

MONTANA WORKERS' COMPENSATION COURT

Minute Book Hearing No. 4168  
Volume XXII

Helena, Montana  
June 16, 2010

CASSANDRA SCHMILL

Laurie Wallace

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

and

MONTANA STATE FUND

Bradley J. Luck  
Thomas E. Martello

WCC No. 2001-0300

A telephone conference call came on this date at 2:00 p.m. at the initiation of the Court. Laurie Wallace participated on behalf of Petitioner Cassandra Schmill. Bradley J. Luck and Thomas E. Martello participated on behalf of Intervenor Montana State Fund. Erika Ayers, Claims Project Specialist for the Montana State Fund, was also present on the call. The court reporter was Kim Johnson.

The impetus for the conference call was to discuss whether the common fund attorney fee should be calculated pre or post Social Security Disability Income (SSDI) offset. In particular, I inquired of counsel what the predominant practice was with non-common fund cases.

Ms. Wallace advised that she surveyed her co-workers and other claimants' attorneys, and determined that the predominant practice was to calculate the attorney fee post SSDI offset. However, she explained that there are exceptions to the general practice depending on the particular circumstances of a claim. Ms. Wallace's position is that the predominant practice of calculating the attorney fee after the SSDI offset should not apply to the common fund cases. Ms. Wallace argued that common fund cases should be treated differently because there is no attorney fee agreement signed with individual clients. Rather, the attorney fee in common fund is based on the common fund doctrine. Ms. Wallace argued that the common fund in this case is the underpayment of benefits, not the underpayment of benefits after the offset of SSDI. Ms. Wallace's position is the attorney fee should be taken pre SSDI offset in this case.

Mr. Martello stated that the State Fund does not generally deal with the issue of attorney fees except in relation to common fund cases. He argued that the issue of attorney fees in this case could be distilled down to the basis for the attorney fee -- the efforts of the attorney. In this case, Ms. Wallace's efforts removed apportionment. She

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therefore is entitled to a fee based upon her efforts rather than on the gross amount. Mr. Martello argued that this approach would be consistent with the approach of other common fund cases, including *Murer*, and *Broeker*.

After questioning both parties, I advised that the Court will issue a written Order.

JAMES JEREMIAH SHEA  
Judge

c: Parties of record via website.

JP/PS

Docket Item No. 472