

LAURIE WALLACE
Bothe & Lauridsen, P.C.
P.O. Box 2020
Columbia Falls, MT 59912
Telephone: (406) 892-2193
Attorneys for Petitioner/Schmill

FILED

JUN - 8 2015

OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS COMPENSATION COURT OF THE STATE OF MONTANA
IN AND FOR THE AREA OF KALISPELL
BEFORE THE WORKERS' COMPENSATION JUDGE

CASSANDRA SCHMILL,)	
)	WCC NO. 2001-0300
Petitioner,)	
)	
vs.)	PETITIONER'S REPLY BRIEF IN
)	SUPPORT OF MOTION FOR CONTEMPT
LIBERTY NW INS. CORP.,)	
)	
Respondent/Insurer,)	
)	
and)	
)	
MONTANA STATE FUND,)	
)	
Intervenor.)	
_____)	

COMES NOW the Petitioner, CASSANDRA SCHMILL, by and through her attorney of record, and submits the following Reply Brief in Support of Motion for Contempt. For the reasons stated herein, and those in the opening brief, the Petitioner's Motion for Contempt should be granted.

PROCEDURE

Respondent asserts that Petitioner's Motion for Contempt is procedurally defective because she did not file an affidavit with her motion. (Respondent's Brief, p. 3.) Respondent cites to section 3-1-512, MCA, as support for this contention. The statute reads as follows:

"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

DOCKET ITEM NO. 610

facts by the referee or arbitrators or other judicial officers shall be presented to the court or judge." [Emphasis added.]

Contrary to Respondent's argument, the statute allows for a motion for contempt to be supported by either an affidavit or a statement of facts from a judicial officer. Attorneys are considered officers of the Court. (Preamble (2), Montana Rules of Professional Conduct.) Petitioner's brief sets out 2-1/2 pages of facts in support of her motion. The majority of the facts listed come from documents that are part of the Court's file in this case. Surely, the Court does not need Petitioner's counsel to file an affidavit swearing to the authenticity of the Court's own documents. As for Exhibits 1-5 that were attached to Petitioner's Motion for Contempt, Petitioner has attached to this pleading an Affidavit swearing to the authenticity of those documents.

ARGUMENT

In its response to Petitioner's chronological accounting of the Respondent's complete failure for eight years to identify, review, and pay *Schmill* claims pursuant to the Court's Order of July 10, 2007, ¶3(a), the Respondent does not refute one fact. Instead, the Respondent's entire argument consists of obfuscation and spurious assertions. Respondent begins by denying that there is a court order directing it to identify, review, and pay *Schmill* claims. Then Respondent asserts that, if there is an order, it didn't set deadlines requiring the Respondent to act; that there can't be a delay in complying with the order, if there is one, until there is an agreed implementation process; that the Respondent's delay in complying with the order, if there is one, was justified by the fact that the *Flynn* decision wasn't issued until 2011; and, finally, that if the Petitioner was concerned about the delay, she should have moved for contempt sooner. The facts speak for themselves.

The Court's Order of July 10, 2007, clearly states:

"[A]ll claims . . . should be identified, reviewed, and paid under *Schmill* . . ."

The order is clear, direct, and unambiguous. Respondent admitted the order required immediate action regardless of whether or not it contained a court ordered deadline when it filed a Motion to Stay the order in May of 2009. If Respondent was not under an order to identify, review, and pay *Schmill* claims, there was no reason to move the Court for a stay. If Respondent, and the other insurers, were not under an order to identify, review, and pay *Schmill* claims, there was no reason for the State Fund to represent to the WCC in March of 2008 that it had the ability at that time to identify all *Schmill* claims. If the Respondent was not under an order to identify, review, and pay *Schmill* claims, there was no reason for Respondent to begin to send computer printouts to Petitioner of potential *Schmill* claims in March of 2010, a year before the *Flynn* decision. The Respondent knew it was under a court order to identify, review, and pay *Schmill* claims from and after the Court's Order of July 10, 2007, and was doing its best to do

nothing to comply with that order.

The Respondent's contention that an implementation process must be in place before the Court's Order of July 10, 2007, becomes final is not based on fact. There is nothing in the Court's Order that delays the enforcement of the order until the Respondent has developed an implementation process. The order directed the Respondent to identify *Schmill* claims. How the Respondent chose to do that was left up to the Respondent to determine. The fact that Respondent wants to seek Petitioner's counsel's approval of the implementation plan so as to avoid repeated attempts to identify *Schmill* claims doesn't transfer Respondent's duty to comply with the Court's Order to Petitioner. Petitioner's participation in the process is voluntary. Respondent's participation is mandatory and it arose on July 10, 2007, the date of the Court's Order, and not on the date an implementation procedure is agreed upon by the parties, or the date of the *Flynn* decision. The Court made that clear when it denied Respondent's Motion to Stay back on October 13, 2009.

Respondent's final argument is that because Petitioner allowed eight years to go by from the date of the Court's Order to identify, review, and pay *Schmill* claims, before moving to find the Respondent in contempt of Court, the Court should find the Petitioner to have acquiesced in the delay and deny the motion. If the Court's Order imposed a duty on Petitioner to act, maybe Respondent's argument would have merit. But that is not the case. The Court's Order imposed a duty on Respondent to act. Respondent has failed to act in accordance with that order and should be found in contempt of Court with or without a hearing.

