

WORKERS' COMPENSATION COURT

Hearing No. 3750
Volume XIX

Helena, Montana
September 20, 2006

CASSANDRA SCHMILL

Laurie Wallace

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Larry W. Jones

and

MONTANA STATE FUND

Bradley J. Luck

WCC No. 2001-0300

An in-person conference was held on this date at the request of Petitioner's counsel. Counsel and persons attending the conference were: Ronald A. Thuesen, Cris McCoy, Laurie Wallace, Thomas J. Murphy, Steven W. Jennings, Larry W. Jones, Oliver H. Goe, Brian J. Hopkins, Bryce R. Floch, Bradley J. Luck, Thomas E. Martello, Malin Stearns Johnson, and Thomas A. Marra.

The purpose for the conference was to clarify the issues to be briefed. Ms. Wallace stated that although there were some issues that will be decided in other common fund cases, there are issues in *Schmill* that are not duplicative and can be briefed now.

I advised counsel that the Flynn Order is drafted and will be out by the end of next week. *Flynn* should answer the final, closed, inactive, and settled issues applicable to *Schmill*. The *Flynn* Order will be certified for appeal. I stated that it appears that the Supreme Court decision in *Stavenjord* should answer the issue of retroactivity for *Schmill*. However, Ms. Wallace believed that *Schmill* differed from *Stavenjord* regarding retroactivity.

Ms. Wallace had reviewed the responses to the summons and wrote down the different defenses which were raised. She noted the Montana State Fund has not answered the summons. Following is her list of defenses raised by Respondents which she believes can be briefed:

- the burden placed on defendants by the common fund
- due process claim
- nonparticipating beneficiaries - the age of files would limit the identification of beneficiaries so a common fund could not be maintained

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- this Court lacks jurisdiction over nonparty defendants; the defendants are not bound by decisions in other cases
- *Schmill* is not a proper common fund case
- the Uninsured Employers Fund is not an insurer
- attorney fee lien defenses

Ms Wallace was asked to e-mail the parties with the issues she set forth. Mr. Luck had e-mailed all parties his list of proposed issues to be discussed prior to the conference.

Arguments were made as to whether some claimants may be identified so the payment of claims can be implemented. Petitioner's counsel believed that it would be possible to identify claimants who fall within the *Schmill* common fund, even if decisions in *Stavenjord* and *Flynn* were not yet issued. Respondents' counsel argued that it is not possible to identify claimants until these decisions were issued and perhaps not until the *Flynn* Order to be issued by this Court has come back down from the Supreme Court. I stated that there may only be a "thimble full" of identifiable claimants at this time, but it may be possible to pay that "thimble full."

The proposed Order Authorizing Withholding that Tom Harrington drafted in September 2005 was copied and provided to everyone present. This Order will require insurers and self-insureds to withhold 25% for the attorney's lien. Counsel are to agree on language and Mr. Luck will submit the Order to the Court for issuance.

This Court will draft an Order delineating issues to be briefed. This draft will be routed to the parties for comment. The Court may also issue an Order regarding implementation.

James Jeremiah Shea
JUDGE

Minute Entry e-mailed to All Common Fund Distribution Lists on September 21, 2006

JB

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