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JAN 23 2006

OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

Steven W. Jennings
Crowley, Haughey, Hanson,
Toole & Dietrich P.L.L.P.
P. O. Box 2529
Billings, MT 59103-2529
(406) 252-3441
Attorneys for Insurance Company:

AIG National Insurance Company
AIU Insurance Company
American Home Assurance Company
American International Insurance Company
American International Pacific Insurance Company
American International Specialty Lines Insurance
Birmingham Fire Insurance Company
Commerce & Industry Insurance Company
Granite State Insurance Company
Illinois National Insurance Company
Insurance Company of the State of Pennsylvania
Lexington Insurance Company
National Union Fire Insurance of Pittsburgh
New Hampshire Insurance Company
Bituminous Casualty Corp.
Bituminous Fire & Marine Insurance Company
Farmers Insurance Exchange
Mid Century Insurance Company
Truck Insurance Exchange
Federal Express Corp.
Factory Mutual Insurance Company
Great American Alliance Insurance Company
Great American Assurance Company
Great American Insurance Co. of NY
Great American Insurance Co.
Great American Spirit Insurance Company
Republic Indemnity Company of America
Hartford Accident & Indemnity Co.
Hartford Casualty Insurance Co.
Hartford Fire Insurance Co.
Hartford Insurance Co. of the Midwest
Hartford Underwriters Insurance Co.
Property & Casualty Insurance Co. of Hartford
Sentinel Insurance Company Ltd.
Trumbull Insurance Co.
Twin City Fire Insurance Company
Millers First Insurance Company
Montana Health Network Worker's Compensation Insurance Trust
Petroleum Casualty Company
Dairyland Insurance Company
Middlesex Insurance Company
P P G Industries Inc.
Sentry Insurance Mutual Company

DOCKET ITEM NO. 153

Sentry Select Insurance Company
 Stillwater Mining Company
 Universal Underwriters Insurance Company
 Combined Benefits Insurance Company
 Grocers Insurance Company
 Guaranty National Insurance Company
 Royal Indemnity Company
 Security Insurance Company of Hartford
 Atlantic Mutual Insurance Co.
 Centennial Insurance Co.
 Chubb Indemnity Insurance Company
 Chubb National Insurance Company
 Executive Risk Indemnity Inc.
 Federal Insurance Company
 Great Northern Insurance Company
 Pacific Indemnity Company
 Quadrant Indemnity Company
 Vigilant Insurance Company

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 SUMMONS

COMES NOW the above listed Respondents ("Respondents"), and in response to this Court's *Amended Summons and Notice of Attorney Fee Lien*, dated December 7, 2005, states as follows:

**RESPONDENTS DISPUTE THE ENTITLEMENT OF SCHMILL BENEFICIARIES TO
ADDITIONAL BENEFITS**

Respondents dispute the entitlement of claimants insured by them to additional benefits under the *Schmill* decision. The grounds upon which Respondents dispute said entitlements are as follows:

1. Certain claimants' entitlement to *Schmill* benefits are precluded by the passage of time and the applicability of the doctrines of waiver, estoppel, laches, and/or various statutes of limitations.
2. An order requiring Respondents to identify all *Schmill* beneficiaries creates an unreasonable and undue burden upon Respondents.
3. An order requiring Respondents to pay *Schmill* benefits and/or to pay or withhold the attorney lien in favor of Petitioners' attorneys is prohibited by the due process clause of the Montana Constitution, Article II, Section 17. Respondents were not parties to the *Schmill* case and were not given notice and opportunity to be heard on the merits of that case.
4. An order requiring Respondents to pay *Schmill* benefits and/or to pay or withhold the attorney lien in favor of Petitioners' attorneys is prohibited by the due process clause of the of the 14th Amendment to the United States Constitution. Respondents were not parties to the *Schmill* case and were not given notice and opportunity to be heard on the merits of that case.
5. This Court lacks personal jurisdiction over Respondents to compel them to pay *Schmill*-type benefits or to withhold the asserted attorneys fees therefrom. Respondents were never served or notified in the cases of *Schmill v. Liberty Northwest Ins. Corp.*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290, and *Schmill v. Liberty Northwest Ins. Corp.*, 2005 MT 144, ¶ 17, 327 Mont. 293, ¶ 17, 114 P.3d 204, ¶ 17, and therefore, the decisions in those cases are not binding upon Respondents due to the absence of personal jurisdiction over the Respondents.
6. No common fund may be maintained against Respondents in this case because the purported non-participating beneficiaries of the *Schmill* decision are not ascertainable for several reasons, including but not limited to the fact that Montana insurers are not required by Montana statutes or regulations to maintain claim files and records for the length of time necessary to identify all *Schmill* beneficiaries described in *Amended Summons and Notice of Attorney Fee Lien*.

