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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CASSANDRA SCHMILL,

Petitioner,

v.

LIBERTY NW INS. CORP.,

Respondent/Insurer.

And

MONTANA STATE FUND,

Intervenor.

WCC No. 2001-0300

**RESPONDENT LIBERTY NW INS.
CORP.'S BRIEF IN OPPOSITION TO
PETITIONER'S MOTION FOR
CONTEMPT, PENALTY AND
ATTORNEY FEES AND REQUEST FOR
HEARING**

Schmill moves the Court to find Liberty in contempt and to issue the three orders set forth in her Motion.

SUMMARY

Schmill's Motion is based on her implied claim that the Court's July 10, 2007, ORDER ADOPTING ORDER OF SPECIAL MASTER set deadlines for the payment of common fund claims. It did not.

Schmill's Motion should be denied because (1) Liberty has not violated an order of the Court or presented a challenge to its dignity or authority, (2) Schmill has not filed with her motion an affidavit, as required by statute, with the alleged facts she claims support her request for a contempt order, (3) the Court's July 10, 2007, ORDER ADOPTING ORDER OF SPECIAL MASTER did not set any deadlines for payment of common fund benefits, and therefore Liberty has not failed to comply with the order (4) the parties must first agree to an implementation procedure approved by the Court, or an order by

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the Court independent of the parties' agreement, before there can be a delay in paying Schmill benefits, (5) the Court must first hold a hearing on the Motion if the Court does not dismiss the Motion for failure to comply with MCA 3-1-512, and require Schmill to present her evidence in support of her Motion and to allow Liberty to defend, (6) the Court's own treatment of the July 10, 2007, ORDER ADOPTING ORDER OF SPECIAL MASTER indicates that there was no deadline in that pleading as evidenced by its Minute entry of October 25, 2010, and (7) Schmill's request for penalty and fees requires factual findings that cannot be made based only on her Motion.

CONTEMPT

Contempt of court is a discretionary tool used to enforce compliance with a court's decisions. The power to inflict punishment by contempt is necessary to preserve the dignity and authority of the court. Marriage of Jacobson (1987), 228 Mont. 458, 464, 743 P.2d 1025, 1028

Woolf v. Evans, 264 Mont. 480, 483, 872 P.2d 777, 779 (1994).

¶ 45 A district court has the responsibility to enforce its own orders. See In re Marriage of Boyer (1995), 274 Mont. 282, 289, 908 P.2d 665, 669. We stated in In re Marriage of Jacobson (1987), 228 Mont. 458, 464, 743 P.2d 1025, 1028, that contempt is a discretionary tool of the court to enforce ****1133** compliance with its decisions. We also stated that its power to inflict punishment by contempt is necessary to preserve the dignity and authority of the court. See also Woolf v. Evans (1994), 264 Mont. 480, 483, 872 P.2d 777, 779. Accordingly, where a district court has found that there is no such need to enforce ***335** compliance with its order or that the actions of a party do not present a challenge to its dignity and authority, we will not reverse its decision absent a blatant abuse of discretion.

In re Marriage of Baer, 1998 MT 29.

¶ 19 Kauffman raises another jurisdictional argument. She contends that Judge Langton was without jurisdiction to preside over charges which can only be described as indirect contempt. Direct contempt is an open insult committed in the presence of the court, whereas an indirect contempt is an act done not in the presence of the court, but at a distance that tends to belittle or degrade the court. See Malee, 275 Mont. at 75-76, 911 P.2d at 832-33. The distinction is critical to a determination of the proper procedures which the court must follow.

Kauffman v. MONTANA Twenty-first Judicial District Court, 1998 MT 239.

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CONTEMPT PROCEDURE

Schmill assumes the relief she requests can be granted on her bare pleading without regard to any other procedural safeguards. Specifically she first states at p. 4 of her Motion that “judicial officers of the state are given the power to punish for contempt and to compel obedience to the officer’s official orders” citing to MCA 31-71-402, 403, but then she misstates the jurisdiction of the Court when she claims “The WCA grants the same powers to the office of the Worker’s Compensation Judge” citing to MCA 39-71-2901. What that statute actually states in relevant part is “(2) The worker’s compensation court has power to: (3) punish for contempt in the same manner **and by the same procedures as in district court.**” (emphasis added).

