

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2010 MTWCC 22

WCC No. 2001-0300

CASSANDRA SCHMILL

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent

and

MONTANA STATE FUND

Intervenor.

ORDER REGARDING CALCULATION OF ATTORNEY FEES

Summary: Petitioner Cassandra Schmill and Intervenor Montana State Fund dispute the correct calculation of common fund attorney fees on claims where an offset is taken for payment of social security disability income (SSDI) benefits. Petitioner argues that the calculation of the contingent fee should be based on the gross amount of the common fund benefit, before the SSDI offset is taken. Intervenor argues that the calculation of the contingent fee should be based on the net amount of the common fund benefit, after the SSDI offset is taken.

Held: Pursuant to the common fund doctrine, Schmill's counsel is entitled to reasonable attorney fees from the common fund beneficiaries. In determining which is the more reasonable method for calculating a contingent fee on common fund benefits in this case, the Court looks to the predominant practice for calculating a contingent attorney fee in cases where an SSDI offset is taken. Petitioner's counsel advised the Court that the predominant practice is to calculate the attorney fee on the net benefits after the SSDI offset is taken. Seeing no compelling reason to deviate from the predominant practice in this case, the Court orders that when calculating the attorney fee on *Schmill* common fund benefits payable by Montana State Fund, the contingent fee shall be based on the net amount of the common fund benefit, after the SSDI offset is taken.

Topics:

Attorney Fees: Common Fund. Under the common fund doctrine, Schmill's attorney is entitled to reasonable attorney fees from the common fund beneficiaries. Schmill's counsel advised the Court that the predominant practice is to take attorney fees after the SSDI offset. This provides a good measure of what is reasonable. The contingent fee for *Schmill* common fund benefits shall be based on the net amount of the common fund benefit after the SSDI offset is taken.

¶1 Before the Court is a dispute between Cassandra Schmill (Schmill) and Intervenor Montana State Fund (State Fund) concerning the correct calculation of common fund attorney fees on claims where an offset is taken for payment of social security disability income (SSDI) benefits. Schmill argues that the calculation of her attorney's contingent fee should be based on the gross amount of the common fund benefit, before the SSDI offset is taken. State Fund argues that the calculation of the contingent fee should be based on the net amount of the common fund benefit, after the SSDI offset is taken.

BACKGROUND

¶2 In *Schmill v. Liberty Northwest Ins. Corp.*¹ (*Schmill I*), the Montana Supreme Court held that allowing for apportionment deductions for nonoccupational factors in the Occupational Disease Act (ODA) but not in the Workers' Compensation Act (WCA) violated the equal protection guarantee in the Montana Constitution. In the second appeal, *Schmill v. Liberty Northwest Ins. Corp.*² (*Schmill II*), the Supreme Court held that the decision in *Schmill I* is retroactive to all cases not yet final or settled at the time of its issuance. The Supreme Court further held that Schmill's attorneys properly requested common fund attorney fees and that the common fund created in *Schmill I* results in a global lien for the benefit of all claimants affected by the decision. In the third appeal, *Schmill v. Liberty Northwest Ins. Corp.*³ (*Schmill III*), the Supreme Court held that the enforcement of *Schmill I* and *Schmill II* does not violate the due process rights of insurers who were not named parties to *Schmill I* or *Schmill II*. The Supreme Court

¹ *Schmill I*, 2003 MT 80, ¶ 23, 315 Mont. 51, 67 P.3d 290.

² *Schmill II*, 2005 MT 144, ¶ 28, 327 Mont. 293, 114 P.3d 204.

³ *Schmill III*, 2009 MT 430, ¶ 15, 354 Mont. 88, 223 P.3d 842.

further held that Schmill had standing to pursue a claim for common fund benefits and enforce a common fund attorney fees lien on the fund.⁴

¶3 Before *Schmill I* was decided, if an OD claimant's total disability benefits were reduced by a certain percentage due to apportionment, State Fund's practice was to reduce the SSDI offset by the same percentage as the apportionment. For example, if a pre-*Schmill* OD claimant's total disability benefits were reduced by 40% due to apportionment, State Fund reduced the SSDI offset by 40% as well. After *Schmill I* ruled apportionment of OD benefits unconstitutional, State Fund began paying OD claimants 100% of their total disability benefits. State Fund likewise reinstated the SSDI offset on those benefits to 100%.

