IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 38

WCC No. 2001-0300

CASSANDRA SCHMILL

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer

and

MONTANA STATE FUND

Intervenor.

ORDER ADOPTING ORDER OF SPECIAL MASTER

On Appeal at the Montana Supreme Court - August 27, 2008

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 38

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FILED

JUL 29 2008

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

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¶ 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 The Court considered the record in the above-captioned matter, considered the Order of the Special Master, and enters the following Order.

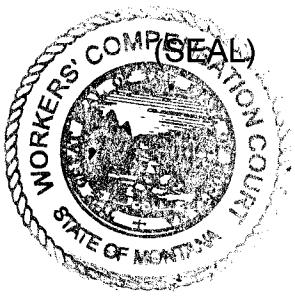
¶ 3 IT IS ORDERED the Findings and Conclusions of Special Master Denying Responding Insurers' Motion to dismiss on "Gateway Legal Issues" are adopted as follows:

> ¶ 3a The Motion to Dismiss brought by the insurers and self-insured employers identified in the Special Master's Findings and Conclusions as "Responding Insurers" is **denied**.

¶ 4 Pursuant to ARM 24.5.348(2), the July 25, 2008, Findings and Conclusions of Special Master Denying Responding Insurers' Motion to Dismiss on "Gateway Legal Issues" is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DOCKET ITEM NO. 441

DATED in Helena, Montana, this 29th day of July, 2008.



(SEAL)

JUDGE

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

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FINDINGS AND CONCLUSIONS OF SPECIAL MASTER
DENYING RESPONDING INSURERS' MOTION TO
DISMISS ON "GATEWAY LEGAL ISSUES"

I. Basis of the Motion to Dismiss

¶ 1 Before the Workers' Compensation Court (WCC) is a Motion to Dismiss filed and joined by numerous insurers and self-insured employers doing business in Montana (hereafter collectively referenced as "Responding Insurers")[1]. Liberty Northwest Insurance Corporation (the named insurer in this litigation, hereafter Liberty) and Montana State Fund (an Intervenor in this litigation) are not involved in the pending motion.

¶ 2 Responding Insurers argue that the "global common fund" created by this litigation violates their constitutional rights to Due Process under the Fourteenth Amendment of the United States Constitution and Article 2, Section 17 of the Montana Constitution. Their concern is that the underlying judgment enforced as

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[1] The Motion to Dismiss and Supporting Brief was filed on behalf of 95 insurers and self-insured employers represented by Steven W. Jennings, Crowley, Haughey, Hanson, Toole & Dietrich, P.L.L.P. Notice of Joinder in the Motion was filed on behalf of seven insurers by Geoffrey R. Keller, Matovich & Keller, P.C., and on behalf of 11 insurers/self-insurers by Bryce R. Floch of Hammer, Hewitt, Jacobs & Floch, PLLC.

a global common fund "now obligates every insurer that has ever written workers' compensation insurance in this state to conduct expansive and burdensome file reviews stretching back twenty years in order to identify and pay beneficiaries of her ruling (with a portion going to her counsel)."[2]

¶ 3 Responding Insurers contend that they were not provided notice or an opportunity to be heard on the issues decided in *Schmill v. Liberty Northwest Ins. Corp.*(*Schmill I*)[3] and *Schmill v. Liberty Northwest Ins. Corp. (Schmill II)*.[4] *Schmill I* determined that the apportionment provisions of §39-72-706, MCA of the Occupational Disease Act violated equal protection principles by requiring reduction of benefits based on a percentage contribution of non-occupational factors to an occupational disease, where no such reduction was made in injury cases. *Schmill II* determined that *Schmill I* applied retroactively, that it created a common fund, and that the common fund was "global," i.e., inclusive of benefits payable by all insurers as a result of the decision, not just the insurers involved in the litigation.

