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WORKERS' COMPENSATION COURT
IN AND FOR THE STATE OF MONTANA

Cassandra Schmill,)	WCC No. 2001-0300
)	
Petitioner,)	April 30, 2013
)	10:00 a.m.
v.)	
)	
Liberty Northwest)	Oral Argument
Insurance Corporation,)	
)	
Respondent/Insurer,)	
)	
and)	
)	
Montana State Fund,)	
)	
Intervenor.)	

BEFORE THE HONORABLE JAMES JEREMIAH SHEA

The hearing call in the above-entitled matter was held on Tuesday, April 30, 2013, at 10:00 a.m., at the Workers' Compensation Court, 1625 11th Avenue, Helena, Montana.

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A-P-P-E-A-R-A-N-C-E-S

ON BEHALF OF THE PETITIONER:

Laurie Wallace
Attorney at Law
PO Box 2020
Columbia Falls, Montana 59912

ON BEHALF OF THE RESPONDENT/INSURER:

Larry W. Jones
Attorney at Law
323 W. Pine Street
Missoula, Montana 59802

ON BEHALF OF THE AFFIDAVIT INSURERS:

Steven W. Jennings
Attorney at Law
PO Box 2529
Billings, Montana 59103

1 BE IT REMEMBERED that on Tuesday, April
2 30, 2013, before the Honorable James Jeremiah Shea,
3 at the Workers' Compensation Court in Helena,
4 Montana, the following proceedings were had:

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* * * * *

7

8 THE COURT: This is the time set for the
9 oral argument on Respondent/Insurers' motion for
10 reconsideration or, in the alternative,
11 clarification regarding the order that I had issued
12 on a number of the affidavits with respect to the
13 dismissal of these insurers.

14 And Steve, it's your motion and you
15 requested the oral argument, so we will go ahead
16 and hear from you. And I have probably questions
17 for both counsel, but I'll ask them as they come up
18 just as I usually do. You can go first.

19 MR. JENNINGS: Thank you, Your Honor. And
20 to expand on that, I think it would be helpful to
21 ask questions and maybe do this a little bit more
22 informally. Laurie, you may have some questions
23 that I wouldn't mind answering.

24 I -- where we are at is trying to
25 determine what an effective search is. I, I think

1 there's one of two things going on here: Either
2 Laurie is, is, doesn't understand our search method
3 based on my comments in the earlier hearing, or
4 she's trying to re-argue Flynn.

5 The use of the April 10, 2003 date --

6 THE COURT: Steve, let me interrupt you
7 because I think -- and I am sorry, and I will let
8 you cover all the ground you want to cover, and you
9 know that -- but I think this may be, to kind of,
10 at least as my understanding or potentially lack
11 thereof of the dispute, to frame it for both
12 parties, is, maybe this could be specifically
13 addressed, is it does appear to me that in, as I
14 set forth in my order that sustained Laurie's
15 objection is that there were search parameters set
16 out in terms of what the lien would be or what
17 would encompass the class, for lack of a better way
18 to put it, from July 1, 1987, and as set out in my
19 Order at Page 3. It's a transcript, actually, from
20 Judge McCarter's meeting with various counsel
21 through June 22, 2001.

22 If I understand it correctly, Steve, your
23 clients did a search for those dates and then went
24 beyond --

25 MR. JENNINGS: Yes, sir.

1 THE COURT: And I can't remember the date
2 in 2003?

3 MR. JENNINGS: I think I can address that.

4 THE COURT: Okay. But is that -- and so I
5 guess -- and what I will do is let you continue on
6 and then, Laurie, let you speak to it, as well,
7 because it seems to me, then, that --

8 MR. JENNINGS: -- our search is
9 over-inclusive.

10 THE COURT: Yeah, and I reference that in
11 the order, and so I'm kind of stymied a little bit.
12 And Laurie, this would be really more for you. And
13 when you speak, is, what is the downside to that, I
14 guess, if you know, let's say if they wanted to
15 say, you know, that we went back to the Supreme
16 Court's decision in Shea versus North Butte Mining
17 and to present day just to make sure but -- and
18 that we have no claimants in there -- well, if that
19 encompasses the date, it seems like no harm, no
20 foul.

21 And I want to make sure -- this is a
22 rhetorical question -- I want to make sure I'm not
23 missing something. I'm not seeing right now if
24 they over searched. So, I'll let you finish,
25 Steve, but Laurie, that's just something that I

1 will throw that out there as far as what my
2 understanding is.

3 MR. JENNINGS: The reason I say there
4 might be two things, either one of two things going
5 on here, is Laurie seems to make two separate
6 arguments. She seems to, she seems to believe that
7 we only searched our files back to April 10, 2003.
8 On the other hand, she seems to say, no, April 10,
9 2003, is not the date for the retroactivity
10 analysis. The date of retroactivity analysis is
11 Judge McCarter's decision of June 22, 2001. We
12 disagree with that. We believe it is Schmill I
13 that is to be applied retroactively.