¶4 Schmill contends that the contingent fee calculation should be based on the full amount of benefits reinstated as a result of *Schmill I*, before State Fund withholds the reinstated SSDI offset on the common fund benefits. State Fund contends that the contingent fee calculation should be based on the amount of benefits reinstated as a result of *Schmill I*, after State Fund withholds the reinstated SSDI offset on the common fund benefits.

¶5 After this issue was fully briefed, I scheduled a conference call. In advance of the conference call, I advised counsel for Schmill and State Fund that I wanted to discuss two specific issues regarding this dispute.⁵ The first issue was to determine whether a consensus exists as to how attorney fees are typically calculated in non-common fund cases with an SSDI offset – i.e., whether the contingent fee is calculated before or after the offset. The second issue was whether a justification exists for deviating from the standard practice when calculating a common fund fee. During the conference call, Schmill's counsel, Laurie Wallace, stated that she surveyed both the other attorneys in her firm and other claimants' attorneys regarding the predominant practice for calculating an attorney fee when there is an SSDI offset. Ms. Wallace reported that although the calculation has been done both ways, the predominant practice is to calculate the attorney fee after the offset has been taken.

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⁴ *Id.* at ¶ 20.

⁵ E-Mail Correspondence From James Jeremiah Shea to Laurie Wallace, Bradley J. Luck, and Thomas E. Martello Re Conference Call, Docket Item No. 471.

DISCUSSION

¶6 Schmill argues that the contingent attorney fee should be calculated on the full amount of the common fund benefit, before the SSDI offset is taken because: “It is clear from the language of the attorney fee statutes and the fee petition itself, that the attorney fee attaches to all compensation benefits the claimants receive, even if some of those benefits are subsequently used to reimburse the State Fund.”⁶

¶7 Schmill cites *Kelleher Law Office v. State Comp. Ins. Fund*,⁷ for the general proposition that in workers’ compensation cases, attorney fee liens attach to all compensation upon the filing of an attorney retainer agreement with the Department of Labor and Industry.⁸ Schmill cites *Lockhart v. New Hampshire Ins. Co.*⁹ for the proposition that benefits do not have to be actually received by the claimant in order for the claimant’s attorney to claim a contingent fee on those benefits. Although Schmill is correct in her characterization of both the *Kelleher* and *Lockhart* holdings, her reliance on these cases in the present dispute is misplaced.

¶8 In *Kelleher*, the Supreme Court issued a declaratory judgment that a lien for attorney fee and costs attaches at the time the Department of Labor and Industry approves the attorney retainer agreement.¹⁰ In *Lockhart*, the Supreme Court concluded that a claimant’s attorney was entitled to collect an attorney fee on all disputed medical benefits paid by the insurer even though the medical providers received the payments.¹¹ Citing *Kelleher*, the Supreme Court held:

In the context of workers’ compensation cases, it is well settled that attorney fee liens attach to all compensation upon the filing of an attorney retainer agreement with the Department of Labor and Industry. A proper and timely retainer agreement was filed in these cases and thus, an attorney fee lien has attached as a matter of law to all medical benefits paid.¹²

⁶ Petitioner’s Brief Regarding Calculation of Attorney Fees at 2, Docket Item No. 442.

⁷ *Kelleher*, 213 Mont. 412, 416, 691 P.2d 823, 825 (1984).

⁸ Petitioner’s Brief Regarding Calculation of Attorney Fees at 2.

⁹ *Lockhart*, 1999 MT 205, 295 Mont. 467, 984 P.2d 744.

¹⁰ *Kelleher*, 213 Mont. at 417, 691 P.2d at 825.

