

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

JUN 12 2009

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

PETITIONER'S BRIEF REGARDING JURISDICTION OF WCC TO RULE ON
RESPONDENT'S MOTION FOR STAY

COMES NOW the Petitioner, CASSANDRA SCHMILL, by and through her attorney of record, and pursuant to the Court's Order of June 4, 2009, submits the following brief regarding the Court's jurisdiction to rule on Liberty NW's Motion to Stay Proceedings. For the reasons state herein, the Court should conclude that it has jurisdiction to rule on Liberty NW's Motion to Stay Proceedings.

FACTS

1. July 10, 2007 (Docket #380) Court Order establishing the time period for *Schmill* claims at July 1, 1987, through June 21, 2001; excluding retroactive application of *Schmill* to settled claims through department-approved or court-ordered compromise of benefits; excluding from retroactive application of *Schmill* certain final judgments entered by the WCC; denying the application of doctrine of laches, or any statute of limitations; concluding that claims handled by the UEF are subject to the retroactive application of *Schmill*.
2. August 31, 2007 (Docket #390) Liberty's Status Report stating that there are no unresolved legal issues, only implementation issues.
3. August 31, 2007 (Docket #391) State Fund's Status Report indicating there

DOCKET ITEM NO.

465

pdf

are only issues as to the scope of retroactivity and implementation, but no unresolved legal issues.

4. February 14, 2008 (Docket #410) Order denying State Fund's request for a stay of the July 10, 2007, Order defining the search parameters for implementing *Schmill* retroactively. Sets briefing schedule of "gateway legal issues" requested by insurers other than Liberty NW and State Fund.
5. July 29, 2008 (Docket #441) Order denying Responding Insurers' motion to dismiss on gateway legal issues. The Order notes specifically that Liberty NW and the State Fund are not involved in the pending motion. The issues raised by the responding insurers included allegations that the global common fund violated the insurers' constitutional rights to due process; the WCC lacked subject matter jurisdiction over the enforcement aspects of the *Schmill* litigation; *Schmill* lacks standing to seek benefits from other insurers; *Schmill* failed to comply with the mandatory mediation requirements; the requirement that responding insurers investigate their files to determine benefit entitlement impermissibly shifted the burden of proof onto the insurers.
6. August 27 and 28, 2008 (Docket #446, 447, 448) Responding Insurers' (but not Liberty NW or the State Fund) file a notice of appeal from the Court's Order of July 29, 2008.
7. May 19, 2009 (Docket #460) Liberty NW files a Motion to Stay implementation of the *Schmill* retroactive benefit entitlement until a *Flynn* implementation issue is ruled on.

ARGUMENT

Pending before the Court is Liberty NW's Motion to Stay Implementation Proceedings in *Schmill*. Prior to ruling on that Motion, the Court asked the parties to brief the issue of the Court's jurisdiction. Specifically, the Court is concerned that since the Order denying the Responding Insurers' Motion to Dismiss on gateway legal issues is on appeal to the Montana Supreme Court, the Court lacks jurisdiction to rule on Liberty NW's Motion to Stay Proceedings. For the following reasons, the Court should conclude that it is properly vested with jurisdiction to rule on Liberty NW's Motion to Stay Proceedings and, thereafter, should deny the motion.

The general rule is that upon the filing of a notice of appeal "jurisdiction passes from the District Court and vests in the Supreme Court." *Powder River County v. State*, 2002 MT 205, ¶27, 312 Mont. 198, ¶27, 60 P.3d 357, ¶27. However, the district court can retain jurisdiction to perform certain acts under three exceptions to the rule. The district court retains jurisdiction to 1) correct clerical errors; 2) rule on ancillary matters; and 3) deal with

matters involving appeals such as the undertaking of costs, a stay of judgment, and appellate transcripts. *Powers Mfg. Co. v. Leon Jacobs Enter.* (1985), 216 Mont. 407, 411-12, 701 P.2d 1377, 1380.

The first exception allows the district court to retain jurisdiction to correct clerical errors. *Northern Plains Resource Council v. Board of Health and Environmental Sciences* (1979), 184 Mont. 446, 472, 603 P.2d 684, 688. The third exception allows the district court to retain jurisdiction to handle matters involving an appeal such as an undertaking of costs, a stay of judgment, and matters involving the transcript on appeal. *Powers*, 216 Mont. at 412, 701 P.2d at 1380. Liberty NW is not seeking the correction of a clerical error, nor is it seeking rulings involving an appeal as it is not involved in an appeal at this time in this case. As such, neither the first nor the third exception gives the Court jurisdiction.

The second exception allows the district court to retain jurisdiction to rule on ancillary matters. *Churchill v. Holly Sugar Corp.* (1981), 192 Mont. 533, 536, 629 P.2d 758, 760. Ancillary matters are those issues which are not embraced in the order or judgment on appeal. *McCormick v. McCormick* (1995), 168 Mont. 136, 138, 541 P.2d 765, 766. In *Alpine Buffalo, Elk and Llama Ranch, Inc. v. Andersen*, 2001 MT 307, 307 Mont. 509, 38 P.3d 815, the Alpine Buffalo, Elk and Llama Ranch (Alpine) held a promissory note executed by Lisa Andersen (Andersen). When Andersen stopped paying on the note, Alpine obtained a deficiency judgment and the property securing the note was sold at a foreclosure sale for a loss. Alpine returned to court and obtained an order giving it an assignment of the prospective proceeds of a pending malpractice claim being pursued by Andersen in order to satisfy the deficiency judgment. Andersen appealed the assignment order and also moved the trial court to set aside the deficiency judgment. Alpine moved the district court to hold Andersen in contempt for failing to execute the assignment pursuant to the court's order. The trial court determined that it lacked jurisdiction to rule on either the contempt motion, or the motion to set aside the deficiency judgment. Andersen appealed.

