

LAURIE WALLACE  
Bothe & Lauridsen, P.C.  
P.O. Box 2020  
Columbia Falls, MT 59912  
Telephone: (406) 892-2193

**FILED**

AUG - 8 2008

OFFICE OF  
WORKERS COMPENSATION JUDGE  
HELENA, MONTANA

"Attorneys for Petitioner"

IN THE WORKERS COMPENSATION COURT OF THE STATE OF MONTANA

CASSANDRA SCHMILL,	)	
	)	WCC NO. 2001-0300
Petitioner,	)	
	)	
vs.	)	PETITIONER'S BRIEF REGARDING
	)	CALCULATION OF ATTORNEY FEES
LIBERTY NW INS. CORP.,	)	
	)	
Respondent.	)	
	)	
and	)	
	)	
MONTANA STATE FUND,	)	
	)	
Intervenor,	)	
	)	

COMES NOW the Petitioner, CASSANDRA SCHMILL, by and through her attorneys of record, and submits the following brief pursuant to the Court's Order of July 25, 2008, regarding the calculation of attorney fees. For the reasons stated herein, the Court should rule that the *Schmill* attorney fee applies to all benefits received by the claimants before any offsets for social security or repayment of other advances/overpayments.

**FACTS**

1. Petitioner's counsel has a signed Attorney Retainer Agreement on file and approved by the Department of Labor & Industry.
2. The only *Schmill* benefits against which an attorney fee lien is being asserted are underpayments of temporary total disability benefits.
3. The State Fund is seeking repayment out of *Schmill* temporary total disability underpayments of all overpayments whether due to SSDI offsets, advances, or any other

cause.

4. Some *Schmill* fees will be split with other common fund attorneys such as in *Murer and Flynn*.

### ARGUMENT

The issue before the Court is whether the *Schmill* attorney fee should be calculated before the State Fund reimburses itself for the SSDI offset and other advances/overpayments, or after those reimbursements are taken. It is clear from the language of the attorney fee statutes and the fee petition itself, that the attorney fee attaches to all compensation benefits the claimants receive, even if some of those benefits are subsequently used to reimburse the State Fund.

Attorney fee liens are statutorily recognized in section 37-61-420, MCA, which states, in part, as follows:

"(2) From the commencement of an action or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim which attaches to a verdict, report, decision, or judgment in his client's favor and the proceeds thereof in whose hands they may come . . ."

In workers' compensation cases, attorney fee liens attach to all compensation upon the filing of an attorney retainer agreement with the Department of Labor & Industry. *Kelleher Law Office v. State Comp. Ins. Fund* (1984), 213 Mont. 412, 416, 691 P.2d 823, 825. In the present case, Claimant's counsel has a signed attorney retainer agreement on file with the Department of Labor & Industry. Thus, a valid attorney fee lien exists and the only question is to what benefits does the lien attach.

It is anticipated that Respondents will argue that the lien should not attach to benefits which are reimbursed to the State Fund because the claimants never "receive" those benefits. According to the Respondents, only benefits the claimants receive and can use for things other than paying a debt to the State Fund should be subject to the *Schmill* attorney fee lien. The law does not support the Respondent's position.

In *Lockhart v. New Hampshire Ins. Co.*, 1999 MT 205, 295 Mont. 467, 984 P.2d 744, the issue was whether an attorney fee lien attached to disputed medical benefits ultimately paid by the insurer directly to the medical providers. Since the benefits were paid by the workers' compensation insurer directly, the claimants never received or had any control over the benefits. In light of this lack of receipt by the claimants, the insurer argued that an attorney fee lien could not attach nor be paid out of such benefits. The Supreme Court disagreed.

The Court held that a claimant did not have to receive the benefits in hand in order for them to be considered "compensation" to the claimant. *Id.* ¶20. In addition to relying on the language of the workers' compensation retainer agreement that attorney fees are payable on medical benefits, the Court also referenced the attorney fee lien statute quoted above, section 37-61-420, MCA. The statute recognizes that the benefit to the claimant may not result in the client actually receiving the proceeds of the action and thus permits the lien to attach to the proceeds "in whose hands they may come." Recognizing that medical benefits do constitute compensation to the claimant even absent actual receipt by the claimant, the Court held that an attorney fee lien was enforceable against such benefits.