¶ 4 Along with the due process argument of Responding Insurers come several other arguments. Responding Insurers contend that the principles articulated by the Montana Supreme Court in *Stavenjord v. Montana State Fund (Stavenjord II)*[5] argue against a common fund finding in the *Schmill* litigation. They contend that the WCC lacks subject matter jurisdiction over the enforcement aspects of this litigation; that claimant Cassandra Schmill received her benefits from Liberty and lacks standing to seek benefits from other insurers; that Schmill has failed to comply with the mandatory mediation requirements of the Workers' Compensation Act; and that requiring them to investigate their files for benefit entitlements of past occupational disease claimants impermissibly shifts the burden of proof onto insurers, when it should remain on injured workers claiming entitlement to additional benefits.

¶ 5 In support of their due process argument, Responding Insurers point out that the insurers participating in *Schmill I and Schmill II* did not contest whether *Schmill* created a common fund.[6] Responding Insurers quote from the Supreme Court's *Schmill II* decision as follows:

> After an in-depth analysis of the issue, the WCC concluded that *Schmill I* created a common fund. The State Fund does not challenge this conclusion. Liberty does challenge the conclusion, but only on the assumption that *Schmill I* does not apply retroactively. Liberty goes so far as to say that if *Schmill I* does

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[2] Responding Insurers' Brief and Motion to Dismiss on "Gateway Legal Issues," p. 3.
[3] 2003 MT 80.
[4] 2005 MT 144.
[5] 2006 MT 257..
[6] Responding Insurers' Brief and Motion to Dismiss on "Gateway Legal Issues," section titled "Responding Insurers Were Not Adequately Represented by Liberty or Intervenor State Fund in Earlier Proceedings," pp. 11-13.

> apply retroactively then the decision did create a common fund. Since we have determined that the WCC was correct in concluding that *Schmill I* does apply retroactively, there is no challenge to the court's further conclusion that *Schmill I* created a common fund. Therefore, we do not disturb the court's conclusion on this issue.[7]

Thus, Responding Insurers argue that their interests with respect to findings of common fund and global common fund were not adequately represented by Liberty and Montana State Fund.

¶ 6 Though the arguments of Responding Insurers encompass several legal grounds, the crux of the motion seems to be whether the WCC can require, under the global common fund doctrine, numerous insurers and self-insured employers to review occupational disease claim files to determine whether benefits should be paid under *Schmill I*. Responding Insurers argue that

> to the extent that there are potential *Schmill* beneficiaries covered under policies written by Responding Insurers, those beneficiaries have the duty to step forward and assert claims. In other words, it is their duty to identify themselves and not Responding Insurers' duty to do so at great burden and expense. As with any other claim for benefits, if a *Schmill* beneficiary notifies a Responding Insurer of a claim to unpaid benefits, that Responding Insurer will evaluate the claim and decide whether to accept or deny based upon the facts or the claim and the law set forth in *Schmill I* and *II*. If benefits are denied, the claimant may proceed to mediation, and if necessary, litigation bearing the burden of proving his entitlement to *Schmill* benefits.[8]

¶ 7 The Responding Insurers appear to acknowledge the retroactive application of *Schmill I* as found in *Schmill II*, but the Motion to Dismiss apparently assumes that their dismissal from the *Schmill* litigation would allow them to avoid an affirmative duty to review files and pay *Schmill* beneficiaries on their own initiative.

¶ 8 In arguing against the Motion to Dismiss, Petitioner Schmill contends that *Schmill I* created a vested right among all potential beneficiaries of that decision, regardless of insurer, to receive benefits payable under that decision. Relying on common fund precedent, Petitioner argues that common fund designation, already made by the Supreme Court in this case, creates the obligation of all insurers to investigate files and pay benefits. Petitioner also argues that Responding Insurers were not denied due process because they had notice of ongoing common fund litigation and could have participated in litigation of *Schmill II* if they had so desired.

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[7] *Schmill II*, ¶25.

[8] Responding Insurers' Brief and Motion to Dismiss on "Gateway Legal Issues," p. 19.