What are the relevant procedures in district court? Contempt includes disobedience to a court order. MCA 3-1-501 (1)(e). “When the contempt is not committed in the immediate view and presence of the court or judge at chambers, **an affidavit of the facts constituting the contempt or a statement of the facts by the referees or arbitrators or other judicial officer shall be presented to the court or judge.**” MCA 3-1-512 (emphasis added).

¶ 25 As we stated above, the distinction between direct and constructive contempt is critical when determining the due process afforded to the contemnor. Actually, the alleged conduct in question in *129 this proceeding is probably best described as a mixture of both direct and indirect. However, Judge Langton was certainly justified, based on our case law, to characterize the alleged conduct in this instance as direct contempt. Direct contempt includes acts or statements made in open court or within the purview of the presiding judge. See Malee, 275 Mont. at 76, 911 P.2d at 834. We have previously expanded the definition of direct contempt to include the filing of pleadings placed before the court. See Malee, 275 Mont. at 76, 911 P.2d at 834. In the case before him, Judge Langton based his contempt order on written documents placed with the court, as well as oral testimony at the contempt hearing.

¶ 26 Regardless of how we classify the conduct at issue, this Court has always been vigilant to insure that due process is properly accorded to the person charged. We have held that in constructive or indirect contempt proceedings, the following due process requirements must be followed:

That one charged with contempt of court be advised of the charges against him, have reasonable opportunity to meet them by way of defense or explanation, have the right to be

represented by counsel and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation.

Malee, 275 Mont. at 76, 911 P.2d at 833 (citing *In re Oliver* (1948), 333 U.S. 257, 275, 68 S.Ct. 499, 508, 92 L.Ed. 682, 695). Additionally, we have held that a court must follow the affidavit or statement of facts procedure set forth in § 3-1-512, MCA.

Kauffman, supra.

SCHMILL'S ARGUMENT

Schmill's argument that Liberty should be found in contempt is simple, but completely without factual or legal foundation.

The decisions in *Schmill I* and *Schmill II* imposed a duty on Respondent to find and pay *Schmill* claims. . . . Respondent cannot justify its delay in locating and paying *Schmill* benefits and it should be found in contempt of this Court's Order of July 10, 2007.

Motion at p. 5.

LIBERTY'S ARGUMENT

JULY 10, 2007, ORDER

Let's examine the "Court's Order of July 10, 2007" to which she refers (DOCKETT ITEM NO. 79). First, it is captioned ORDER ADOPTING ORDER OF SPECIAL MASTER. The Special Master's FINDINGS AND CONCLUSIONS BY SPECIAL MASTER ON ISSUES PRESENTED PURSUANT TO DECEMBER 11, 2006 ORDER OF THE WORKERS' COMPENSATION COURT itself does not order any actions be taken or completed by any deadline.

This Court's ORDER ADOPTING ORDER OF SPECIAL MASTER similarly does not order any actions be taken or completed by a deadline.

This Court in *Flynn v. Montana State Fund*, Minute Book Hearing No. 4377 (March 8, 2012) (Omnibus Hearing) contains the following paragraph:

Ms. Wallace [Schmill's attorney] stated that this Court **never certified** Hearing Examiner Jay Dufrechou's Findings and Conclusions by Special Master on Issues Presented Pursuant to December 11, 2006, Order of the Worker's Compensation Court in Schmill docket item No 380 adopted by

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this Court, **as final**, This Order set forth a definition of “paid in full.” Ms. Wallace believes this Order controls in *Schmill* and the most recent Supreme Court Order in *Flynn* delineating the meaning of “paid in full” does not control in *Schmill* because the statute at issue in was enacted after all of the *Schmill* claims. I granted Ms. Wallace 30 days to file a motion requesting certification of Mr. Dufrechou’s Order.