14 But with respect to Laurie's understanding
15 of the search, let me clarify something, and it
16 pretty much addresses what you spoke to, Your
17 Honor. Laurie is placing far too much emphasis on
18 our use of April 10, 2003. As Your Honor stated in
19 the order sustaining Laurie's objection, that has
20 very little effect on our search. All we did was
21 use that to exclude a category of claims that we
22 would not have to look at, exclude a category of
23 files we would not have to look at.

24 Because of the decision in Flynn on
25 paid-in-full, nobody who has not received benefits

1 since April 10, 2003, the date of the original
2 Schmill I decision, is eligible for retroactive
3 adjustment, okay?

4 That's -- we are simply using the
5 retroactivity analysis to -- we start with all
6 Montana claims, okay, and we use that retroactivity
7 analysis to throw out a subset of claim files that
8 we wouldn't have to look at.

9 What we have done here -- let me try to, I
10 diagramed this in the reply brief that was sent
11 back because there's no reply briefs, I'm sorry,
12 Laurie.

13 If you start with the set of all Montana
14 claims --

15 MS. WALLACE: That's okay.

16 MR. JENNINGS: May be better over here,
17 start with a set of all Montana claims, this is
18 every claim my insurers had in Montana
19 (indicating), okay? From that, we flow out --

20 THE COURT: Just so we are clear as we
21 move forward, without a date restriction?

22 MR. JENNINGS: Without a date restriction,
23 every claim we had in Montana.

24 THE COURT: Okay.

25 MR. JENNINGS: If you throw out all claims

1 in which no benefits were received after April 10,
2 2003, you are left with this subset. This subset
3 is all Montana claims in which benefits were
4 received after April 10, 2003, (indicating), okay?
5 We then narrow it further by date of injury, okay?
6 If you have a date of injury after April 10, 2003,
7 you throw those out, too, because they are not part
8 of common fund.

9 I think Laurie would agree that after the
10 Schmill decision, the benefit becomes Montana law
11 and simply a matter of simple precedent and not
12 part of the common fund.

13 This is what we are left with
14 (indicating). We search that, okay, and we look
15 for apportioned claims. We find no apportioned
16 claims. The time line that we are searching here
17 is basically forever, you know all claims of
18 record, okay, going forward to April 10, 2003,
19 (indicating), 4-10-2003. Laurie's summons commands
20 us to do a search from July 1, 1987, until June 22,
21 2001, okay? So if there is an apportioned claim in
22 here, we pick it up, okay?

23 If we had apportioned claims after June
24 21, 2000, we would have had another subset. We
25 would have thrown out everything after June, June

1 22, 2001. If apportionment happened after that, we
2 would have thrown it out because it wouldn't have
3 been responsive to Laurie's summons, okay? But
4 since we had no apportioned claims, this is the
5 period we searched for (indicating).

6 Laurie, in her briefing, accuses us of
7 going back to April 10, 2003. I'm not sure I
8 understand what she means by that because frankly,
9 I think it would be absurd to believe that we only
10 searched our files from the date of the affidavit
11 back to April 10, 2003. That would give us, that
12 would give us this portion of the timeline. And
13 under this portion of the timeline, none of them
14 would be eligible for common fund --

15 THE COURT: -- because they're outside of
16 the class?

17 MR. JENNINGS: Because they're outside of
18 the class, okay? So I'm not sure what I understand
19 it means when she says, go back to April 10, 2003.
20 We started with all Montana claims of record and we
21 searched --

22 THE COURT: -- up to April 10, 2000 --

23 MR. JENNINGS: -- up to April 10, 2003 the
24 April 10, 2003 date, again, was just our starting
25 point to throw out this chunk of claims from the

1 set of all Montana claims because we don't have to
2 look at those.

3 THE COURT: Because those are claims that
4 would have or should have been adjusted. I mean,
5 precedent now has been set.

6 MR. JENNINGS: It's Montana law now. If
7 we failed to provide the benefit, the Schmill
8 benefit to those people, they have a case against
9 us bringing in front of you, and has nothing to do
10 with Laurie and, frankly, a bad faith case if we
11 did that. Bring it in front of you, but Laurie has
12 nothing to do with that. Just like the Supreme
13 Court said in Rausch, is retroactive but it has
14 nothing to do with common fund.

15 THE COURT: Uh-huh.

16 MR. JENNINGS: So that is kind of, I
17 won't, I'm certainly not entering that into
18 evidence. Call it demonstrative.

19 THE COURT: -- take a picture with my
20 camera. Steve, let me ask you because I was making
21 a note for myself there. So you have the outer
22 circle is all claims, the second circle is which?
23 What are now -- what is the --

24 MR. JENNINGS: The second circle is --
25 actually, I can do better than that. I don't know

1 if you want to object to this, Laurie?