II. Schmill II Requires Denial of the Motion to Dismiss

¶ 9 Under *Schmill II*, the Motion to Dismiss must be denied because it challenges determinations already made by the Montana Supreme Court in this litigation. The WCC is not empowered to alter those decisions. Specifically, the Supreme Court in *Schmill II* (1) affirmed the WCC's finding of the existence of a common fund[9] and (2) held that a global common fund exists in this case, including all insurers with potential *Schmill* beneficiaries.[10]

¶ 10 Pursuant to principles of common fund law developed by the Montana Supreme Court and implemented by the WCC in several cases,[11] these findings presume the existence of an ascertainable class of beneficiaries of the *Schmill* decision and require the WCC to enforce identification of those beneficiaries, payment of benefits, and payment of attorneys' fees under the common fund lien. For instance, in *Murer III,* the Supreme Court summarized:

> In order to implement the mandate of *Murer II,* the State Fund, under supervision of the Workers' Compensation Court: (1) identified a substantial number of absent claimants; (2) notified those claimants of their rights pursuant to *Murer II;* (3) calculated, with mathematical certainty, the increases to which each individual absent claimant is entitled; and (4) made actual payments to those claimants.[12]

Where the Supreme Court has already found a global common fund, the WCC is not empowered to dismiss Responding Insurers from this litigation, but must require their payment of benefits and fees pursuant to the decision.

¶ 11 To provide context for this determination, some review of the procedural history of the *Schmill* litigation is appropriate. After *Schmill I* found the apportionment provisions of section 39-72-706, MCA, unconstitutional, the WCC was presented with questions regarding whether that decision created a common fund and whether that common fund was global. The WCC's determination of common fund was based on review of earlier common fund decisions and application of the three common fund factors derived from those decisions. The WCC stated:

> ¶45 For the common fund doctrine to apply, three elements must be satisfied:

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[9] *Schmill II, supra,* ¶25.
[10] *Id,* ¶27.
[11] *Murer v. State Compensation Insurance Fund,* 283 Mont. 210, 222, 942 P.2d 69, 76 (1997) (*Murer III*); *Broeker v. State Compensation Ins. Fund,* 275 Mont. 502, 914 P.2d 967 (1996); *Rausch v. State Compensation Ins. Fund,* 2002 MT 203.
[12] *Murer III, supra,* 283 Mont. 210, 222, 942 .2d 69, 76.

First, a party (or multiple parties in the case of a consolidated case) must create, reserve, increase, or preserve a common fund. This party is typically referred to as the active beneficiary. Second, the active beneficiary must incur legal fees in establishing the common fund. Third, the common fund must benefit ascertainable, non-participating beneficiaries.

Rausch [v. State Compensation Ins. Fund, 2002 MT 203,] 311 Mont. at 224, 54 P.3d at 35.

¶46 Under criteria one and three, there must in fact be a common fund which benefits ascertainable, non-participating beneficiaries.

....

¶51 This case is similar to the four discussed above [*Murer v. State Compensation Ins. Fund*[13]*; Rausch, supra; Broeker v. State Compensation Ins. Fund*[14]*;* and *Flynn v. State Compensation Ins. Fund*[15].] The benefited claimants are defined, consisting of claimants injured after June 30, 1987, whose benefits have been reduced pursuant to section 39-72-706, MCA (1987-2003). The additional benefits due those claimants are mathematically certain, amounting to the difference between the benefits to which they were entitled without the reduction for apportionment and the benefits actually paid. I therefore find that criteria one and three of the common fund doctrine are met.

¶52 Criteria two is also met: The petitioner in this case incurred legal fees in establishing her entitlement and the entitlement of the other beneficiaries.

¶53 I therefore hold that the petitioner's attorney is entitled to common fund fees from claimants who benefit from the decision in *Schmill v. Liberty Northwest Ins. Corp.,* 2003 MT 80, 315 Mont. 51, 67 P.3d 290.[16]

¶ 12 When the WCC found the potential common fund in *Schmill I* to benefit "ascertainable, non-participating beneficiaries," that finding was with reference only to potential beneficiaries insured by Liberty, as the WCC had not extended the common fund doctrine to insurers not participating in the litigation before the

[13] 283 Mont. 210, 222, 942 P.2d 69, 76 (1997) (*Murer III).*
[14] 275 Mont. 502, 914 P.2d 967 (1996).
[15] 2002 MT279, 312 Mont. 410, 60 P.3d 397.
[16] Schmill v. Liberty Northwest Ins. Corp., 2004 MTWCC 47.

