

GARLINGTON, LOHN & ROBINSON, PLLP

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
THOMAS J. HARRINGTON
WILLIAM EVAN JONES
MAUREEN H. LENNON
BRADLEY J. LUCK
ROBERT C. LUKES
TERRY J. MACDONALD
ALAN F. MCCORMICK
CHARLES E. MCNEIL
ANITA HARPER POE

Attorneys At Law
199 West Pine • P. O. Box 7909
Missoula, Montana 59807-7909
406-523-2500
Telefax 406-523-2595
www.garlington.com

SHANE N. REELY
LARRY E. RILEY
SUSAN P. ROY
ROBERT E. SHERIDAN
PETER J. STOKSTAD
KEVIN A. TWIDWELL
WILLIAM T. WAGNER
KELLY M. WILLS

A. CRAIG EDDY, MD, JD
OF COUNSEL - HEALTH LAW

J. C. GARLINGTON
1908 - 1995

SHERMAN V. LOHN

(RETIRED)

R. H. "TY" ROBINSON

(RETIRED)

September 15, 2005

The Honorable James J. Shea
Workers' Compensation Court
P.O. Box 537
Helena, MT 59624-0537

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

FILED

SEP 16 2005

OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

Dear Judge Shea:

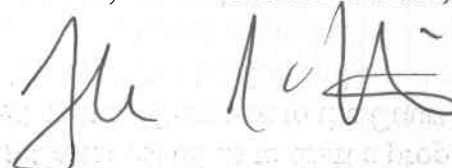
At the in-person conference on July 14, 2005, Judge McCarter asked us to draft a proposed Order Authorizing Withholding in the above-referenced matter. Pursuant to the Court's request, we drafted a proposed order and circulated it to Larry Jones, Tom Murphy, and Laurie Wallace. After reviewing the proposed order, Mr. Murphy voiced an objection to the third and fourth paragraphs. In a letter dated September 13, 2005, Ms. Wallace indicated she would contact the Court to request a conference call to discuss the language of the proposed order as well as Mr. Murphy's objection. Therefore, to facilitate discussions during the conference call, we have enclosed a copy of the proposed Order Authorizing Withholding we drafted.

If you have any questions or concerns, please do not hesitate to contact us.

Very truly yours,

GARLINGTON, LOHN & ROBINSON, PLLP

By



Thomas J. Harrington

TJH:sec

Enc.

DOCKET ITEM NO. 74

Honorable James Shea

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

September 15, 2005

Page 2

c: Laurie Wallace, Esq. (w/enc.)
Thomas Murphy, Esq. (w/enc.)
Larry W. Jones, Esq. (w/enc.)
Nancy Butler, Esq. (w/enc.)
Thomas E. Martello, Esq. (w/enc.)
David Hawkins, Esq. (w/enc.)

DRAFT

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CASSANDRA M. SCHMILL,

Petitioner,

v.

LIBERTY NORTHWEST INSURANCE
CORPORATION,

Respondent.

WCC No. 2001-0300

ORDER AUTHORIZING WITHHOLDING

On July 11, 2003, Petitioner's counsel filed a Notice of Attorney Fee Lien wherein she claimed a common fund attorney fee lien of 25% as a result of any additional benefits paid as a result of the precedent established by the Montana Supreme Court's decision in *Schmill v. Liberty Northwest Ins. Corp.*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290 ("*Schmill I*"). As a result of the Montana Supreme Court's decision in *Ruhd v. Liberty Northwest Ins. Corp.*, 2004 MT 236, 322 Mont. 478, 97 P.3d 561, the common fund attorney fee lien of Petitioner's counsel is asserted against all entities providing workers' compensation coverage for occupational disease claims occurring on or after July 1, 1987 through June 22, 2001.

Following the issuance of *Schmill I*, the parties litigated the additional issues of common fund entitlement and retroactivity. On June 7, 2005, the Montana Supreme Court issued a decision in which it concluded that Petitioner's counsel was entitled to common fund attorney fees and that *Schmill I* applied retroactively to certain occupational disease claims occurring on or after July 1, 1987. *Schmill v. Liberty Northwest Ins. Corp.*, 2005 MT 144, 327 Mont. 293, 114 P.3d 204 ("*Schmill II*"). This case has now been remanded to this Court for a determination of which claimants are entitled to receive additional benefits as a result of *Schmill I*.

During a recent conference with this Court, the Montana State Fund requested guidance with respect to whether it was authorized to withhold common fund attorney fees while *Schmill I* is formally implemented. Following the conference, discussions were held regarding the potential overlap of the common fund attorney fee lien filed in this matter with the common fund attorney fee lien filed in *Stavenjord v. Montana State Fund*, WCC No. WCC No. 2000-0207. Ms. Schmill's counsel has confirmed that her common fund attorney fee lien applies to increased occupational disease benefits which are now payable as a result of the inapplicability of the apportionment provision previously codified at Montana Code Annotated § 39-72-706. However, the common fund attorney fee lien of Ms. Schmill's counsel is limited by the \$10,000 limitation on permanent partial disability ("PPD") benefits previously codified at Montana Code Annotated § 39-72-405. Therefore, with respect to PPD benefits, her attorney fee lien only applies to non-apportioned occupational disease benefits that are paid as a result of *Schmill I* which bring the cumulative PPD award to \$10,000 or less.

Any additional PPD payments which are made in excess of the cumulative occupational disease benefit limitation of \$10,000 are potentially subject to the common fund attorney fee lien of Ms. Stavenjord's counsel because the *Stavenjord* decision invalidated the \$10,000 limitation previously codified at Montana Code Annotated § 39-72-405.

Finding good cause, and until further order of the Court, all insurers, self-insured employers, and the Montana State Fund are authorized to withhold the attorney fee amounts claimed by Ms. Schmill's counsel from any and all additional benefits which are paid to claimants on account of *Schmill I* and which would not have been paid absent that decision. By this Order, I specifically authorize all insurers, self-insured employers, and the Montana State Fund to withhold 25% of any increased occupational disease benefits which are paid as a result of *Schmill I*.

SO ORDERED.

DATED this ____ day of _____, 2005.

By _____
Workers' Compensation Court Judge

c: Laurie Wallace, Esq.
Larry W. Jones, Esq.
Thomas J. Murphy, Esq.
Nancy Butler, Esq.
David A. Hawkins, Esq.
Bradley J. Luck, Esq.

ORDER AUTHORIZING WITHHOLDING

Page 2