2 MS. WALLACE: I have no objection.

3 THE COURT: Okay, it's demonstrative.

4 MR. JENNINGS: Call it demonstrative. You
5 can give it back to me when we are done.

6 THE COURT: Okay, thank you. Okay, and
7 you have seen this Laurie because it was --

8 MS. WALLACE: It was in the brief.

9 THE COURT: -- yeah, so...

10 MR. JENNINGS: The, umm, Laurie also,
11 Laurie also states that, in the alternative, she
12 states: "If, contrary to their counsel's statement
13 at the omnibus hearing, the affidavit insurers are
14 now representing to this court that they did review
15 their files from July 1, 1987, to April 10, 2003,
16 looking for Schmill claimants, then for any claims
17 where an apportionment occurred prior to June 22,
18 2001, the affidavit insurers must still review
19 those claims from April 10, 2003, to the present to
20 see if any benefits were paid, thereby qualifying
21 such claimants for Schmill benefits and file new
22 affidavits reflecting such actions."

23 That reveals to me that Laurie has
24 misunderstood our search technique because, as I
25 stated in the earlier hearing, which is the genesis

1 of this, I stated, quote: "If someone were to ask
2 me what a Schmill claimant was or how to find one,
3 I would say, 'Identify all Montana claimants
4 receiving benefits on or after April 10, 2003.
5 From that list, remove all claimants whose claims
6 were filed after April 10, 2003. From remaining
7 list, identify all claimants whose benefits were
8 apportioned for non-occupational factors.'"

9 That, I believe, is very consistent, and I
10 am quite confident that this accurately describes
11 the search. I was hesitant to say this because I'm
12 revealing client confidentiality -- attorney-client
13 privilege. This is exactly what I advised my
14 clients to do, okay?

15 THE COURT: Uh-huh.

16 MR. JENNINGS: But when Laurie asked us to
17 go back and review claims from April 10 to see if
18 benefits have been paid --

19 THE COURT: Uh-huh.

20 MR. JENNINGS: -- that was our first step.
21 That was our first step in throwing out all those
22 ones in which no benefits were received. So that
23 makes me feel that this is simply a
24 misunderstanding as to the search criteria that we
25 used, and maybe I could have more artfully stated

1 the search criteria. But I think that, I think
2 that nails it.

3 We didn't simply go back to April 10,
4 2003. We started with all Montana claims of
5 record, and throughout the various categories we
6 wouldn't have to look at based on the definitions.

7 And Your Honor kind of nailed it in your
8 analysis of the order sustaining her objection when
9 you stated "our retroactivity analysis doesn't
10 really affect our search because the search was
11 from time memorial until April 10, 2003." All we
12 did with April 10, 2003, is identify a category of
13 files we wouldn't have to look at.

14 THE COURT: Uh-huh.

15 MR. JENNINGS: Laurie initially in her
16 initial arguments also seems to argue that the
17 appropriate date for retroactivity analysis is not
18 April 10, 2003, but rather June 22, 2001, which is
19 the date of Judge McCarter's decision in Schmill.

20 THE COURT: Uh-huh.

21 MR. JENNINGS: That is inconsistent with
22 the Court's ruling on retroactivity. In *Dempsey v*
23 *Allstate*, the Court stated, "We conclude that in
24 keeping with our prior cases, all civil decisions
25 of this Court apply retroactively to cases

1 depending on direct review or not yet final, unless
2 all three of the Chevron factors are satisfied."
3 And of course, pending on direct review are not yet
4 final, but you're probably sick of hearing that
5 phraseology.

6 It's also important to note that in
7 Schmill II, the Court and Laurie -- well, Laurie
8 advocated that it was Schmill I to be applied, her
9 brief is chock full of references to Schmill I
10 being the case to be applied retroactively, and
11 that is what the Court held.

12 The Court held, quote: "Thus, if an
13 occupational disease claim was settled or became
14 final prior to our ruling in Schmill I, then
15 Schmill I does not affect whatever apportionment
16 might have been deducted from the claimants'
17 award." So Schmill I is not retroactive to claims
18 after Schmill I, if they were paid in full, if they
19 didn't receive a benefit after that.

20 Again, throughout her briefing in that
21 case, Laurie makes consistent reference to Schmill
22 I being the case to be applied retroactively. And
23 I think that's accurate because the Supreme Court
24 is the one that sets the law in Montana. If there
25 is a law to be applied retroactively, it's going to

1 be the decision of the Supreme Court. I think
2 that's very consistent with Chevron and, as the
3 Court said, consistent with prior cases.

4 So the effect of that, if that's Laurie's
5 argument, the effect of that would simply broaden
6 the window of retroactivity. Because of the
7 passage of time, Your Honor, there would simply be
8 a greater potential for claimants to receive
9 benefits after June 22, 2001, than after April 10,
10 2003, because April 10 is simply a more recent
11 date. Just a passage of time to do that. So I
12 think she either may be misunderstanding the Court
13 or she may simply be broadening the potential
14 universe of potential Schmill claimants.

15 But again, that analysis has very little
16 to do with the search we conducted because the
17 search we conducted was from her summons, July 1,
18 1987 to June 22, 2003. Whatever date we used for
19 retroactivity, we covered that period when we were
20 looking for apportioned claims, and we found none.

