montana State Fund*, WCC No. 2000-0207 (Jan. 22, 2004).
5. The scope of retroactivity of the common fund must be limited by the statute of limitations and the doctrine of laches.
6. The parties must agree on, or the Court must clarify, the following implementation issues:
  - a. appropriate search parameters and identification documentation;
  - b. the method of notifying claimants;

- c. a verification that overpayments on the files may be deducted from the increased benefits paid;
- d. calculations to be utilized where a Social Security offset is present on a file;
- e. procedure and obligations for locating claimants with changed addresses;
- f. procedure for resolving competing liens from *Schmill, Stavenjord, Murer, and Flynn*;
- g. determination of actual common fund attorney fee obligations and payment by way of due process hearing; and
- h. timeliness for completion of activities given the administrative burdens involved.

DATED this 11 day of October, 2006.

Attorneys for Intervenor Montana State Fund:

GARLINGTON, LOHN & ROBINSON, PLLP  
199 W. Pine • P. O. Box 7909  
Missoula, MT 59807-7909  
Telephone (406) 523-2500  
Telefax (406) 523-2595

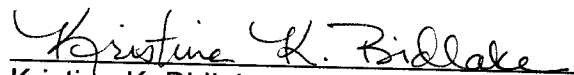
By   
Bradley J. Luck

**CERTIFICATE OF MAILING**

I, the undersigned, of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for Intervenor, hereby certify that on this 11<sup>th</sup> day of October, 2006, I mailed a copy of the foregoing RESPONSE TO SUMMONS, postage prepaid, to the following persons:

Laurie Wallace, Esq.  
Bothe & Lauridsen  
P.O. Box 2020  
Columbia Falls, MT 59912

Larry W. Jones, Esq.  
Liberty Northwest Insurance Corp.  
700 S.W. Higgins Ave., Suite 108  
Missoula, MT 59803

  
Kristina K. Bidlake

garlington | lohn | robinson



199 West Pine Street  
P.O. Box 7909  
Missoula, Montana 59807-7909  
(406) 523-2500  
Fax (406) 523-2595  
www.garlington.com

David C. Berkoff  
J. Michael Bouchee  
Stephen R. Brown  
Gary B. Chumrau  
Randall J. Colbert  
Lawrence F. Daly  
Kathleen L. DeSoto  
Candace C. Fetscher  
Lucy T. France  
Gary L. Graham  
Charles E. Hansberry  
Gregory L. Hanson  
Malin Stearns Johnson  
William Evan Jones  
Maureen H. Lennon  
Bradley J. Luck  
Robert C. Lukes  
Alan F. McCormick  
Charles E. McNeil  
Anita Harper Poe  
Shane N. Reely  
Larry E. Riley  
Susan P. Roy  
Robert E. Sheridan  
Brian J. Smith  
Peter J. Stokstad  
Kevin A. Twidwell  
William T. Wagner  
Kelly M. Wills

October 11, 2006

Clerk of Court  
Workers' Compensation Court  
P.O. Box 537  
Helena, MT 59624-0537

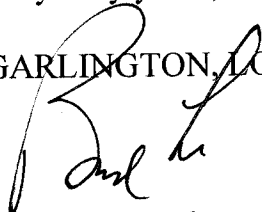
Re: *Schmill v. Liberty, WCC No. 2001-0300*

Dear Clerk:

Enclosed for filing is the Response to Summons. Thank you for your assistance.

Very truly yours,

GARLINGTON, LOHN & ROBINSON, PLLP

  
Bradley J. Luck  
406-523-2548  
bjluck@garlington.com

BJL:kbb  
Enclosure

c: Laurie Wallace, Esq.  
Thomas Murphy, Esq.  
Larry W. Jones, Esq.  
Thomas E. Martello, Esq.

A. Craig Eddy, MD, JD  
Of Counsel - Health Law

J. C. Garlington  
1908 - 1995

Sherman V. Lohn  
(Retired)

R. H. "Ty" Robinson  
(Retired)