The Supreme Court affirmed the district court's order concluding that "the assignment order . . . and her Rule 60(b) motion to set aside the deficiency judgment are inextricably intertwined," thereby divesting the district court of jurisdiction. *Id.*, 307 Mont. at 515, 38 P.3d at 819. In arriving at that conclusion, the Court acknowledged that there may be a case "where two separate causes of action were filed jointly, [and] appeal of one separable judgment did not effect the other," thereby allowing jurisdiction to remain in the trial court over the separate cause of action. *Id.*, 307 Mont. at 514-15, 38 P.3d at 819. The Court reasoned as follows:

"In other words, one separable judgment was not embraced within the other. While a similar result might be obtained in Montana where, for example, a trial court properly certifies a judgment as final for purposes of appeal under Rule 54(b), M.R.Civ.P., retaining jurisdiction of the underlying action, that scenario is not before us in the present case." *Id.*

The Court's reasoning is supported by section 25-1-103, MCA, which states that "[a]n action is deemed to be pending from the time of its commencement until its final determination upon appeal or until the time for appeal has passed, unless the judgment is sooner satisfied." Only questions of law are presented on appeal. The action itself is still pending in the lower court and, thus, "[e]xcept insofar as effected by the appeal, the cause remains in the district court, the primary forum." *Bordeaux v. Bordeaux* (1902), 26 Mont. 533, 536, 69 P. 103, 104.

In *Kaasa v. District Court of the 17th Judicial District* (1978), 177 Mont. 546, 550, 582 P.2d 551, 776, the court used the foregoing reasoning to conclude that despite an appeal, the trial court had jurisdiction to enforce a judgment already entered by contempt proceedings, where the party did not obtain a stay of judgment pending the appeal.

The opposite conclusion was reached in *Polson v. Thomas* (1960), 138 Mont. 533, 357 P.2d 349. In that case, the Court held that the trial court was without jurisdiction to make additional findings of fact after the judgment had been appealed. The Court noted that "findings of fact and conclusions of law are within the phrase 'or upon the matters embraced therein' appearing in section 93-8011, (superseded by Rule 6 and 7, M.R.App.R.) and, therefore, upon an appeal being taken, jurisdiction thereof passed from the district court to the supreme court, subject however to the right of a district court to correct clerical errors." *Id.*, 138 Mont. at 535, 357 P.2d at 350.

In the present case, the judgment appealed from deals with the liability for payment of *Schmill* benefits of insurers who were not made parties to the *Schmill* litigation until after the decisions in *Schmill I* and *Schmill II* were handed down. In contrast, Liberty NW has moved the Court to stay Liberty's duty to locate and pay *Schmill* claims, a duty which was established by the decisions in *Schmill I* and *Schmill II* to which Liberty NW was a party.¹ In other words, Liberty NW's liability for *Schmill* benefits is not in dispute, and certainly is not on appeal. No order coming from the Supreme Court pursuant to the nonparty insurers' appeal of this Court's Order of July 29, 2008, can or will effect Liberty NW's liability for *Schmill* benefits and, therefore, is not intertwined with the issues on appeal. As such, this Court should conclude that it has jurisdiction to rule on Liberty NW's Motion to Stay Proceedings.

Having established jurisdiction, the Court should go on to deny Liberty NW's Motion to Stay Proceedings. In addition to the reasons set forth in Petitioner's brief in response to Liberty NW's motion, Petitioner would also direct the Court to Petitioner's response to Liberty NW and the State Fund's prior motion to stay proceedings when another implementation ruling in *Flynn* was being litigated. The Court rejected the insurers' arguments then, and should do so again now.

¹ Liberty has acknowledged in status reports to the Court that no liability issues remain as to Liberty, only implantation issues. No implementation issues are currently on appeal in *Schmill*.

WHEREFORE, for the foregoing reasons, the Court should conclude that it has jurisdiction to rule on Liberty NW's Motion to Stay Proceedings. Thereafter, the Court should deny Liberty NW's Motion.

DATED this 12 day of June, 2009.

ATTORNEYS FOR PETITIONER

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

By: 
LAURIE WALLACE

Certificate of Mailing

I, Robin Stephens, do hereby certify that on the 12 day of June, 2009, I served a true and accurate copy of the PETITIONER'S BRIEF REGARDING JURISDICTION OF WCC TO RULE ON RESPONDENT'S MOTION FOR STAY by U.S. mail, first class, postage prepaid to the following:

Mr. Larry Jones
Law Offices of Larry W. Jones
2291 W. Broadway, Ste. 3
Missoula, MT 59808


Robin Stephens