21 Now, if, Your Honor says, "Jennings is
22 full of garbage and I am going to decide against
23 him," the second issue is we are not really sure
24 what we do with respect to the affidavits. The
25 order was somewhat unclear because the affidavits,

1 as you know, are form affidavits. Nowhere do they
2 indicate how or where or why or the dates we used
3 in conducting the search. And your decision
4 appeared to be premised on consistency with earlier
5 affidavit filers. And I don't know how to do that,
6 if it's just a matter of filing a new affidavit.

7 In addition, we are a little bit chagrined
8 about the 90 days. If we file affidavits, then 90
9 days isn't 90 days, it is 180 days. So for those
10 -- an additional reason is, at least in the case of
11 two of my clients -- and God knows how many I have,
12 I think I'm 50 something, 58 something like that,
13 you have the list.

14 THE COURT: Yeah.

15 MR. JENNINGS: But at least in the case of
16 two of my clients, we are starting to lose personal
17 knowledge of the search, just people switching
18 chairs. We would actually have to conduct an
19 expensive and identical search just to have
20 somebody -- I don't want to be misleading. That's
21 not most of my clients, but it is, it is a factor
22 with two of them.

23 THE COURT: Yeah, and I think that's
24 actually -- I appreciate that. To be perfectly
25 candid, I had not contemplated in terms of -- if we

1 can reconcile or clarify the methodology, I think
2 using -- and in fairness to your clients, I mean,
3 the boiler plate, if we can resolve that issue,
4 then I don't think it makes sense, since the
5 affidavit doesn't talk about the methodology, as
6 you pointed out, it just talks about we did a
7 search and we didn't find any claimants that met
8 the criteria. So if we can assess, come to terms
9 on what the search parameters were and what the
10 criteria were, and we can all get on the same page,
11 then I don't think that it would necessitate a
12 re-filing of an affidavit because the affidavit
13 doesn't require, nor do I think it would be
14 appropriate or should require, you know, stating
15 this is what we did. I mean, just that the case
16 law sets out, here are the parameters and somebody
17 is swearing that, you know, under oath that we
18 followed those parameters and we didn't find
19 anybody who met the criteria.

20 So I think this is more of a question -- I
21 think your point is well taken in that regard. I
22 think this is more of a question of trying to get
23 on the same page as to what the parameters, what
24 parameters were used.

25 MR. JENNINGS: I, I suspected that we were

1 going to argue about this after Flynn I came out,
2 so I put a great deal of effort into noodling this
3 out to see -- once I gave the clients this advice
4 for the search parameters, I did it because I
5 thought I could defend it --

6 THE COURT: Uh-huh.

7 MR. JENNINGS: -- and I still believe
8 that.

9 I do want to make one point. We had the
10 issue of Laurie -- or at least I raised an issue in
11 my briefing of Laurie dismissing two of my insurers
12 based on the discovery she conducted. She does
13 have a point that I didn't pick up when I was doing
14 the brief: Those particular insurers found, what
15 was it, no Montana claims or no --

16 MS. WALLACE: Right, either they didn't
17 write insurance here or they had no claims.

18 MR. JENNINGS: She has a good point on
19 that. I don't know why you selected those two and
20 only those two, but, but you can pretty much
21 scratch that portion of my brief out, Your Honor.

22 THE COURT: Okay.

23 MR. JENNINGS: She had a good point on
24 that.

25 THE COURT: Okay. Okay. Laurie?

1 MS. WALLACE: Okay. My concern was
2 following that omnibus hearing is that what Steve
3 had indicated his search methodology was that he
4 asked his clients to do was that we would have this
5 gap from June 22, 2010 to April 10, 2003.

6 THE COURT: You said 2010.

7 MS. WALLACE: '01 to '03, where potential
8 open claims could still be found pursuant to Flynn.
9 And my reason for that was that I didn't have an
10 understanding, which I think I have now, that
11 Steve's clients went back and looked for
12 apportionment during '87 through the 2003 date. If
13 in fact they did that and they found no claims that
14 were apportioned, then I think we are probably all
15 fine here.

16 THE COURT: Uh-huh.

17 MS. WALLACE: My concern was that they
18 were simply looking as of 2003 to see if they had
19 any open claims --

20 THE COURT: Uh-huh.

21 MS. WALLACE: -- which would leave out
22 those claims where there was apportionment early,
23 then a person returned to work or something and the
24 claim was still open, then after June of '01 and
25 before April of '03, benefits --

1 THE COURT: Benefits --

2 MS. WALLACE: -- had been paid so those
3 claims weren't getting picked up because, if the
4 insurer is just looking for apportionment in that
5 gap, they might not find the claim that had been
6 previously apportioned, but a medical benefit was
7 paid that would trigger Flynn.

8 So it was unclear from the way Steve
9 described it that they had actually looked for
10 apportionment for that entire time period.

11 THE COURT: Uh-huh.

12 MS. WALLACE: So I would agree. If they
13 looked for apportionment for the entire time period
14 and found no claims that were apportioned, then
15 obviously there was no need to look beyond TTD
16 benefits to see if other benefits were being paid,
17 because it wouldn't have mattered. They would have
18 already still been part of the group so...

