

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 2001-0300

CASSANDRA SCHMILL

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer

and

MONTANA STATE FUND

Intervenor.

FILED

FEB 14 2008

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

ORDER ADOPTING ORDER OF SPECIAL MASTER

¶ 1 Issues in the above-entitled matter were duly briefed before Special Master Jay Dufrechou, who considered the evidence and prepared and submitted his Order for consideration by the Court. These issues are fully set forth in the Special Master's Order.

¶ 2 Thereupon, the Court considered the record in the above-captioned matter, considered the Order of the Special Master, and does hereby make and enter the following Order.

¶ 3 IT IS ORDERED the "Findings and Conclusions by Special Master on Request for Stay, Regarding Additional Issues Raised by Some Insurers, and Regarding Requests by Petitioner" are adopted as follows:

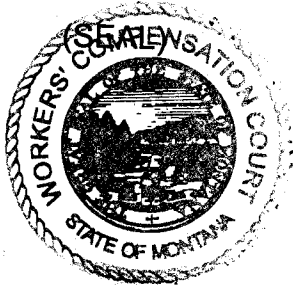
¶ 3a The Request for Stay of the July 10, 2007, Order is **denied**.

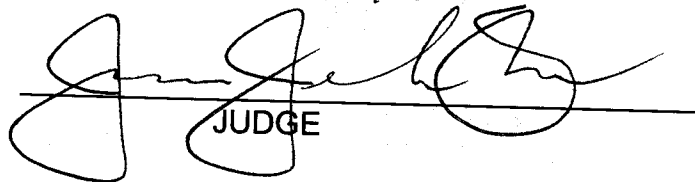
¶ 3b Briefing and decision on the "gateway" legal issues identified by numerous insurers other than Montana State Fund and Liberty Northwest Ins. Corp. is appropriate prior to further Court-enforced implementation of the *Schmill* decision with respect to those insurers. **Opening briefs are due on or before Monday, March 17, 2008,**

answer briefs are due on or before Monday, April 21, 2008, reply briefs are due on or before Monday, May 12, 2008.

- ¶ 3c Briefing and decision on the "practical implementation issues" identified by Steven W. Jennings are deferred until the above-referenced issues are resolved.
- ¶ 3d Within 14 days from the date of this Order, Montana State Fund and Liberty Northwest Ins. Corp. are ordered to file a statement indicating whether an attorney fee hearing is appropriate with regard to claimants of Montana State Fund and Liberty Northwest Ins. Corp.
- ¶ 3e Resolution of Petitioner's question as to how to proceed against insurers not responding to the Summons is premature.

DATED in Helena, Montana, this 14th day of February, 2008.




JUDGE

c: *Counsel of Record via Website*
Jay P. Dufrechou

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 2001-0300

CASSANDRA SCHMILL

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer

and

MONTANA STATE FUND

Intervenor.

**FINDINGS AND CONCLUSIONS BY SPECIAL MASTER
ON REQUEST FOR STAY, REGARDING
ADDITIONAL ISSUES RAISED BY SOME INSURERS,
AND REGARDING REQUESTS BY PETITIONER**

¶ 1 These Findings and Conclusions by Special Master are made pursuant to the *Order* appointing Special Master issued by the Workers' Compensation Court (WCC) on April 23, 2007.

¶ 2 Three matters are before the Special Master as raised in requests and status reports filed by various parties following the Workers' Compensation Court's July 10, 2007, Order Adopting Order of Special Master (Findings and Conclusions by Special Master on Issues Presented Pursuant to December 11, 2006, Order of Workers' Compensation Court) (hereafter "July 10, 2007 Order"). These matters are:

¶ 3 Respondent Liberty Northwest Insurance Corporation (Liberty), Intervenor Montana State Fund and other parties have requested the Court to stay further implementation of the July 10, 2007, Order.

¶ 4 Counsel on behalf of numerous insurers other than Liberty and Montana State Fund have identified legal issues relevant to their situation in this matter

and have requested that a briefing schedule be set on “unresolved ‘gateway’ legal issues” and “practical implementation issues.”¹

¶ 5 Petitioner has asked that an attorney fee hearing be scheduled and requests guidance on how to proceed against insurers who have not responded to the summons of the WCC.

