

1 WORKERS' COMPENSATION COURT
2 IN AND FOR THE STATE OF MONTANA

4 CASSANDRA SCHMILL,) WCC No. 2001 - 0300
5 Petitioner,)
6 vs.) June 16, 2010
7) 2:20 p.m.
8 LIBERTY NORTHWEST INSURANCE) Conference Call
9 CORPORATION,)
10 Respondent/Insurer.)
11 and)
12 MONTANA STATE FUND)
Intervenor.)

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14
15 BEFORE THE HONORABLE JAMES JEREMIAH SHEA

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17 The conference call in the above-entitled matter was
18 held on Wednesday, June 16, 2010, at 2:20 p.m., at the
19 Workers' Compensation Court, Helena, Montana.

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APPEARANCES:

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Court Reporter: Kim Johnson, RPR

1 BE IT REMEMBERED that on Wednesday, June 16,
2 2010, in Helena, Montana, before the Honorable James Jeremiah
3 Shea, Workers' Compensation Judge, the following proceedings
4 were had:

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8 THE COURT: Okay, let me just start off. First, did
9 everybody get my e-mail? Laurie?

10 MS. WALLACE: Yes.

11 THE COURT: And Tom?

12 MR. MARTELLO: Yes.

13 THE COURT: And Brad?

14 MR. LUCK: Yes, sir.

15 THE COURT: I think -- Laurie, you are the petitioner.
16 I think I kind of laid out what my thoughts were and what I
17 wanted to discuss in the e-mail, so I don't want to take up a
18 bunch of time just reiterating that.

19 Basically, you know, I was trying to see -- I wanted to
20 know if there was a consensus, if there is a predominant practice
21 in terms of attorney fees on non-common fund cases, whether
22 they are calculated on the pre-offset amount or on the
23 post-offset amount. And that would be, obviously, kind of the
24 threshold issue.

25 And then contingent upon that, if there is a

1 predominant practice there, why should this be done differently
2 if there is a reason to do it differently in common fund. So
3 Laurie, since you are representing the petitioners, I'll let you go
4 first.

5 MR. MARTELLO: Judge, I wanted to let you know
6 that I have in my office Erika Ayers, who is the claim project
7 specialist for State Fund, so she will be listening in.

8 THE COURT: Okay. Thanks, Tom. Go ahead, Laurie.

9 MS. WALLACE: Okay. Thanks, Judge. Well, I did
10 solicit my coworkers and also other claimants' attorneys based
11 on your request, Judge, and I have to say I didn't get an
12 overwhelming response from the claimants' attorneys out there.
13 So but as far as our office, we have actually calculated the fee
14 both ways. We have predominantly calculated the fee after the
15 offset. But we have done it prior to an offset and maintained
16 that, that fee amount even once the offset was applied.

17 THE COURT: Okay.

18 MS. WALLACE: And those are situations usually
19 where, you know, like liability that's denied so you get liability
20 accepted so you are taking a fee on the full benefit amount.

21 THE COURT: Right.

22 MS. WALLACE: And a person gets on Social Security
23 and then their benefits are reduced as a result of that. So in
24 that -- in some of those situations, the guys here in the office
25 have maintained the full fee based on the original benefit

1 entitlement. And then the majority of the time, it's been
2 reduced after the benefits have been reduced by the offset.

3 THE COURT: You would then take it on the
4 post-offset amount the majority of the time?

5 MS. WALLACE: Yes.

6 THE COURT: Okay.

7 MS. WALLACE: And of the attorneys that responded
8 to me from outside the office, they indicated that that was their
9 general practice, as well, to take it after. I don't think that the
10 fee agreement would require us to do that.

11 THE COURT: Right.

12 MS. WALLACE: But I think that is the general
13 practice.

14 THE COURT: Okay.

15 MS. WALLACE: I think it is a little bit of a different
16 situation with the common fund because common fund attorney
17 fees are not based on the attorney fee agreement that
18 everybody has to sign with their individual clients.