19 THE COURT: Right.

20 MR. JENNINGS: I understand where you are
21 coming from now. If all we did was check for open
22 claims after 2003, she would be right. But as you
23 see, we did more --

24 THE COURT: Right.

25 MR. JENNINGS: -- first step was to check

1 for benefits received after April 10, 2003. And if
2 there were no benefits, then that file didn't make
3 the cut. Umm --

4 MS. WALLACE: And by "benefits," you
5 included medical?

6 MR. JENNINGS: Yes.

7 THE COURT: Any benefits.

8 MR. JENNINGS: Any payment of anything.

9 MS. WALLACE: Okay.

10 THE COURT: So are we all on the same page
11 here? Everything copasetic?

12 MS. WALLACE: Yes.

13 THE COURT: Larry, do you feel a need to
14 muck this up? (Laughter.) With that preface, no
15 -- actually, if you do have -- I'm sorry, I don't
16 mean to be facetious there. Again, I have been
17 warned about how e-mails and transcripts may not
18 carry inflection. So this looks like, wow, he is
19 just a jerk to Jones, is the way it reads on the
20 transcript. (Laughter.) No, but Larry, do you
21 have anything to add?

22 MR. JONES: No, but thank you, Your Honor.

23 THE COURT: So Laurie, then, in terms of
24 your objection to the dismissal, is that withdrawn?

25 MS. WALLACE: It is.

1 THE COURT: Okay. Great.

2 MR. JENNINGS: I would like an argument,
3 please.

4 THE COURT: Huh?

5 MR. JENNINGS: I would like an argument,
6 please. Have you ever seen that Monty Python --
7 (off-record discussion).

8 THE COURT: Great, we can go off the
9 record then. The stipulation is on the record.
10 The transcript will be finalized and posted so we
11 will just -- that will satisfy for purposes of the
12 order and we can just, we will just grant
13 dismissals then.

14 MS. WALLACE: Okay.

15 THE COURT: Thanks, everyone.

16 (The time is 10:25 a.m.)

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

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

8

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

14

15 IN WITNESS WHEREOF, I have hereunto set my
16 hand this _____ day of _____, 2013.

17

18

19

20

Kimberly E. Johnson
Registered Professional Reporter
Notary Public
My Commission Expires 3/19/2016

21

22

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decide [1] - 15:22
decision [8] - 5:16, 6:11, 6:24, 7:2, 8:10, 13:19, 15:1, 16:3
decisions [1] - 13:24
deducted [1] - 14:16
defend [1] - 18:5
definitions [1] - 13:6
demonstrative [3] - 10:18, 11:3, 11:4
Dempsey [1] - 13:22
described [1] - 20:9
describes [1] - 12:10
determine [1] - 3:25
diagramed [1] - 7:10
direct [2] - 14:1, 14:3
disagree [1] - 6:12
discovery [1] - 18:12
discussion [1] - 22:7
disease [1] - 14:13
dismissal [2] - 3:13, 21:24
dismissals [1] - 22:13
dismissing [1] - 18:11
dispute [1] - 4:11
done [2] - 7:9, 11:5
downside [1] - 5:13
during [1] - 19:12

E

e-mails [1] - 21:17
early [1] - 19:22
effect [3] - 6:20, 15:4, 15:5
effective [1] - 3:25
effort [1] - 18:2
either [4] - 4:1, 6:4, 15:12, 18:16
eligible [2] - 7:2, 9:14
emphasis [1] - 6:17
encompass [1] - 4:17
encompasses [1] - 5:19
entering [1] - 10:17
entire [2] - 20:10, 20:13
evidence [1] - 10:18
exactly [1] - 12:13
exclude [2] - 6:21, 6:22
expand [1] - 3:20
expensive [1] - 16:19

F

facetious [1] - 21:16
fact [1] - 19:13
factor [1] - 16:21
factors [2] - 12:8, 14:2

failed [1] - 10:7
fairness [1] - 17:2
faith [1] - 10:10
far [2] - 6:1, 6:17
file [3] - 11:21, 16:8, 21:2
filed [1] - 12:6
filers [1] - 16:5
files [6] - 6:7, 6:23, 7:7, 9:10, 11:15, 13:13
filing [2] - 16:6, 17:12
final [3] - 14:1, 14:4, 14:14
finalized [1] - 22:10
fine [1] - 19:15
finish [1] - 5:24
first [4] - 3:18, 12:20, 12:21, 20:25
flow [1] - 7:19
Flynn [5] - 4:4, 6:24, 18:1, 19:8, 20:7
followed [1] - 17:18
following [2] - 3:4, 19:2
forever [1] - 8:17
form [1] - 16:1
forth [1] - 4:14
forward [2] - 7:21, 8:18
foul [1] - 5:20
frame [1] - 4:11
frankly [2] - 9:8, 10:10
front [2] - 10:9, 10:11
full [4] - 6:25, 14:9, 14:18, 15:22
fund [4] - 8:8, 8:12, 9:14, 10:14

