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April 12, 2012

**FILED**

APR 13 2012

The Honorable Judge Shea  
Workers Compensation Court  
1625 11th Ave.  
P.O. Box 537  
Helena, MT 59624-0537

OFFICE OF  
WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

2001-0300

Re: *Schmill v. Liberty NW Ins. Co.*, WCC No. 2002-0676

Dear Judge Shea,

In your March 19, 2012 Order Incorporating Minute Entry entered in *Flynn* and *Schmill* following the omnibus hearing on March 8, 2012, you requested that I confirm that my clients used the "correct starting date" for screening prospective class members under *Schmill*. See *Schmill* #519, ¶ 4. Within the context of the hearing and our common fund jurisprudence, by "starting date," we are referring to the date of the judicial decision that created an entitlement to benefits. See *Schmill* #518, Mar. 8, 2012 Tr. at 40. If no benefits have been paid to a claimant after that date, then claims are considered "paid in full" and settled under *Flynn II* and *Flynn III*.

This letter confirms to the Court and Ms. Wallace that my clients have used a "correct starting date" of April 10, 2003, the day that the Montana Supreme Court issued its decision in *Schmill I*. The Montana Supreme Court was very clear in *Schmill II* that the decision date of *Schmill I* controls the retroactivity analysis:

Thus, if an occupational disease claim was settled or became final prior to our ruling in *Schmill I* then *Schmill I* does not affect whatever apportionment might have been deducted from the claim's award.

*Schmill II*, 2005 MT 144, ¶ 17.

As your Honor recognized at the March 8, 2012 omnibus hearing, "it was the date of the decision that established the entitlement to benefits basically." *Schmill* #518, Mar. 8, 2012 Tr. at 40.

Under that criteria, either April 10, 2003 (*Schmill I*), or June 7, 2005 (*Schmill II*), would be the correct starting date. *Schmill I* established Cassandra Schmill's entitlement to increased benefits. *Schmill II* found that *Schmill I* resulted in a common fund. In *Schmill III*, the Supreme Court remarked that potential beneficiaries were "granted a vested right, which was manifested in *Schmill II*..." *Schmill III*, 2011 MT 300, ¶ 15. In an effort to avoid further burdening the Court with disputed issues over common fund implementation, insurers have used the more generous date of April 10, 2003, as the starting date in their common fund claim searches.

At the March 8, 2012 omnibus hearing, however, counsel for Schmill suggested that only those claims that have had no benefits paid after June 22, 2001 – the date of the WCC's decision that led to *Schmill I* – may be excluded from the class as paid in full. We do not believe that this argument to expand the scope of common fund retroactivity at this late date is supported by common fund precedent or common sense. Notably, the Supreme Court did not reference the Workers' Compensation Court's ("WCC's") initial June 22, 2001 decision in *Schmill* as the starting date for retroactivity purposes. See *Schmill II*, 2005 MT 144, ¶ 17. Moreover, using the date of the WCC's decision would not have made any sense because the WCC's decision was immediately appealed and thus, was not final until the date of the Supreme Court's decision in *Schmill I* – April 10, 2003.

At this point, numerous insurers have completed their searches and filed affidavits stating that they have no eligible Montana claims for adjustment under the criteria for *Schmill*'s common fund, as informed by the Supreme Court's retroactivity guidance in *Flynn III*. Those insurers justifiably relied on a correct starting date of April 10, 2003 to evaluate whether claims were paid in full. Once 90 days have passed after those affidavits were filed, we respectfully request that the Court dismiss them from this action.

Sincerely,



STEVEN W. JENNINGS

SWJ:jcb

c: Laurie Wallace  
Common Fund Insurers