Finally, in *Hartford v. Young* (1989), 239 Mont. 527, 782 P.2d 365, the attorney sought to take a fee on the full workers' compensation settlement, which included waiver of several advances and a SSDI overpayment. The Court agreed with the fee calculation and noted that "in workers' compensation cases, an attorney may bill for debts waived through the attorney's efforts." *Id.* at 239 Mont. 531, 782 P.2d 367.

The foregoing cases make it clear that an attorney fee lien attaches to all compensation benefits the claimant receives whether the benefits are actually received by the claimant or received by another on the claimant's behalf. In this case, *Schmill* benefits are past due temporary total disability benefits. According to the fee agreement, disputed temporary total disability benefits can be the subject of an attorney fee lien if they are paid as a result of the efforts of the attorney. *Schmill* benefits meet this requirement.

*Schmill* benefits have also been "received" by the claimants, even if certain *Schmill* claimants will have to use some of their *Schmill* benefits to pay back the State Fund for SSDI offsets, advances, and other overpayments. The fact that they are using *Schmill* benefits to pay these debts verifies that they have "received" such benefits. In other words, "but for" having received the *Schmill* benefits, these claimants would be required to use other assets to pay back the State Fund for the various overpayments. Since they are using *Schmill* benefits to pay back the overpayments they have "received" such benefits and thus such benefits constitute compensation subject to an attorney fee lien.

WHEREFORE, for the foregoing reasons, it is clear that the *Schmill* attorney fee attaches to all compensation benefits received by the claimants before the deduction for any reimbursements to the State Fund for offsets or advances/overpayments.

DATED this 7 of August, 2008.

ATTORNEYS FOR PETITIONER

BOTHE & LAURIDSEN, P.C.  
P.O. Box 2020  
Columbia Falls, MT 59912  
Telephone: (406) 892-2193

By:   
LAURIE WALLACE

Certificate of Mailing

I, Robin Stephens, do hereby certify that on the 7 day of August, 2008, I served a true and accurate copy of the PETITIONER'S BRIEF REGARDING CALCULATION OF THE ATTORNEY FEES by U.S. mail, first class, postage prepaid to the following:

Mr. Larry Jones  
Liberty NW Ins. Corp.  
700 SW Higgins, Ste. 108  
Missoula, Montana 59803-1489

Mr. Bradley Luck  
Garlington, Lohn & Robinson  
P.O. Box 7909  
Missoula, MT 59807-7909

Mr. Thomas Martello  
Legal Counsel  
Montana State Fund  
P.O. Box 4759  
Helena, MT 59604-4759

  
Robin Stephens

*Bothe & Lauridsen, P.C.*  
*Attorneys at Law*

5 HIGHWAY 2 EAST  
P.O. BOX 2020  
COLUMBIA FALLS, MT 59912

KENNETH S. THOMAS  
DAVID W. LAURIDSEN  
LAURIE WALLACE  
DAVID M. SANDLER

(406) 892-2193  
1 (800) 354-3262  
FAX (406) 892-0207  
E-MAIL: [legalpad@digisys.net](mailto:legalpad@digisys.net)  
WEBSITE: [www.bandllaw.com](http://www.bandllaw.com)

---

JOHN H. BOTHE  
(1951-1996)

August 6, 2008

Ms. Clara Wilson  
Clerk of Workers'  
Compensation Court  
P.O. Box 537  
Helena, MT 59624-0537

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

Dear Ms. Wilson:

Enclosed please find the Petitioner's Brief Regarding Calculation of Attorney Fees in regard to the above-referenced matter.

Should you have any questions concerning this matter, please contact me directly.

Sincerely,

  
LAURIE WALLACE  
BOTHE & LAURIDSEN, P.C.

LW/rs  
Enc.

cc: Bradley Luck  
Thomas Martello  
Larry Jones