G

gap [2] - 19:5, 20:5
garbage [1] - 15:22
genesis [1] - 11:25
God [1] - 16:11
grant [1] - 22:12
great [3] - 18:2, 22:1, 22:8
greater [1] - 15:8
ground [1] - 4:8
group [1] - 20:18
guess [2] - 5:5, 5:14

H

hand [1] - 6:8
harm [1] - 5:19
hear [1] - 3:16
hearing [5] - 4:3, 11:13, 11:25, 14:4,

19:2
held [2] - 14:11, 14:12
Helena [1] - 3:3
helpful [1] - 3:20
hesitant [1] - 12:11
Honor [8] - 3:19, 6:17, 6:18, 13:7, 15:7, 15:21, 18:21, 21:22
Honorable [1] - 3:2

I

identical [1] - 16:19
identify [2] - 12:7, 13:12
II [1] - 14:7
important [1] - 14:6
included [1] - 21:5
inclusive [1] - 5:9
inconsistent [1] - 13:21
indicate [1] - 16:2
indicated [1] - 19:3
indicating [3] - 7:19, 8:4, 8:19
indicating [2] - 8:14, 9:5
inflection [1] - 21:18
informally [1] - 3:22
initial [1] - 13:16
injury [2] - 8:5, 8:6
insurance [1] - 18:17
insurer [1] - 20:4
insurers [6] - 3:13, 7:18, 11:13, 11:18, 18:11, 18:14
interrupt [1] - 4:6
issue [4] - 15:23, 17:3, 18:10
issued [1] - 3:11
IT [1] - 3:1

J

James [1] - 3:2
Jennings [1] - 15:21
JENNINGS [30] - 3:19, 4:25, 5:3, 5:8, 6:3, 7:16, 7:22, 7:25, 9:17, 9:23, 10:6, 10:16, 10:24, 11:4, 11:10, 12:16, 12:20, 13:15, 13:21, 16:15, 17:25, 18:7, 18:18, 18:23, 20:20, 20:25, 21:6, 21:8, 22:2, 22:5
Jeremiah [1] - 3:2
jerk [1] - 21:19
Jones [1] - 21:19
JONES [1] - 21:22

Judge [3] - 4:20, 6:11, 13:19
July [4] - 4:18, 8:20, 11:15, 15:17
June [12] - 4:21, 6:11, 8:20, 8:23, 8:25, 11:17, 13:18, 15:9, 15:18, 19:5, 19:24

K

keeping [1] - 13:24
kind [4] - 4:9, 5:11, 10:16, 13:7
knowledge [1] - 16:17
knows [1] - 16:11

L

lack [2] - 4:10, 4:17
Larry [2] - 21:13, 21:20
laughter [2] - 21:14, 21:20
Laurie [26] - 3:22, 4:2, 5:6, 5:12, 5:25, 6:5, 6:17, 7:12, 8:9, 9:6, 10:10, 10:11, 11:1, 11:7, 11:10, 11:11, 11:23, 12:16, 13:15, 14:7, 14:21, 18:10, 18:11, 18:25, 21:23
Laurie's [6] - 4:14, 6:14, 6:19, 8:19, 9:3, 15:4
law [5] - 8:10, 10:6, 14:24, 14:25, 17:16
least [4] - 4:10, 16:10, 16:15, 18:10
leave [1] - 19:21
left [2] - 8:2, 8:13
lien [1] - 4:16
line [1] - 8:16
list [3] - 12:5, 12:7, 16:13
look [8] - 6:22, 6:23, 7:8, 8:14, 10:2, 13:6, 13:13, 20:15
looked [3] - 19:11, 20:9, 20:13
looking [4] - 11:16, 15:20, 19:18, 20:4
looks [1] - 21:18
lose [1] - 16:16

M

mails [1] - 21:17
matter [2] - 8:11, 16:6
mattered [1] - 20:17
McCarter's [3] - 4:20,

6:11, 13:19
mean [4] - 10:4, 17:2, 17:15, 21:16
means [2] - 9:8, 9:19
medical [2] - 20:6, 21:5
meeting [1] - 4:20
memorial [1] - 13:11
met [2] - 17:7, 17:19
method [1] - 4:2
methodology [3] - 17:1, 17:5, 19:3
might [3] - 6:4, 14:16, 20:5
mind [1] - 3:23
Mining [1] - 5:16
misleading [1] - 16:20
missing [1] - 5:23
misunderstanding [2] - 12:24, 15:12
misunderstood [1] - 11:24
Montana [15] - 3:4, 7:6, 7:13, 7:17, 7:18, 7:23, 8:3, 8:10, 9:20, 10:1, 10:6, 12:3, 13:4, 14:24, 18:15
Monty [1] - 22:6
most [1] - 16:21
motion [2] - 3:9, 3:14
move [1] - 7:21
MR [31] - 3:19, 4:25, 5:3, 5:8, 6:3, 7:16, 7:22, 7:25, 9:17, 9:23, 10:6, 10:16, 10:24, 11:4, 11:10, 12:16, 12:20, 13:15, 13:21, 16:15, 17:25, 18:7, 18:18, 18:23, 20:20, 20:25, 21:6, 21:8, 21:22, 22:2, 22:5
MS [15] - 7:15, 11:2, 11:8, 18:16, 19:1, 19:7, 19:17, 19:21, 20:2, 20:12, 21:4, 21:9, 21:12, 21:25, 22:14
muck [1] - 21:14
must [1] - 11:18