Court through a global common fund doctrine. *Schmill II* reversed this determination, holding as follows:

> ¶27 Schmill cross-appeals the WCC's conclusion that the common fund created in *Schmill I* did not apply a global lien, but only a lien on claimants whose benefits are paid by Liberty. The WCC stated that "[i]n *Ruhd v. Liberty Northwest Ins. Corp.*, 2003 MTWCC 38, I held that the common fund doctrine extends only to the claimants whose benefits are paid by the respondent insurer. I rejected the claim that the petitioner's attorney is entitled to a fee from all the claimants who may benefit from the precedent irrespective of the insurer liable for the benefits. While my decision in *Ruhd* has been appealed to the Supreme Court, I find no reason to reconsider or deviate from my decision." *Schmill v. Liberty Nw. Ins. Corp.*, 2004 MTWCC 47, ¶54. Subsequent to the appeal in the instant case, we reversed the WCC's decision in *Ruhd*, concluding that the common fund created in that case "includes fees culled from all claimants regardless of insurer." *Ruhd v. Liberty Nw. Ins. Corp.*, 2004 MT 236, ¶25, 322 Mont. 478, ¶25, 9 P.3d 561, ¶25. Pursuant to the reasoning of *Ruhd* we likewise reverse the WCC on this issue, holding that the common fund created in *Schmill I* applied a global lien against all claimants who may benefit from the decision, not just those whose benefits are paid by Liberty.

¶ 13 Arguing that they are left with obligations under *Schmill II* without participating in that litigation, Responding Insurers want the common fund "slate [to be] wiped clean" so that they may argue against their inclusion in common fund implementation proceedings.[17] They cite *Stavenjord v. Montana State Fund (Stavenjord II)*[18] as recognizing problems with handling large numbers of claims within a single piece of common fund litigation. The problem with this argument is that *Stavenjord II* declined to find a common fund because benefits payable under the *Stavenjord* litigation were not readily ascertainable. The Supreme Court explained:

> Here, by contrast [to prior common fund cases], benefits due to non-participating *Stavenjord* beneficiaries will not be readily identifiable on superficial review of case files, nor can benefits due be calculated with certainty by way of a mathematical formula. The result of this case will not be that all eligible claimants will automatically be due a sum certain for unpaid PPD benefits. Rather, the parties here stipulated that it may be necessary for claimants' claim files to be updated or augmented in order to determine what PPD benefits each claimant is due under *Stavenjord I*. Thus, the "identifiable monetary fund or benefit"

[17] Motion to Dismiss, p. 4.
[18] 2006 MT 257.

> which the first of the three elements of the common fund doctrine requires is absent here. *See* ¶ 24, and *Ruhd*, ¶ 16. Moreover, because each claimant's situation will be unique, there will be no simple universal formula that can be applied to all non-participating claimants to determine to what additional money they are entitled.[19]

¶ 14 In contrast, *Schmill II* is based on the determination that *Schmill* benefits are readily ascertainable, a matter of paying the previously unpaid share of apportioned benefits. Responding Insurers want to inject consideration of administrative burden in locating and reviewing files into the question of their inclusion in a global common fund. In *Schmill II,* the Supreme Court did consider and reject Montana State Fund's argument of administrative burden with regard to whether the decision should be applied "retroactively."[20] Where the Supreme Court was not inclined to allow Montana State Fund to avoid file review when considering "retroactivity", it seems unlikely that the Court would be impressed with the administrative burden alleged by Responding Insurers. In any event, the existence of such burden is not a question the WCC can reach, where the rulings of *Schmill II* already include the determination of global common fund, which then requires the WCC to mandate identification and payment of *Schmill* beneficiaries.