19 THE COURT: Right.

20 MS. WALLACE: The attorney fees in common fund is
21 based on the common fund. So the percentage is applicable to
22 that before any lien would be applied. And that's the way that I
23 would view, I think appropriately would view the offset is akin to
24 a lien.

25 So for example, like in our office, when we get child

1 support liens, those don't generally reduce the attorney fee
2 withholding so...

3 THE COURT: I'm sorry. Go ahead, Laurie. I didn't
4 mean to cut you off.

5 MS. WALLACE: That's okay. So it's my position, I
6 guess, that the common fund in this case is the underpayment
7 of benefits and so the attorney fees should be calculated based
8 on the underpayment of benefits, not the underpayment of
9 benefits after any liens have been calculated and deducted.

10 THE COURT: Okay. What -- I mean, what about
11 when we are talking about -- and I recognize obviously in
12 common fund there's no specific fee agreement with each
13 member of the class. But I mean, what about in situations like
14 obviously you are going to have a situation where some of these
15 folks would have just gotten their benefits apportioned but there
16 would have been, in terms of initial liability -- or there would
17 have been no dispute. They would have gotten their benefits.
18 There would have been apportionment, but no fee agreement on
19 that underlying thing.

20 So I guess the thing I'm struggling with is trying to --
21 you are going to have folks who may have had the, the fee
22 agreement with their -- they may have had an attorney who are
23 going to be wondering -- and this is where I am having a tough
24 time reconciling this in my own mind if, you know, for instance, I
25 guess to use State Fund's example of the, you know, you have

1 got the apportioned disability rate -- and this is at Page 2 -- the
2 \$96 would have been the apportioned disability rate after the
3 offset pre-common fund.

4 If somebody was getting their fee calculated on a,
5 you know, the stuff that was the pre-common fund, if that
6 portion of their benefits was being -- the attorney fee was being
7 taken post-offset and, you know, people are understandably
8 going to wonder why all of a sudden they are going to have their
9 fee taken pre-offset on the other part of their fee. Do you see
10 what I am saying? Or excuse me, on the other part of their
11 benefits.

12 In other words, if you are looking at \$96, if that was
13 something that was, you know, that was undisputedly paid to
14 them pre-Schmill, if they were getting -- if they were paying
15 their attorney a post-offset attorney fee but then now they are
16 getting this additional amount beyond the apportionment -- or
17 excuse me, that's now unapportioned, rather, you are going to
18 have, I guess, differing standards, is what my concern is, that
19 you know, if you are going to have -- I guess, and I don't want
20 to try and oversimplify it, but it seems to me if there's a
21 prevailing practice, I'm having a tough time reconciling in my
22 mind -- and I wasn't sure what the practice was myself.

23 And obviously, you know, you kind of took a survey of
24 claimants' attorneys, and I didn't know if there was a prevailing
25 practice and if that was to do it pre- or post-offset. I'm just

1 really having a tough time reconciling why it should be done one
2 way for, you know, even in the case of like Schmill claimants,
3 why part of their benefits, the part that is pre-Schmill, for lack of
4 better way to put it, would be calculated after the offset but then
5 benefits, their Schmill benefits would be calculated pre-offset?
6 And I just -- I mean, for lack of a better way to put it, it's almost
7 a matter of consistency. I think there's merit to either
8 argument.

9 Obviously, there's nothing directly on point. I read to
10 cases that were addressed in there in terms of obviously
11 Lockhart, and none of them are exactly on point. They are
12 instructive -- and Hartford, rather. They are instructive to some
13 degree, but it seemed to me like this was probably the most, I
14 guess, common sense way to do it, unless there was a good
15 reason, compelling reason to do it otherwise, to go with
16 whatever the prevailing practice is.

17 So I don't know -- and I didn't want to cut you off.
18 Brad, Tom, and Laurie, I'll let you speak to that, as well, again,
19 but Brad or Tom, do either of you have anything to add?

20 MR. MARTELLO: Yes, Judge this is Tom. We also did
21 a survey here and that's why I had Erica come in because she is
22 the one who heads up the special projects and did similar work
23 that Cris McCoy had done in the past, and she keeps track
24 primarily of our common fund cases but is also cognizant of
25 what's going on kind of State Fund wide.

