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**FILED**

AUG 26 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 REPLY TO STATE FUND'S
	)	BRIEF REGARDING CALCULATION OF
LIBERTY NW INS. CORP.,	)	ATTORNEY FEES
	)	
Respondent.	)	
	)	
and	)	
	)	
MONTANA STATE FUND,	)	
	)	
Intervenor,	)	
_____	)	

COMES NOW the Petitioner, CASSANDRA SCHMILL, by and through her attorney of record, and submits the following Reply to State Fund's Brief Response Regarding Calculation of Attorney Fees. For the reasons stated herein and those contained in her opening brief, the Petitioner would ask the Court to calculate the attorney fee as proposed by the Petitioner.

The State Fund admits in its opening paragraph that it does not have standing to contest the attorney fee being sought by the Petitioner's counsel. Despite its lack of standing, the State Fund goes on to profess its concern that the *Schmill* claimants receive all the benefits to which they are entitled. That, of course, is the reason that the Petitioner initiated this litigation to begin with and thus both the Petitioner and the State Fund are in agreement on this point.

The determination of the attorney fee calculation is quite simple. It turns solely on what the past due benefits are with regard to the individual *Schmill* claimants. If the Court determines that the *Schmill* decision entitles *Schmill* claimants to have their temporary total disability benefits increased from the apportioned rate up to the maximum rate, then an

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attorney fee should attach to that amount. If, on the other hand, the Court concludes that the *Schmill* decision only entitles claimants to the benefits they receive after the State Fund takes credit for all overpayments and offsets, then the attorney should only attach to that amount. The State Fund did not cite any case law which supports its contention that attorney fees only attach to benefits the claimant actually receives and thus it seems clear that the attorney fee calculation should be based on the total benefits due as a result of the elimination of the apportionment.

The State Fund's attempt at indignation over a "40% attorney fee" is insincere at best. The attorney fee is 25% regardless of the formula used by the Court. It is up to the Court to determine what constitutes the compensation to which the 25% attorney fee attaches. The attorney fee percentage itself, is not increasing, which the State Fund well knows. If the State Fund is so concerned about the welfare of the *Schmill* claimants, it certainly is free to reduce its claimed offsets and overpayments. Moreover, unlike the State Fund's ongoing social security offset, there is no ongoing attorney fee being claimed by *Schmill's* counsel.

WHEREFORE, for the foregoing reasons and those contained in the her opening brief, the Petitioner respectfully requests that the Court calculate the *Schmill* attorney fee from the total benefits owed prior to any offsets or overpayments being deducted.

DATED this 25th of August, 2008.

ATTORNEYS FOR PETITIONER

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By:   
LAURIE WALLACE

Certificate of Mailing

I, Robin Stephens, do hereby certify that on the 25th day of August, 2008, I served a true and accurate copy of the PETITIONER'S REPLY TO STATE FUND'S BRIEF REGARDING CALCULATION OF 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. Thomas Martello  
Legal Counsel  
Montana State Fund  
P.O. Box 4759  
Helena, MT 59604-4759

Mr. Bradley Luck  
GARLINGTON, LOHN & ROBINSON  
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JOHN H. BOTHE  
(1951-1996)

August 25, 2008

**VIA ELECTRONIC FILING AND U.S. MAIL**

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 Reply Brief to State Fund'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