¶ 6 The Special Master finds and concludes as follows:

I. The Request for Stay of the July 10, 2007, Order Should Be Denied

¶ 7 Petitioner Schmill argues that the WCC does not have authority to issue stays except with regard to judgments or orders which have been appealed pursuant to WCC Rule 24.5.346(1). Parties requesting the stay argue that the WCC has inherent authority to stay proceedings. Without addressing whether the WCC would have authority to stay proceedings in situations other than those referenced in Rule 24.5.346(1), the Special Master finds and concludes that a stay of the July 10, 2007, Order is not appropriate. However, as noted below, the Special Master finds that briefing and decision on the “gateway’ legal issues” identified by numerous insurers other than Montana State Fund and Liberty is appropriate prior to further Court-enforced implementation of the *Schmill* decision with respect to those insurers.

¶ 8 The parties requesting stay argue that the Montana Supreme Court, in deciding the appeal in *Flynn v. Montana State Fund*, 2006 MTWCC 31, may make determinations contrary to the July 10, 2007, Order. These parties contend that the Special Master’s Findings and Conclusions relied upon *Flynn*, making a stay appropriate until decision is issued on the *Flynn* appeal. As pointed out by Petitioner, while the Special Master referenced the *Flynn* decision, the Findings and Conclusions of the Special Master were based on the decision of the Montana Supreme Court in *Stavenjord v. Montana State Fund (Stavenjord I)*², which was issued *after* the WCC’s decision in *Flynn*, and upon the Supreme Court’s second opinion in this case, *Schmill v. Liberty Northwest (Schmill II)*³. The WCC’s decision in *Flynn* was not the underpinning of the July 10, 2007, Order in *Schmill*. Accordingly, reference to *Flynn* in the Special Master’s Findings and Conclusions, as adopted by the WCC, is not itself grounds for a stay pending decision by the Supreme Court in *Flynn*.

¶ 9 Respondent Liberty and other insurers argue that stay of implementation in *Schmill* would prevent hardship and inequity that could result from costly searches by insurers for potential common fund claimants under parameters subject to modification through the *Flynn* appeal. Montana insurers clearly have

¹ Responding Insurers’ Status Report to Special Master, filed by Steven W. Jennings, Crowley, Haughey, Hanson, Toole & Dietrich, P.L.L.P., on August 30, 2007.

² 2006 MT 257.

³ 2005 MT 144.

legitimate concerns regarding the scope of their obligation to review numerous files, some of which may have been inactive for long periods of time. The complexity of implementing common fund cases has long been apparent to those involved in the day-to-day operation of the Montana workers' compensation system. In *Stavenjord v. Montana State Fund*, the WCC recently filed an *Order Regarding Identification and Notification of Potential Beneficiaries*⁴, in which the Court concluded it was impossible for it to comply with the Supreme Court's order on remand in the *Stavenjord* proceedings. The procedural, jurisdictional and practical complexities existing in the *Stavenjord* proceeding are different than those existing here, where the Supreme Court has found the existence of a common fund and global attorney fee lien. However, the situation articulated by the WCC in *Stavenjord* illustrates at least some of the difficulties in implementation of common fund cases, particularly where global liens exist.

¶ 10 Insofar as the *Schmill* proceedings are concerned, the WCC's July 10, 2007, Order has defined the parameters for searching claims on the basis of rulings of the Supreme Court in *Stanvenjord II* and *Schmill II*. In these circumstances, the Special Master finds and concludes that the WCC must attempt to move this particular case forward on the basis of issues presented by the parties. The Special Master concludes that a request for a stay of the *Schmill* proceedings until the Supreme Court issues its decision in *Flynn* should be denied.