N

nailed [1] - 13:7
nails [1] - 13:2
narrow [1] - 8:5
necessitate [1] - 17:11
need [2] - 20:15, 21:13
new [2] - 11:21, 16:6
nobody [1] - 6:25

non [1] - 12:8
non-occupational [1] - 12:8
none [2] - 9:13, 15:20
noodling [1] - 18:2
North [1] - 5:16
note [2] - 10:21, 14:6
nothing [3] - 10:9, 10:12, 10:14
nowhere [1] - 16:1
number [1] - 3:12

O

oath [1] - 17:17
object [1] - 11:1
objection [5] - 4:15, 6:19, 11:2, 13:8, 21:24
obviously [1] - 20:15
occupational [2] - 12:8, 14:13
occurred [1] - 11:17
off-record [1] - 22:7
omnibus [2] - 11:13, 19:2
once [1] - 18:3
one [5] - 4:1, 6:4, 12:2, 14:24, 18:9
ones [1] - 12:22
open [4] - 19:8, 19:19, 19:24, 20:21
oral [2] - 3:9, 3:15
Order [1] - 4:19
order [7] - 3:11, 4:14, 5:11, 6:19, 13:8, 15:25, 22:12
original [1] - 7:1
outer [1] - 10:21
outside [2] - 9:15, 9:17
over-inclusive [1] - 5:9

P

page [3] - 17:10, 17:23, 21:10
Page [1] - 4:19
paid [7] - 6:25, 11:20, 12:18, 14:18, 20:2, 20:7, 20:16
paid-in-full [1] - 6:25
parameters [7] - 4:15, 17:9, 17:16, 17:18, 17:23, 17:24, 18:4
part [3] - 8:7, 8:12, 20:18
particular [1] - 18:14
parties [1] - 4:12

passage [2] - 15:7, 15:11
payment [1] - 21:8
pending [1] - 14:3
people [2] - 10:8, 16:17
perfectly [1] - 16:24
period [4] - 9:5, 15:19, 20:10, 20:13
person [1] - 19:23
personal [1] - 16:16
phraseology [1] - 14:5
pick [2] - 8:22, 18:13
picked [1] - 20:3
picture [1] - 10:19
placing [1] - 6:17
plate [1] - 17:3
point [6] - 9:25, 17:21, 18:9, 18:13, 18:18, 18:23
pointed [1] - 17:6
portion [3] - 9:12, 9:13, 18:21
posted [1] - 22:10
potential [4] - 15:8, 15:13, 15:14, 19:7
potentially [1] - 4:10
precedent [2] - 8:11, 10:5
preface [1] - 21:14
premised [1] - 16:4
present [2] - 5:17, 11:19
pretty [2] - 6:16, 18:20
previously [1] - 20:6
privilege [1] - 12:13
proceedings [1] - 3:4
provide [1] - 10:7
purposes [1] - 22:11
pursuant [1] - 19:8
put [2] - 4:18, 18:2
Python [1] - 22:6

Q

qualifying [1] - 11:20
questions [3] - 3:16, 3:21, 3:22
quite [1] - 12:10
quote [2] - 12:1, 14:12

R

raised [1] - 18:10
rather [1] - 13:18
Rausch [1] - 10:13
re [2] - 4:4, 17:12
re-argue [1] - 4:4
re-filing [1] - 17:12
reads [1] - 21:19

really [3] - 5:12, 13:10, 15:23
reason [3] - 6:3, 16:10, 19:9
receive [2] - 14:19, 15:8
received [5] - 6:25, 8:1, 8:4, 12:22, 21:1
receiving [1] - 12:4
recent [1] - 15:10
reconcile [1] - 17:1
reconsideration [1] - 3:10
record [6] - 8:18, 9:20, 13:5, 22:7, 22:9
reference [2] - 5:10, 14:21
references [1] - 14:9
reflecting [1] - 11:22
regard [1] - 17:21
regarding [1] - 3:11
remaining [1] - 12:6
remember [1] - 5:1
REMEMBERED [1] - 3:1
remove [1] - 12:5
reply [2] - 7:10, 7:11
representing [1] - 11:14
requested [1] - 3:15
require [2] - 17:13, 17:14
resolve [1] - 17:3
respect [3] - 3:12, 6:14, 15:24
Respondent/ Insurers' [1] - 3:9
responsive [1] - 9:3
restriction [2] - 7:21, 7:22
retroactive [3] - 7:2, 10:13, 14:17
retroactively [5] - 6:13, 13:25, 14:10, 14:22, 14:25
retroactivity [9] - 6:9, 6:10, 7:5, 7:6, 13:9, 13:17, 13:22, 15:6, 15:19
returned [1] - 19:23
revealing [1] - 12:12
reveals [1] - 11:23
review [5] - 11:14, 11:18, 12:17, 14:1, 14:3
rhetorical [1] - 5:22
ruling [2] - 13:22, 14:14