7. Petitioner's common fund attorney's lien does not and cannot extend to "all Montana insurers and self-insurers" who proportionally reduced occupational disease benefits for non-occupational factors between July 1, 1987 and June 22, 2001. Petitioner's purported attorney lien notice is overbroad because *Schmill* does not apply to claims that were settled, made final, or closed prior to April 10, 2003, the date of the *Schmill* decision.
8. Even if a common fund were created through the efforts of Petitioners, neither Petitioners nor their attorney are entitled to a fixed percentage of additional benefits that may be awarded to non-participating beneficiaries with whom neither Petitioners nor their attorney have any relation. Under the common fund doctrine, non-participating beneficiaries should contribute, in proportion to the benefits actually received by them, only to the litigation costs incurred by Petitioners in the *Schmill* litigation, including reasonable attorney fees. The maximum amount of costs and attorneys' fees recoverable by the participating litigants and/or their attorney is limited to those costs and fees actually incurred in creating the benefit for the non-participating beneficiaries.
9. Respondents request and reserve the right to assert additional grounds and defenses, or to adopt the grounds presented by others responding to the summons as circumstances apply and warrant.

WHEREFORE, Respondents respectfully request this Court to enter an order:

- a. denying the entitlement to *Schmill*-type benefits by any potential claimants insured by Respondents; or alternatively,
- b. denying the enforcement of the attorney fee lien asserted by Petitioners' attorneys.

Dated this 23rd day of January, 2006.

CROWLEY, HAUGHEY, HANSON,
TOOLE & DIETRICH P.L.L.P.

By: 

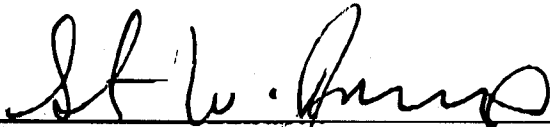
STEVEN W. JENNINGS

Attorneys for Respondents listed above

CERTIFICATE OF SERVICE

I, STEVEN W. JENNINGS, one of the attorneys for the law firm of Crowley, Haughey, Hanson, Toole & Dietrich P.L.L.P., hereby certify that on the 23rd day of January, 2006, I mailed a true and correct copy of the foregoing document, postage prepaid, to the following:

Ms. Laurie Wallace
Bothe & Lauridsen, P.C.
PO Box 2020
Columbia Falls, MT 59912



STEVEN W. JENNINGS

CROWLEY, HAUGHEY, HANSON, TOOLE & DIETRICH P.L.L.P.

ATTORNEYS AT LAW

500 TRANSWESTERN PLAZA II • 490 NORTH 31ST STREET • BILLINGS, MONTANA 59101
 P.O. Box 2529 • BILLINGS, MONTANA 59103-2529
 TEL (406) 252-3441 • FAX (406) 252-5292
 www.crowleylaw.com

STEPHEN M. BARRETT
 COLBY L. BRANCH *
 KATY A. BRANDIS
 ALAN C. BRYAN *
 ASHLEY BURLESON
 DAVID L. CHARLES
 PAUL C. COLLINS
 GARY M. CONNELLY
 RENEE L. COPPOCK
 MARCIA J. DAVENPORT
 JASON A. DELMUE
 MICHAEL S. DOCKERY
 JOHN B. DUDIS, JR.
 JON T. DYRE *
 MARY SCRIM DYRE
 SCOTT A. FISK
 BRUCE A. FREDRICKSON *
 MICHAEL W. GREEN