1 The difficulty we have is you never see these types of
2 cases except for in a common fund, and reason being is that you
3 are not going to be paying -- on a new law claim, you are not
4 going to be paying attorney's fees except if they were by way of
5 a court order following a decision from the court that found that
6 we were unreasonable and we had to pay attorney's fees.

7 And even in that case, you are not going to see it
8 because the attorney fees that you would pay are based on an
9 hourly amount.

10 So the only time that you are going to see this sort of
11 a situation arise would be in a common fund setting where you
12 are dealing with a percentage rather than an hourly amount.

13 And the basis, really, if I could distill down what were
14 a lot of numbers that I kind of threw at you in my brief, it really
15 distills down to the basis for the attorney fee, which is that due
16 to the efforts of the attorney -- and clearly due to Laurie's
17 efforts, she was able to remove the apportionment.

18 But the basis for which the disability rate and the
19 offset rate, that's going to -- that amount is not due to her
20 efforts, if you will. The best example I could give is another
21 common fund, really, in the Seminole common fund case, which
22 is Murer. And if you look at that case, what the percentage
23 common fund fee was based on was what was garnered by Allan
24 McGarvey in the Murer case.

25 So for example, 149.50 was the locked in rate for

1 partial. And then I think the first year, post-Murer, it jumped to
2 151, so there was \$1.50 increase. Now Allen didn't take his fee
3 on \$151, he took his fee, 15 percent of \$1.50 because that \$1.50
4 is what he was able to garner for the fund, if you will, the
5 common fund of Murer recipients.

6 And I think the same thing applies in this case with
7 Schmill by way of the example, what Laurie was able to garner is
8 the removal of the apportionment and, therefore, you have to
9 look at the fee being based upon what was due to her efforts
10 rather than to look at the gross amount, which is not something
11 due to her efforts.

12 And that's kind of the way we approached it, and I
13 think that's consistent with the way we have paid money in other
14 common fund cases, including Broeker and these other cases in
15 which you are dealing with a percentage of the fee. This was a
16 little different because you are dealing with percentages on top
17 of percentages, because apportionment is going to be a
18 percentage.

19 THE COURT: Right.

20 MR. MARTELLO: So I hope that didn't muddy things
21 up more, but that's kind of the way we do it.

22 THE COURT: Let me ask you this, Tom. If you have
23 obviously a regular non-common fund work comp case and you
24 have got an offset and, say, you are paying out somebody PTD
25 benefits, you would make out the check dual payee and send it

1 to -- tell me just the procedure you would -- you would take the
2 offset and send the check out after the offset; is that right?

3 MR. MARTELLO: Yes.

4 THE COURT: And obviously, you are not seeing what
5 the attorney is taking the fee on, you are just -- I'm sorry?

6 MR. MARTELLO: We are not seeing what was taken
7 because the payee, that in those type of cases, not common
8 fund, what's going to govern is like Laurie pointed out, the
9 contract between the claimant and her attorney, and those are
10 going to be determined, you know, in private. Not something
11 we are involved with.

12 THE COURT: Right. But obviously, the check that
13 you would send out dual payee to the attorney is going to be
14 after taking the offset, after reducing it for the offset.

15 MR. MARTELLO: Correct.

16 THE COURT: So Laurie, at your end, I just want to
17 make sure I understand this correctly. You would get that check
18 from State Fund, and would the typical practice be to take your
19 fee on the -- on what the amount of that check is? Or would
20 you add back in the, what the offset was and then calculate the
21 20 or 25 percent?

22 MS. WALLACE: Well, if the case had not been a
23 disputed liability so there was no fee that was already being
24 taken, then the fee would be based on the check coming in. But
25 for example, like another situation, Judge, is when you have a

1 disputed TTD rate. So somebody comes in your office and they
2 are getting 200 bucks a week in TTD benefits, and you run a
3 check and you see that's incorrect so you get them to increase it
4 so it's 225, there's an attorney fee then that attaches to that
5 additional 25 bucks a week. So the check comes here, you take
6 a fee off the \$25 bucks, and remainder is sent out to the client.