Schmill did not file a motion. Schmill’s own understanding of the Court’s order was that it was not final. She also notes that the last Supreme Court decision in *Flynn* “set forth the definition of ‘paid in full.’” She did not claim at this hearing the July 10, 2007, ORDER ADOPTING ORDER OF SPECIAL MASTER, or the last *Flynn* decision created any deadlines for the completion of any action. She recognized that the case was still a work in progress—i.e., needing resolution of the retroactive application issue and agreement by the parties and approval by the Court about the terms that would govern implementation. The issue she raised was an implementation issue.

Although not the basis for her Motion, Schmill in her Motion at p. 2 alleges, “On December 7, 2005, the WCC served a Summons on over 500 WC insurers who had issued policies in Montana, including Respondent, **and ordered them to identify and pay *Schmill* claims.**” (Docket No. 79). That pleading in fact is captioned AMENDED SUMMONS AND NOTICE OF ATTORNEY FEE LIEN. The pleading does not contain any order let alone one to identify and pay claims. It is a summons making named insurers respondents and directing them to file an answer. ¶ 4.

Schmill should concede that in the documents she has identified there is no Court order to take any action and to complete it by a specific deadline.

IMPLEMENTATION

At p. 3 of her Motion Schmill states, “In its [Liberty’s] Status Report to the Court dated August 31, 2007, Respondent represent that it was not raising any further legal disputes regarding entitlement to *Schmill* benefits and that the only remaining issues for resolution were implementation issues. (Docket No. 390).” Schmill would have it appear that implementation was a non-issue and required no time. This is what Liberty stated in that pleading regarding implementation in that document:

PRACTICAL IMPLEMENTATION ISSUES

Implementation at this time would require Liberty and its related insurers to conduct a burdensome search which the pending *Flynn* decision might render unnecessary. Alternatively, the *Flynn* decision might significantly alter the boundaries of the search. Therefore implementation at this time may result in Liberty being compelled to conduct two searches, one under

the boundaries set for in this Court's recent *Order Adopting Order of Special Master* and a second search under the boundaries established as a result of the Supreme Court's decision in *Flynn*.

This pleading was dated August 31, 2007. On November 29, 2011, the Montana Supreme Court issued its decision in *Flynn v. Montana State Fund*, 2011 MT 300 and, as Liberty had expressed its concern about the uncertainty of what would be required to implement a search, the implementation boundaries were changed from what the Court had adopted on July 10, 2007, when the Supreme Court affirmed this Court's decision that the retroactive application of common fund decisions was limited, as regards claims paid in full, as follows:

¶17 For purposes of determining the retroactive application of a judicial decision in the workers' compensation field, a claim that has been "paid in full," is defined as follows:

A claim in which all benefits to which a claimant is entitled pursuant to the statutes applicable to that claim, are paid prior to the issuance of a judicial decision. If any benefits are paid on the claim after the issuance of a judicial decision, the claim can no longer be considered "paid in full" and is subject to retroactive application of the judicial decision.

Flynn v. Montana State Fund, 2010 MTWCC 20.

The Court has not ordered any deadlines for completion of an implementation agreement by the parties or its completion once approved by the Court.

AFFIDAVIT

Schmill failed to file an affidavit as required by statute. At p. 4 of her Motion she characterizes Liberty's alleged conduct as an "indirect contempt." Under MCA 3-1-512 she is required to file an affidavit swearing to the truth of her allegations on the basis of which she asks the Court to find Liberty in contempt. Her failure to comply with the statute is fatal to her motion.

She invokes the jurisdiction of the Court by citing to MCA 39-71-2901 which is not ambiguous: "(2) The worker's compensation court has power to: (3) punish for contempt in the same manner **and by the same procedures as in district court.**" (emphasis added). Schmill would have the Court believe there is no procedure she or the Court must follow and that the Court may find a party in contempt if a party incites the Court's displeasure. Due process requires otherwise.

