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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CASSANDRA M. SCHMILL,

Petitioner,

v.

LIBERTY NORTHWEST INSURANCE
CORPORATION,

Respondent/Insurer

and

MONTANA STATE FUND,

Intervenor.

WCC No. 2001-0300

**STATEMENT REGARDING
APPROPRIATENESS OF ATTORNEY
FEE HEARING**

On February 14, 2008, this Court issued an Order instructing Intervenor Montana State Fund ("State Fund") "to file a statement indicating whether an attorney fee hearing is appropriate at this time." Order Adopting Order of Special Master, February 14, 2008,

Docket # 410. The State Fund agrees that an attorney fee hearing is appropriate based upon due process considerations; however, the State Fund suggests it is essential that all attorney fee issues be resolved before implementation of the *Schmill* decision proceeds.

DISCUSSION

In the February 14, 2008, Order, this Court denied the State Fund's request for a stay of proceedings, but did not mention the other pending issues raised by the State Fund in its Status Report and Response to Petition. Instead, the Court set a briefing schedule for the "gateway issues" identified by the insurers other than the State Fund and deferred briefing and decision on the "'practical implementation issues' identified by Steven W. Jennings," which are essentially the same as the implementation issues raised by the Montana State Fund. See Response to Summons, Docket No. 313, ¶ 6. Also in its Response to Summons, the State Fund asserted its position that deceased claimants are not entitled to an increased benefit award pursuant to *Schmill*. Response to Summons, ¶ 1.

Neither hearing nor briefing is required for all the implementation issues raised by the State Fund. Many of these issues have, as a result of the passage of time and work on other common fund cases, been modified or resolved. For example, the State Fund has now identified occupational disease claims from July 1, 1987 to the present and is capable of identifying *Schmill* claims. If Petitioner is comfortable with the identification process utilized by the State Fund no further Court involvement in that issue is required.

STATEMENT REGARDING APPROPRIATENESS OF ATTORNEY FEE HEARING

With regard to most of the other implementation issues, the State Fund believes it is possible and appropriate to work with opposing counsel to reach agreement prior to seeking the Court's involvement. The length of time required to complete *Schmill* administration will in part be determined by the direction on such issues and perhaps the decision in *Flynn*.

Some issues, however, are not amenable to such an approach and will require Court oversight, most notably those involving attorney fees. The due process rights of the claimants impacted by *Schmill* require that this Court conduct a fee hearing to determine an appropriate fee to be deducted from payments made on account of the decision. In the interest of judicial economy, it is also appropriate that the Court resolve any issues regarding potential competing common fund liens at the same time the *Schmill* fee percentage is determined. The State Fund and Petitioner will require guidance from the Court to determine the appropriate fee to be paid and to resolve issues, if any, between counsel for *Schmill*, *Murer*, and *Flynn*. Covering all issues relating to attorney fees, including competing liens, will allow all claimants, as well as all potentially entitled common fund counsel, the opportunity to be heard in regard to an appropriate attorney fee.

As to issues not concerning attorney fees, the Court may need to consider briefing if resolution between the parties is not possible. For example, the Court has never considered briefing nor issued a decision on the issue raised by the State Fund in its Response to Summons regarding the entitlement of deceased claimants. This issue will

likely require a Court determination. The State Fund believes the majority of other issues can be resolved by agreement between the State Fund and opposing counsel. If additional issues arise as the implementation process proceeds, however, they can be brought to the Court's attention.

CONCLUSION

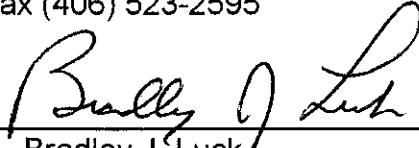
The State Fund submits that the Court should consider all issues related to attorney fees due as a result of the *Schmill* in one proceeding. Other practical implementation issues can be addressed informally through discussion with opposing Counsel or brought before the Court as necessary.

DATED this 7th day of March, 2008.

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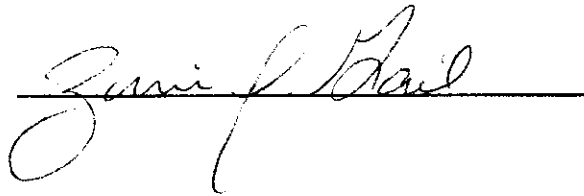

Bradley J. Luck

CERTIFICATE OF SERVICE

I, the undersigned, of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for Intervenor, hereby certify that on this 7th day of March, 2008, I submitted the foregoing **STATEMENT REGARDING APPROPRIATENESS OF ATTORNEY FEE HEARING** for service upon the Workers' Compensation Court website, and also sent a copy, postage prepaid, to the following:

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A handwritten signature in cursive script, appearing to read "Jennifer Paul", is written over a solid horizontal line.