¹¹ *Lockhart*, ¶ 25.

¹² *Id.*, ¶ 26. (Citation omitted.)

¶9 In both *Kelleher* and *Lockhart*, the Supreme Court based its holdings specifically on the existence and terms of the attorney retainer agreement. Although Schmill's counsel has an approved retainer agreement with Schmill, she does not have a retainer agreement with the common fund beneficiaries. Schmill's counsel's entitlement to an attorney fee from the common fund beneficiaries derives from the equitable principles of the common fund doctrine, which provides: "[W]hen a party, through active litigation, creates a common fund which directly benefits an ascertainable class of non-participating beneficiaries, those non-participating beneficiaries can be required to bear a portion of the litigation costs, including reasonable attorney fees."¹³ Since *Kelleher* and *Lockhart* are both premised on an attorney's entitlement to a fee pursuant to the specific terms of a retainer agreement as opposed to an equitable entitlement to a reasonable fee, their holdings are inapposite to the present case and are of limited precedential value.

¶10 Schmill also relies on *Hartford v. Young*,¹⁴ in support of her argument that a claimant's attorney may take a fee when, through the attorney's efforts, the insurer agrees to waive recoupment of advances or overpayments.¹⁵ In *Hartford*, the Supreme Court affirmed the Workers' Compensation Court's holding that a claimant's attorney forfeited his fee pursuant to § 39-71-613(3), MCA, due to overcharging his client. Relevant to the present dispute, the Supreme Court noted:

We agree that in workers' compensation cases, an attorney may bill for debts waived through the attorney's efforts. A waiver of debt is a benefit to the claimant obtained by the attorney and is fully compensable within the limitations of the attorney fees regulation.¹⁶

¶11 If Schmill's counsel negotiates a waiver of the SSDI offset for any of the common fund beneficiaries, *Hartford* would support her claim to an attorney fee on those benefits that would have otherwise been withheld but for her efforts. However, that is not the situation at hand. In this case, State Fund is now asserting its right to the portion of the SSDI offset that it had not taken before *Schmill I* was decided. *Hartford* does not support Schmill's claim to a fee on those common fund benefits which are subject to the offset.

¹³ *Murer v. State Comp. Mut. Ins. Fund*, 283 Mont. 210, 223, 942 P.2d 69, 76 (1997).

¹⁴ *Hartford*, 239 Mont. 527, 782 P.2d 365 (1989).

¹⁵ Petitioner's Brief Regarding Calculation of Attorney Fees at 3.

¹⁶ *Hartford*, 239 Mont. at 531, 782 P.2d at 367.

¶12 There is no dispute that pursuant to the common fund doctrine, Schmill's counsel is entitled to reasonable attorney fees from the common fund beneficiaries.¹⁷ The issue is whether calculating that fee based on the gross amount of the common fund benefit, before factoring in the SSDI offset, is reasonable. In the absence of any case law directly on point, the best guidance I can ascertain for reasonableness is the predominant practice in cases where an SSDI offset is taken. During the conference call, Schmill's counsel advised the Court that although the attorneys in her office have calculated the fee both before and after the SSDI offset, their predominant practice is to take the fee after the offset;¹⁸ this was also the general practice of other claimants' attorneys to whom Schmill's counsel spoke.¹⁹ Although the predominant practice is certainly not controlling of the Court's determination, it provides a good barometer of what is reasonable. I see no compelling reason for deviating from the predominant practice in this case.

ORDER

¶13 When calculating the attorney fee on *Schmill* common fund benefits payable by State Fund, the contingent fee shall be based on the net amount of the common fund benefit, after the SSDI offset is taken.

DATED in Helena, Montana, this 1st day of July, 2010.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Parties of Record Via Website
Submitted: August 26, 2008

¹⁷ *Murer*, 283 Mont. at 223, 942 P.2d at 76.

¹⁸ Tr. of Minute Book Hearing No. 4168 at 4:9-15, Docket Item No. 473.

¹⁹ *Id.* at 5:7-10.