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HEARING

Similarly, Schmill believes the Court can act on her unsworn allegations without the Court giving Liberty a hearing for her to prove her allegations or to allow Liberty to defend itself. Again, due process requires otherwise. The Court is aware that Schmill's common fund claim goes back to 1987.

Numerous implementation issues exist that Liberty has had to investigate for numerous companies which are now its affiliates. How are the potentially relevant claims to be identified? Once identified, what steps are necessary to confirm whether the file is or is not in the common fund? What are the file retention policies that could affect identification? Will files identified contain enough information to determine if they are in the *Schmill* common fund?

If, and only if, the Court does not dismiss the Motion, as requested below, Liberty requests the hearing to which Schmill must prove her allegations and Liberty is entitled to present evidence in its defense.

PURPOSE OF CONTEMPT

Schmill's motion by implication argues her only remedy available to her is a contempt order. How has the dignity and the authority of the Court been diminished, attacked, maligned or undermined by Liberty's alleged conduct? It has not.

Instead Schmill's real argument is that **she is unhappy with the pace of developing an implementation procedure mutually agreeable to the parties and which the Court will then be asked to approve.** Without an implementation procedure approved by the parties and the Court, an insurer runs the risk, if it acts unilaterally, of incurring substantial costs and expending substantial time identifying what it believes is the implementation procedure to follow for identification of actual *Schmill* common fund claims only to be told by the common fund attorney that she has objections to the implementation procedure that warrants a different implementation procedure and search. The Court can take judicial notice that in other common fund cases there have been mutually agreed to implementation procedures.

Because Schmill is dissatisfied with the work that has been done to date, the proper remedy to her alleged wrong is to move the Court for an order to implement the common fund **based** on what she believes would be an appropriate implementation procedure. She has not done this because she knows the complexity involved.

ALLEGED DELAY

Schmill at p. 5 of her Motion alleges, "Respondent cannot justify its delay in locating and

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paying *Schmill* benefits and it should be found in contempt of the Court's Order of July 10, 2007." Let's examine the alleged delay.

The Court in its Minute Book Hearing No. 4207 (DOCKETT ITEM NO. 478) memorializes a telephone conference call by the parties with the Court on October 25, 2010. "The conference call was scheduled at the initiation of counsel to discuss implementation issues with Liberty Northwest Insurance Corporation." *Schmill's* counsel stated "that the implementation procedure has been resolved with the State Fund." This Minute entry again demonstrates, as reflected in other common fund cases, that a **mutually agreed to** implementation plan is necessary.

Schmill at p. 3 of her Motion references this Minute entry but mischaracterizes it when she states, "At the hearing on October 25, 2010, the parties discussed some implementation issues **and the WCC directed the parties to use the procedures adopted by the State Fund to move the implementation process forward.** (Docket No. 479)" (emphasis added). Here is what, in fact, the Court recorded: "Although not dispositive, I believe the procedure adopted by the State Fund has precedential value. After confirming State Fund has no proprietary or intellectual property interests in the method utilized in performing its search, Ms. Wallace may share State Fund's **spreadsheets** with Liberty [Northwest] to model and perform its search in the same fashion." The spreadsheets record information; they do not indicate how specific data systems of other insurers can be used to identify the same information.

The same Minute entry reflects Liberty Northwest had been working on identifying potentially relevant common fund cases. The Court noted *Schmill's* attorney took the position "that it is Liberty's responsibility to pull and review the files to locate claims where an apportionment was made." Liberty Northwest "noted that in other common fund cases, Petitioner's counsel chose to review the files themselves and further stated Liberty did not want to be back before the Court in the event Ms. Wallace was not satisfied with Liberty's file review."

Liberty "advised that there are other Liberty-owned companies that may be affected and that may not have been captured in the first query. Counsel agreed to work through the first query that has already been performed and then identify and perform searches of the remaining companies in second query."

Schmill is arguing that the July 10, 2007, ORDER ADOPTING ORDER OF SPECIAL MASTER is a stand-alone order when in fact the Court's minute entry demonstrates it was not self-executing and instead required further action by the parties and the Court. This minute entry concludes the parties "advised they will contact the Court should any additional disputes arise." Now almost 5 years later *Schmill* complains of an alleged delay that is contemptuous without contacting the Court in the intervening period to complain.