CONCLUSION

Ignoring a court order for eight years undermines the Court's authority. The Respondent could have appealed the Court's Order, but it didn't. It simply ignored it for eight years. The Court's Order to identify, review, and pay *Schmill* claims eight years ago was not an impossible task. The State Fund complied with the Court's Order less than a year later, as did other insurers. The Respondent's assertions that it hasn't complied with the Court's Order yet because "there isn't an order," "I mean, there isn't a deadline," "I mean, there isn't an agreed implementation procedure," "I mean, the Petitioner didn't move to compel me to act sooner," should be seen for what they are, excuses. Whatever *Schmill* claimants are eventually identified by Respondent have had to wait an additional seven years more than the State Fund's *Schmill* claimants to get paid benefits that have been due and owing since the decision in *Schmill II*. These claimants deserve an additional 20% penalty for the delay occasioned by the Respondent's unreasonable conduct. Upon such a finding, Petitioner should also be awarded attorney fees of 25% of all benefits paid by Respondent.

DATED this 4 of June, 2015.

ATTORNEYS FOR PETITIONER

BOTHE & LAURIDSEN, P.C.
P.O. Box 2020
Columbia Falls, MT 59912
Telephone: (406) 892-2193

By: Laurie Wallace
LAURIE WALLACE

CERTIFICATE OF MAILING

I, Robin Stephens, do hereby certify that on the 5 day of June, 2015, I served a true and accurate copy of the PETITIONER'S REPLY BRIEF IN SUPPORT OF MOTION FOR CONTEMPT by U.S. mail, first class, postage prepaid to the following:

Mr. Larry Jones
WILLS LAW FIRM
323 W. Pine St.
Missoula, MT 59802

Robin Stephens
Robin Stephens

LAURIE WALLACE
Bothe & Lauridsen, P.C.
P.O. Box 2020
Columbia Falls, MT 59912
Telephone: (406) 892-2193
Attorneys for Petitioner/Schmill

IN THE WORKERS COMPENSATION COURT OF THE STATE OF MONTANA
IN AND FOR THE AREA OF KALISPELL
BEFORE THE WORKERS' COMPENSATION JUDGE

CASSANDRA SCHMILL,)
) WCC NO. 2001-0300
Petitioner,)
)
vs.) AFFIDAVIT OF LAURIE WALLACE
)
LIBERTY NW INS. CORP.,)
)
Respondent/Insurer,)
)
and)
)
MONTANA STATE FUND,)
)
Intervenor.)
_____)

STATE OF MONTANA)
 : ss.
County of Flathead)

LAURIE WALLACE, being first duly sworn, upon oath, deposes and says:

1. That I am an attorney of record for the above-named Petitioner.
2. This affidavit is respectfully submitted in support of Petitioner's Motion for Contempt, Penalty, and Attorney Fees and swears to the authenticity of the documents labeled Exhibits 1-5 attached thereto:
3. Exhibit 1 consists of five letters I received from Respondent's counsel in the usual course of my business. The letters dated 3/5/10, 6/11/10, and 6/15/10 contained computer printouts from Respondent of potential *Schmill* claims. Other than not containing

the computer printouts, the letters are in the same condition in which they were first received.

4. Exhibit 2 consists of an e-mail I received from Respondent's counsel dated 7/19/12, in the usual course of my business. The e-mail is in the same condition in which it was first received.

5. Exhibit 3 consists of two e-mails I received from Respondent's counsel dated 7/19/12 and 11/19/13, in the usual course of my business. The e-mails are in the same condition in which they were first received. The exhibit also contains six letters from me to Jamie Kerns dated 2/27/13, 9/12/13, 9/27/13, 10/4/13, 10/18/13, and 11/14/13. The letters are signed by me and are in the same condition as when I mailed them in the usual course of my business.

6. Exhibit 4 consists of letters from me to Jamie Kerns dated 1/7/14, and to Larry Jones dated 1/16/14. The letters are in the same condition as when I mailed them in the usual course of my business.

7. Exhibit 5 consists of letters from me to Respondent's counsel dated 2/10/14, 2/26/14, 4/7/14, and 4/30/14; e-mails from my office to Respondent's counsel dated 3/19/14, 6/23/14, 7/15/14, 7/30/14, 10/1/14, 10/15/14, 10/31/14, 11/14/14, 12/4/14, 1/9/15, 3/25/15, 4/9/15, 4/21/15; and e-mails from Respondent's counsel to my office dated 2/13/14, 3/17/14, 6/3/14, 7/3/14, 7/31/14, 2/28/15, 4/20/15, and 5/8/15. These documents were all sent or received in the usual course of my business, and all are in the same condition as when there were first sent or received.

FURTHER, your Affiant sayeth not.

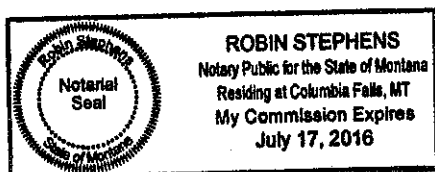
DATED this 4 day of June, 2015.

ATTORNEYS FOR PETITIONER

BOTHE & LAURIDSEN, P.C.
P.O. Box 2020
Columbia Falls, MT 59912
Telephone: (406) 892-2193

By Laurie Wallace
LAURIE WALLACE

Subscribed and sworn to before me this 4th day of June, 2015.



Robin Stephens
Notary Public for the State of Montana
Residing at Columbia Falls
My Commission Expires 7/17/16