7 THE COURT: Right, but the offset would have already
8 been coming out of 200 wouldn't it? That you are not taking any
9 fee on?

10 MS. WALLACE: If there's already an offset in place?

11 THE COURT: Yeah.

12 MS. WALLACE: That wouldn't be the situation if --
13 well, I guess it could be. That would be an unusual scenario.

14 THE COURT: I guess -- and I understand that you
15 know -- obviously, if there was a dispute over the amount that
16 you would take the, you know, you are not taking any fee on the
17 200 because that wouldn't be due to the efforts of the attorney.
18 You are just taking the fee on the 25. What I am trying to figure
19 out is how would -- and maybe like you said, and an offset
20 wouldn't come into play in that situation.

21 But obviously the situation we are dealing with here is
22 the kind of unique situation where we are having the offset. And
23 I guess what I was trying to figure out is, let's assume for sake
24 of argument that you have a disputed liability, denied liability
25 case. You then secure the settlement for your client. There is

1 an SSDI offset, State Fund is going to take that offset and then
2 send the benefits check out to you dual payee.

3 Would your fee be calculated on the amount that that
4 check came, because it would be 100 percent due to your efforts
5 but the check you are getting into your office is going to be
6 based on -- is going to be a post-offset check.

7 And I guess what I am trying to find out is the fee
8 that you would take would be on the check that comes into your
9 office? Or would you add in what State Fund had withheld the
10 offset and take your fee then on that amount? Do you see what
11 I am saying?

12 MS. WALLACE: Well, if it was an initial disputed
13 liability case and we got liability accepted, those are the cases
14 where we have actually done it both ways. So if -- sometimes
15 we have taken a fee on the amount before the offset was taken
16 so it would be a higher fee, and sometimes we have taken it on
17 the amount after the offset has been taken on the disputed
18 liability cases where there's no dispute over liability. Then it's
19 always been to my knowledge with the guys in the office
20 anyway, it's always been on the after offset amount.

21 But I was bringing that up, Your Honor, because you
22 made the comment that you thought if client -- if claimants had
23 seen -- had not had attorney fees taken on those portions of
24 benefits before this whole thing kicks in and they are going to
25 get this windfall of money, then, you know, maybe it would

1 seem inconsistent to them that there would be an attorney fee
2 taken on the full amount instead of the offset amount.

3 And my response to that is that like in these rate
4 cases where you get the fee increased, it's not an unusual
5 situation to have a portion of the benefits where there's no fee
6 that attaches and a portion where there is --

7 THE COURT: Right.

8 MS. WALLACE: -- so I'm not so sure it's a situation
9 that would be that unusual or odd for them to see if that's one of
10 the criteria. And again, the criteria isn't what's due to the efforts
11 of the attorney in the common fund situation.

12 THE COURT: Right.

13 MS. WALLACE: So all benefits were disputed in the
14 apportionment cases. They were all denied, so that's why it's
15 our position that the fee should attach to all of them because
16 they were all denied.

17 MR. MARTELLO: I would disagree with that. Not all
18 the benefits were denied. What was denied was the fact that we
19 weren't going to pay the unapportioned amount.

20 THE COURT: Right.

21 MR. MARTELLO: And so the benefits that were not in
22 dispute are the benefits that were already apportioned. And
23 then it's when you -- like in my example here where you bounce
24 it from 60 percent apportionment up to a 100 percent, there's
25 the 40 percent that you were able to get for your client through

1 Schmill, but that other 60 percent was undisputed. We were
2 paying it.

3 THE COURT: And I think everybody is on the same
4 page with that. I think from Laurie's briefs, she is not disputing
5 that. Obviously, the fee is only applying to the 40 percent. It's a
6 question on whether it's the full 40 percent, or the 40 percent
7 after the SSDI offset was taken. But I think everybody is on the
8 same page, right? The way I understood, Laurie, obviously we
9 are just talking about the Schmill benefit. Nobody is talking
10 about the apportioned benefit that was paid before Schmill.