¶ 15 Moreover, as argued by Petitioner, the "vested right" to payment of benefits under common fund decisions undercuts Responding Insurers' assumption that dismissal from this litigation would allow them to avoid file review and benefit payment. In *Murer III,* the Supreme Court held that the litigants had established a *vested right* on behalf of other potential beneficiaries "to directly receive immediate monetary payments of past due benefits underpayments; and based on the establishment of those vested rights, the State Fund became legally obligated to make the increased benefits payments."[21] Similarly, in *Rausch,* the Supreme Court justified its finding of common fund status by noting that the litigation brought by the named parties

> will benefit an ascertainable class of workers who were denied immediate payment of an impairment award by the State Fund which they were legally entitled to receive. Those absent claimants will receive the benefit 'even though they were not required to intervene, file suit, risk expense or hire an attorney.' *Murer,* 283 Mont. at 223, 942 P.2d at 77.[22]

¶ 16 *Ruhd v. Liberty Northwest Ins. Corp.*, 2004 MT 236 addressed whether the common fund in *Rausch* was global or whether a separate common fund case could proceed against Liberty as filed by a separate attorney. In finding a global common fund in favor of the attorneys in *Rausch,* the Supreme Court

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[19] *Stavenjord II, supra,*¶27.
[20] *Schmill II, supra,* ,¶¶18, 19.
[21] 283 Mont. 210, at 223, 942 P.2d 69, 76-77.
[22] *Rausch, supra,* ¶48.

noted that those attorneys, in bringing the initial litigation against State Fund, "are directly responsible for securing the right of all permanently totally disabled claimants to receive an impairment award, regardless of their insurer."[23] Elsewhere the Court noted, "[a]s soon as we decided *Rausch*, however, liability for immediate payment of impairment awards was established against all insurers."[24]

¶ 17 In *Stavenjord II*, even while finding no common fund, the Supreme Court remanded the case "to the WCC for further proceedings to include the determination of an appropriate procedure by which potential *Stavenjord* beneficiaries will be identified and notified of their interests related to increased *Stavenjord*-type PPD benefits."[25] In considering whether it could comply with the remand Order of *Stavenjord II*, the WCC interpreted "potential *Stavenjord* beneficiaries" to include all potential beneficiaries, regardless of insurer. With reference to a global group, the WCC found it could not comply with the Supreme Court's order that it determine an appropriate identification and notice procedure, for the procedural and jurisdictional reasons stated in the WCC's opinion.[26] That Order of the WCC is on appeal to the Montana Supreme Court. Regardless of the outcome of that appeal, *Stavenjord II* suggests that the Supreme Court contemplates that when benefits are found "retroactively" payable as the result of workers' compensation decisions, insurers must take the initiative to locate and notify claimants impacted by a decision, even if common fund fees are not to be paid.

¶ 18 As noted by Petitioner, the WCC has previously rejected arguments very similar to those made through the present Motion to Dismiss. In the *Rausch* litigation, after the Supreme Court found global common fund status through *Ruhd*, the WCC issued summons to all Montana insurers and self-insurers who paid permanent total disability benefits during the relevant time period, requiring them to file responses identifying permanent totally disabled claimants. Some insurers and self-insurers moved to quash those summons. In denying that motion, the WCC held that "claimants benefited in a common fund case have a right to benefits; insurers have a corresponding duty to pay those benefits."[27] Further, the WCC held that "this Court has a duty to enforce the common fund created by *Rausch,*" which "requires it to compel each insurer and self-insurer to identify the claimants entitled to impairment awards and pay them those awards, as well as enforce the common fund attorney lien."[28]

¶ 19 As in *Rausch*, the global attorney fee lien recognized in *Schmill II* places the Responding Insurers within the jurisdiction of the WCC. Common fund

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[23] 2004 MT 236, ¶19.
[24] *Id*, ¶22.
[25] *Stavenjord II, supra,* ¶31.
[26] *Stavenjord v. Montana State Fund,* 2008 MTWCC 4.
[27] *Rausch v. Montana State Fund,* 2005 MTWCC 9, ¶4.
[28] *Id.* ¶6

precedent requires the WCC to compel Responding Insurers to review open claims within the relevant time frame, to identify potential beneficiaries, and to pay appropriate benefits and attorneys' fees.

¶ 20 The Motion to Dismiss must be denied.

DATED in Helena, Montana, this 25th day of July, 2008.

Jay P. Dufrechou
Special Master