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PENALTY AND FEES

Schmill requests a penalty and attorney fees for Liberty's alleged unreasonable delay or refusal to pay *Schmill* common fund benefits.

In *Hunter v. Gibson Products of Billings* (1986), 224 Mont. 481, 485, 730 P.2d 1139, 1142, we clarified that, with regard to an insurer's decision to contest compensability based on its interpretation of case law, the Workers' Compensation Court's reasonableness finding remains a question of fact subject to the substantial evidence standard of review. This clarification was consistent with our 1984 holding in *Paulson* that the statutory penalty contained in § 39-71-2907, MCA, was never intended to eliminate the assertion of a legitimate defense to liability. *Paulson*, 673 P.2d at 1283. It also was consistent with our conclusion in *Holton v. F.H. Stoltze Land & Lumber Co.* (1981), 195 Mont. 263, 269, 637 P.2d 10, 14, that the existence of a genuine doubt, from a legal standpoint, that any liability exists constitutes a legitimate excuse for denial of a claim or delay in making payments.

Marcott v. Louisiana Pacific Corp., 275 Mont. 197, 203-205, 911 P.2d 1129, 1133-1134 (1996).

Reasonableness is a question of fact. Apparently the time between the October 25, 2010 telephone conference and the Motion was acceptable to Schmill given per the Minute entry we must infer there were no disputes otherwise Schmill's attorney would have advised the Court. Schmill has presented allegations and not facts or affidavit evidence. The proceedings of the Court are governed by common law and statutory rules of evidence. MCA 39-71-2903. Liberty is entitled to a hearing at which Schmill must prove her claim and Liberty can defend against it. The Court does not have jurisdiction to grant Schmill's motion based on bare allegations.

CASE STATUS

Before the Motion was served Liberty had been working on the common fund case and as a result of that work has a revised draft of an implementation procedure (one had already been sent to Schmill's attorney regarding Liberty Northwest) and has identified other insurers in the Liberty Mutual Group that wrote workers' compensation insurance during the relevant time period. Liberty has sent, after the Motion was filed, the revised draft implementation procedure with a list of the relevant Liberty Mutual Group insurers to Schmill's attorney.

Of special significance is the Montana Supreme Court decision in *Flynn v. Montana*

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State Fund, 2011 MT 300, decided November 29, 2011, which significantly limited the scope of all common fund cases when it excluded from common fund cases claims that had been paid in full. What would have been the consequence if Liberty had paid *Schmill* benefits before that decision? Would the Court now be sifting through cases trying to decide who had to repay benefits and fees? The date of the last *Flynn* decision and not the initial *Schmill* decision most accurately reflects when final deliberations regarding how to work through claims potentially in the common fund could begin.

HEARING

If the Court does not dismiss *Schmill's* Motion, then Liberty asks the Court to set a hearing at which *Schmill* must prove facts in support of her motion and Liberty is allowed to introduce evidence and question witnesses in support of its defense against the Motion.

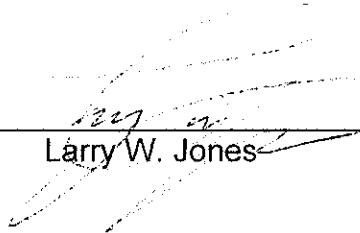
CONCLUSION

For the reasons stated above, Liberty requests the Motion be dismissed or, alternatively, if not dismissed that the Court set a hearing on the Motion.

DATED this 1st day of June, 2015

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By 
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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2015, a copy of Respondent Liberty NW Ins. Corp.'s Response to Petitioner's Motion for Contempt, Penalty and Attorney Fees was served on the person(s) listed below by the following means:

| | |
|----------------|----------------------------|
| _____ | Hand Delivery |
| <u>1</u> _____ | Mail |
| _____ | Overnight Delivery Service |
| <u>1</u> _____ | E-Mail |

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