S

satisfied [1] - 14:2
satisfy [1] - 22:11
Schmill [17] - 6:12, 7:2, 8:10, 10:7, 11:16, 11:21, 12:2, 13:19, 14:7, 14:8, 14:9, 14:14, 14:15, 14:17, 14:18, 14:21, 15:14
scratch [1] - 18:21
search [24] - 3:25, 4:2, 4:15, 4:23, 5:8, 6:15, 6:20, 8:14, 8:20, 11:24, 12:11, 12:24, 13:1, 13:10, 15:16, 15:17, 16:3, 16:17, 16:19, 17:7, 17:9, 18:4, 19:3
searched [5] - 5:24, 6:7, 9:5, 9:10, 9:21
searching [1] - 8:16
second [3] - 10:22, 10:24, 15:23
see [6] - 11:20, 12:17, 18:3, 19:18, 20:16, 20:23
seeing [1] - 5:23
selected [1] - 18:19
sense [1] - 17:4
sent [1] - 7:10
separate [1] - 6:5
set [8] - 3:8, 4:14, 4:15, 4:18, 7:13, 7:17, 10:1, 10:5
sets [2] - 14:24, 17:16
settled [1] - 14:13
Shea [2] - 3:2, 5:16
sick [1] - 14:4
simple [1] - 8:11
simply [9] - 7:4, 8:11, 12:23, 13:3, 15:5, 15:7, 15:10, 15:13, 19:18
so.. [2] - 11:9, 20:18
someone [1] - 12:1
somewhat [1] - 15:25
sorry [3] - 4:7, 7:11, 21:15
specifically [1] - 4:12
start [3] - 7:5, 7:13, 7:17
started [2] - 9:20, 13:4
starting [2] - 9:24, 16:16
statement [1] - 11:12
states [2] - 11:11, 11:12
stating [1] - 17:14

step [3] - 12:20, 12:21, 20:25
Steve [7] - 3:14, 4:6, 4:22, 5:25, 10:20, 19:2, 20:8
Steve's [1] - 19:11
still [5] - 11:18, 18:7, 19:8, 19:24, 20:18
stipulation [1] - 22:9
stymied [1] - 5:11
subset [4] - 7:7, 8:2, 8:24
summons [3] - 8:19, 9:3, 15:17
Supreme [4] - 5:15, 10:12, 14:23, 15:1
suspected [1] - 17:25
sustained [1] - 4:14
sustaining [2] - 6:19, 13:8
swearing [1] - 17:17
switching [1] - 16:17

T

talks [1] - 17:6
technique [1] - 11:24
terms [4] - 4:16, 16:25, 17:8, 21:23
THE [39] - 3:8, 4:6, 5:1, 5:4, 5:10, 7:20, 7:24, 9:15, 9:22, 10:3, 10:15, 10:19, 11:3, 11:6, 11:9, 12:15, 12:19, 13:14, 13:20, 16:14, 16:23, 18:6, 18:22, 18:25, 19:6, 19:16, 19:20, 20:1, 20:11, 20:19, 20:24, 21:7, 21:10, 21:13, 21:23, 22:1, 22:4, 22:8, 22:15
thereby [1] - 11:20
thereof [1] - 4:11
three [1] - 14:2
throughout [2] - 13:5, 14:20
throw [5] - 6:1, 7:7, 7:25, 8:7, 9:25
throwing [1] - 12:21
thrown [2] - 8:25, 9:2
timeline [2] - 9:12, 9:13
transcript [3] - 4:19, 21:20, 22:10
transcripts [1] - 21:17
trigger [1] - 20:7
try [1] - 7:9
trying [3] - 3:24, 4:4, 17:22

TTD ^[1] - 20:15
Tuesday ^[1] - 3:1
two ^[10] - 4:1, 6:4, 6:5,
 16:11, 16:16, 16:22,
 18:11, 18:19, 18:20

U

umm ^[2] - 11:10, 21:3
unclear ^[2] - 15:25,
 20:8
under ^[2] - 9:13, 17:17
universe ^[1] - 15:14
unless ^[1] - 14:1
up ^[7] - 3:17, 8:22,
 9:22, 9:23, 18:13,
 20:3, 21:14

V

various ^[2] - 4:20,
 13:5
versus ^[1] - 5:16

W

WALLACE ^[15] - 7:15,
 11:2, 11:8, 18:16,
 19:1, 19:7, 19:17,
 19:21, 20:2, 20:12,
 21:4, 21:9, 21:12,
 21:25, 22:14
warned ^[1] - 21:17
window ^[1] - 15:6
withdrawn ^[1] - 21:24
Workers' ^[1] - 3:3
wow ^[1] - 21:18
write ^[1] - 18:17