II. Briefing Schedule Regarding Issues Raised By Some Insurers

¶ 11 On behalf of approximately forty-five insurers, attorney Steven W. Jennings has requested that the WCC set a briefing schedule on "gateway" and "practical implementation" issues applicable to his clients.⁵ On behalf of Safeco Companies, attorney Geoffrey R. Keller has joined in that request.⁶

¶ 12 The "unresolved 'gateway' legal issues" identified by Mr. Jennings are as follows:

¶ 12a Whether Responding Insurers' right to due process under both the United States and Montana Constitutions precludes the entry of any order requiring Responding Insurers to identify and pay additional benefits on the basis of judgments, decisions, or orders entered in this case prior to 2006. The common fund proceedings in this case attempt to impose common fund liability upon a global class of insurer respondents only *after* individual petitioner Cassandra Schmill obtained decisions from the Montana Supreme Court that (1) held unconstitutional the apportionment provision of the Occupational Disease Act, §39-72-706, MCA (1987-2002), *Schmill I*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290, and (2) determined that *Schmil I* created a global common fund,

⁴ 2008 MTWCC 4.

⁵ Responding Insurers' Status Report to Special Master, filed August 30, 2007.

⁶ Respondent Safeco Companies Notice of Joinder in Status Report to Special Master.

Schmill II, 2005 MT 144, 327 Mont 292, 144 P.2d 204. Responding Insurers were not parties to this case, did not have notice of the proceedings, and were not adequately represented prior to the filing of their response in 2006 to the Amended Summons. As such, the judgment affirmed in *Schmill I*, and the common fund judgment affirmed in part and reversed in part in *Schmill II*, are void as to Responding Insurers.

¶ 12b Responding Insurers have no obligation to search their files stretching back two decades to identify potential *Schmill* beneficiaries. Such an obligation, premised upon judgments to which Responding Insurers were not parties, would impose an undue and unreasonable burden on the Responding Insurers. Claimants bear the burden of proving that they are entitled to the benefits they seek.

¶ 12c No common fund action may be maintained against the Responding Insurers because the result of the *Schmill I* decision did not result in the creation of an identifiable monetary fund or benefit for readily ascertainable beneficiaries, at least as to Responding Insurers. Potential claimants are not readily identifiable upon a superficial file review, and benefits therefore may not be calculated with certainty with a mathematical formula applicable to all claim files.

¶ 12d Whether this Court's summons, by which Responding Insurers were brought into this case after it had been denied on the merits, was sufficient to empower the Court to exercise personal jurisdiction over the Responding Insurers.

¶ 13 The Special Master notes that some of the "gateway" legal issues" may have already been resolved by the Supreme Court's decisions in this case, but concludes that it is appropriate to allow briefing on the issues as phrased by Mr. Jennings. Prior Orders of the WCC make clear that it has always been the intention of the WCC to allow briefing on various issues deemed important by the insurers represented by Mr. Jennings and other counsel.⁷ A briefing schedule should be set that requires any respondent insurers wishing to be heard on these issues to file an opening brief, to be followed by a responsive brief by Petitioner or any other parties with responsive information, to be followed by a closing brief by any party that filed an opening brief.

¶ 14 Briefing and decision on the "Practical Implementation Issues" identified by Mr. Jennings are deferred until after resolution of the above-referenced issues.

⁷ See Order Denying Motion to Add Additional Issues to be Briefed, dated November 14, 2006.

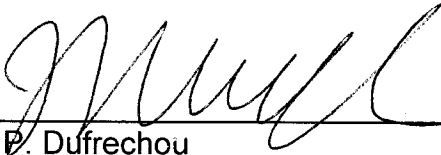
III. Petitioner's Requests

¶ 15 In her Status Report to Special Master, Petitioner has requested that (1) an attorney fee hearing be scheduled to determine the attorney fee entitlement, and (2) guidance be provided as to how to proceed against insurers that have not responded to the WCC's Summons.

¶ 16 Within 14 days of the date of the WCC's Order in the present matter, the Petitioner, Montana State Fund, and Liberty are requested to file a statement with the WCC indicating whether an attorney fee hearing is now appropriate with regard to claimants of Montana State Fund and Liberty.

¶ 17 Given the briefing schedule referenced above for insurers other than Montana State Fund and Liberty, resolution of the question of how to proceed against insurers not responding to the Summons is premature.

DATED in Helena, Montana, this 6th day of February, 2008.



Jay P. Dufrechou
Special Master