ROBERT C. GRIFFIN
 PETER F. HADDIN
 SCOTT D. HADEN
 NATHAN S. HANBY
 KEVIN P. HEANEY
 KENNETH G. HEDGE *
 JAMES R. HINTZ
 BRIAN HOLLAND
 LARRY A. HOLLE
 STEVEN W. JENNINGS
 DANIEL D. JOHNSON
 DARIN W. JOHNSON
 JOEL L. KALEVA
 ALLAN L. KARELL
 KIELY S. KEANE
 PETER M. KIRWAN
 WILLIAM D. LAMBIN III
 MICHAEL J. LANSING #

KENNETH K. LAY
 JOHN R. LEE *
 JARED M. LE FEVRE
 STEVEN J. LEHMAN
 JULIE A. LICHT
 DUNIS D. LINFORD #
 JASON P. LOULI
 CHRIS MANGEN, JR.
 WILLIAM J. MATTIX
 JOE C. MAYNARD, JR.
 JOHN H. MAYNARD
 JOSEPH P. MAZUREK
 IAN MCINTOSH
 DANIEL N. McLEAN
 MATTHEW F. McLEAN #
 ROBERT C. MICHELOTTI, JR.
 STEVEN R. MILCH
 KIMBERLY S. MORE

DONALD R. MURRAY, JR.
 KRISTIN L. OMVIC
 JEFFERY J. OVLIN *
 SHANE D. PETERSON *
 HERBERT I. PIERCE III
 FRED C. RATHER *
 STEVEN P. RUFFATTO
 GINA S. SHERMAN
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 JAMES P. SITES
 GARTH H. SJUE *
 LEONARD H. SMITH
 CHRISTOPHER C. VOIGT *
 DAVID M. WAGNER
 NEIL G. WESTBEN
 BRYAN P. WILSON
 RONALD E. YOUNG

RETIRED
 JAMES M. HAUGHEY
 BRUCE R. TOOLE

OF COUNSEL
 GEORGE C. DALTIORP
 JOHN M. DIETRICH
 DAVID L. JOHNSON
 GARELD F. KRIEG
 ARTHUR P. LAMEY, JR.
 LOUIS R. MOORE *
 MYLES J. THOMAS
 FRED B. WHISENAND *

OFFICES
 100 NORTH PARK AVENUE
 SUITE 300, P.O. BOX 197
 HELENA, MT 59624-0197
 PHONE (406) 449-4165

111 EAST BROADWAY
 P.O. BOX 1206
 WILLISTON, ND 58802-1206
 PHONE (701) 572-2300

431 FIRST AVENUE WEST
 P.O. BOX 759
 KALISPELL, MT 59400-0759
 PHONE (406) 752-4444

45 DISCOVERY DRIVE
 SUITE 200, P.O. BOX 18969
 BOZEMAN, MT 59719-0969
 PHONE (406) 536-1430

700 S.W. HIGGINS
 SUITE 200
 MISSOULA, MT 59803
 PHONE (406) 829-2712

Attorneys are licensed in Montana (unless otherwise noted), * also licensed in North Dakota, # also licensed in Wyoming; + not licensed in Montana

January 23, 2006

Workers' Compensation Court
 PO Box 537
 Helena, MT 59624-0537

RE: *Cassandra Schmill vs. Liberty Northwest Insurance Corporation, et al.*
 WCC No. 2001-0300

Dear Clerk:

On behalf of our clients, enclosed please find a Response to Summons for filing in the above-referenced matter. Please conform the cover sheet and return in the envelope provided.

Thank you in advance for your assistance with this matter.

Sincerely yours,

CROWLEY, HAUGHEY, HANSON,
 TOOLE & DIETRICH P.L.L.P.

Myrna Henschel, PLS

Myrna Henschel, Certified PLS
 Legal Secretary to Steven W. Jennings

mlh
 Enclosures
 c (w/encl.): Ms. Laurie Wallace