11 MS. WALLACE: Right.

12 MR. MARTELLO: But the other component, Judge, is
13 the fact -- the way the State Fund did it. And I don't know if this
14 is consistent with the way other insurers had done it, was that
15 when we took a -- let's say there was 60 percent apportionment.
16 We reduced the offset --

17 THE COURT: Right.

18 MR. MARTELLO: -- also. Well, but I don't know
19 whether some other insurers might have done that because you
20 are going to reduce what were time offset and you are reducing
21 obviously the amount of the initial benefits. When Schmill came
22 off, then you are going to increase both of those.

23 THE COURT: Right.

24 MR. MARTELLO: But when you increase that, our
25 offset, it is obviously reducing the amount claimant is getting.

1 So when you put the two in play I think, I think the way the
2 State Fund does it, which is calculate based upon what has
3 changed as a result of the court decision, then I think our way of
4 doing it, which is the net amount, is the proper way to apply the
5 attorney fee.

6 THE COURT: Let me go back to Laurie. There was
7 one question I had. Where you were talking about -- you said in
8 the cases where liability is disputed, and there have been SSDI
9 offsets, you have done them both ways in cases where liability
10 wasn't disputed pretty much the standard practice was always to
11 do it on the net amount after the offset calculate the fee on that
12 amount.

13 What are the distinctions why -- in terms of what
14 would be the difference between the cases where liability was
15 disputed where sometimes you would take the fee on the
16 pre-offset amount, and sometimes you would take it on the
17 post-offset amount? What was the distinction between these
18 cases that triggered that difference?

19 MS. WALLACE: I think that was simply an individual
20 thing that was going on. I couldn't find any pattern that the
21 attorney followed for that, that there was a specific event that
22 occurred in those particular cases.

23 THE COURT: Okay.

24 MS. WALLACE: It varied by case.

25 THE COURT: I see. I see. What about like -- I mean

1 is there -- so I mean, we are talking basically historically, I take
2 it, is that the way it is now, that some attorneys may, some may
3 not, when you have got disputed liability cases, and I guess you
4 personally, what's your practice?

5 MS. WALLACE: Umm, well, you know, it's a scenario
6 that doesn't come up that often where you have a disputed case
7 and it goes on to have an offset. So I can't think of one recently
8 where I have had the offset come into that situation. I know I
9 settled one a few years back that I distinctly remember I
10 maintained the higher fee on it. So and I am trying to think --
11 that case actually went on for quite some time. The guy had six
12 surgeries, so it was a decade old case, so I'm trying to recall
13 what the original event was. It was a disputed liability case in
14 that one.

15 THE COURT: Okay.

16 MS. WALLACE: So, umm, I don't remember what it
17 was when offset was originally taken, because he was on work
18 and he did go back to work for a while, and it was very
19 convoluted case.

20 THE COURT: Sure. I guess that that's fine. And if
21 you can't recall the specific one, that's fine. Well, let me ask:
22 Does anybody have -- I think you guys have pretty well
23 answered my questions. I got the information I needed. Laurie,
24 do you have anything to add?

25 MS. WALLACE: Nope. I don't think so, Your Honor.

1 THE COURT: Tom?

2 MR. MARTELLO: No.

3 THE COURT: Brad?

4 MR. LUCK: Only that this is the first time I have been
5 in a hearing and didn't say anything.

6 THE COURT: I wasn't -- I was thinking it but I wasn't
7 going to say it.

8 MR. LUCK: It was one of the best arguments I ever
9 made.

10 THE COURT: Thanks, everyone. I'll get the order out
11 shortly. Thanks very much.

12 (Hearing concluded.)

13 (The time is 2:47 p.m.)

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1 STATE OF MONTANA)
2 County of Lewis and Clark) : SS

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I, Kimberly Johnson, a Registered Professional Reporter and Notary Public in and for the County of Lewis and Clark, do hereby certify:

That the foregoing cause was taken before me at the time and place herein named, that the foregoing cause was reported by me, and that the foregoing pages contain a true record of the testimony to the best of my ability.

IN WITNESS WHEREOF, I have hereunto set my hand this _____ day of _____, 2010.

Kimberly E. Johnson
Registered Professional Reporter
Notary Public

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