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JOHN H. BOTHE  
(1951-1996)

October 27, 2006

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

OFFICE OF  
WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

**FILED**

**OCT 30 2006**

RE: SCHMILL v. LIBERTY NW INS. CORP.  
WCC No. 2001-0300

Dear Judge Shea:

At the recent hearing in this case on September 20, 2006, it was determined that an e-mail or two would be circulated among the represented parties in order to clarify the issues which needed to be briefed and to come to a consensus on several other issues. At one point in the hearing, I believe you requested that I perform these duties, but then at the end of the hearing you indicated that the Court would issue several orders in this regard.

I have reviewed the transcript of the hearing and believe that the following actions need to be taken:

1. Circulate an e-mail identifying the issues counsel would like to brief. The issues identified at the hearing were the following:
  - Whether the order to identify all *Schmill* beneficiaries creates an unreasonable and undue burden on defendants.
  - Whether due process precludes application of *Schmill* I to nonparty defendants under either the state or federal constitutions.
  - When nonparticipating beneficiaries cannot be identified, whether a common fund can be maintained.
  - Whether the Court lacks personal jurisdiction over the nonparty defendants.
  - Whether *Schmill* is a proper common fund case.
  - Whether claims of deceased claimants are within the common fund.

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- Any lingering scope of retroactivity issues not decided by *Flynn* and *Stavenjord II*.
  - What are the inclusive dates to which the common fund applies.
  - Whether the scope of retroactivity of the common fund is limited by the statute of limitations and the doctrine of laches.
2. Circulate an e-mail identifying the implementation issues counsel need to discuss amongst themselves and a timeline for doing so. Only if counsel cannot come to an agreement will the issues be presented to the Court for resolution. The issues identified at the hearing were the following:
- Discuss the parameters to be used to identify claimants entitled to *Schmill* benefits.
  - Identify which class of *Schmill* claimants are uncontested and can be paid immediately.
  - The method of notifying claimants.
  - An agreement as to how overpayments on the files are to be deducted from the increased benefits paid.
  - Calculations to be utilized where a social security offset is present on a file.
  - The procedure and obligations for locating claimants with changed addresses.
  - The procedure for resolving competing liens from *Schmill*, *Murer*, and *Flynn*.
  - The determination of actual common fund attorney fee obligations and payment by way of a due process hearing.
  - A timeline for implementation and payment activities.

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3. Circulate an e-mail to see if counsel can agree regarding the entitlement dates to be used for *Schmill* claims.

The purpose of this correspondence is to ask the Court if you wish for me to do these things, or if the Court is going to proceed on these matters.

Sincerely,

A handwritten signature in cursive script that reads "Laurie Wallace".

LAURIE WALLACE  
BOTHE & LAURIDSEN, P.C.

LW/rs