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OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CASSANDRA SCHMILL,

Petitioner,

vs.

LIBERTY NORTHWEST INSURANCE
CORPORATION,

Respondent/Insurer,

vs.

MONTANA STATE FUND,

Intervenor.

WCC No. 2001-0300

STIPULATION FOR IMPLEMENTATION
PLAN AND ORDER

COMES NOW the above common fund Petitioner and her attorney and the Respondent Continental Casualty Insurance Co. and submit the following *Schmill* common fund implementation plan and request the Court to issue an order adopting the implementation for the reasons set forth with particularity below.

Whereas the Montana Supreme Court in *Schmill v. Liberty Northwest Ins. Corp. and Montana State Fund, 2003 MT 80 (Schmill I)* held that it was a violation of the equal protection clauses of the Montana and United States Constitution to allow for apportionment deductions for non-occupational factors in the Occupational Disease Act, since repealed; and

Whereas The Montana Supreme Court in *Schmill v. Liberty Northwest Ins. Corp. and Montana State Fund, 2005* held *Schmill I* was retroactive to all cases not yet final or settled at the time of its issuance, and was therefore a common fund case that created a global lien; and

Whereas this Court in *Flynn v. Montana State Fund, 2010 MTWCC 20* held that "paid in full" meant:

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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.

And whereas the Montana Supreme Court held in *Flynn-Miller v. Montana State Fund and Liberty Northwest Ins. Corp.*, 2011 MT 30 this Court's definition of "paid in full" properly applies the retroactive principles to be applied in common fund cases; and

Whereas the parties agree that in the interests of efficiency, economy and finality that this Court adopt the following common fund implementation plan for the *Schmill* common fund which the parties believe adequately searches for and identifies *Schmill* common fund cases and provides for the appropriate payment of common fund benefits and attorney fees; and

Whereas following the identification of the respective Continental Casualty Insurance companies, Continental Casualty Insurance Co. identified claims systems that would contain open and closed (i.e., settled by ERD petition, Workers' Compensation Court order or paid in full) Montana workers' compensation claims for the requisite time period; and

Whereas after the possible common fund OD files are identified, as proposed in the implementation procedure set out below, they will have to be manually reviewed to determine if they fall within the *Schmill* common fund. For Continental Casualty Insurance Company, these files are available in the electronic claim systems and can be individually reviewed to determine if a claim in the common fund; and


Whereas the parties have negotiated the following implementation plan confident that it is sufficiently comprehensive, given the time span covered and the complexities inherent in identifying relevant cases, is in the best interest of justice and is in the best interests of potential common fund claimants and the parties.

The parties respectfully request the Court to issue an order adopting as the implementation plan for the *Schmill* common fund claimants as set forth below.

1. The inclusive dates of the occupational disease (OD) claims to be considered for review are those with a date of loss of July 1, 1987, through June 22, 2001.
2. Continental Casualty Insurance Co. will conduct its search only by computer review of claims based on computer codes that suggest the claim involve an OD.

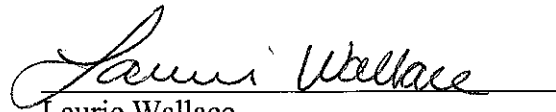
3. The initial file selection for Continental Casualty Insurance Co. is based on the use of computer codes that suggest the claim involved is an OD claim.
4. If a file was not properly coded, than it will not be captured.
5. The claims will be reduced by including only files in which an indemnity payment was made.
6. If no benefits were being paid on a claim on 6/22/2001, then it is considered closed and not part of the common fund. If a claim has a date of OD before 6/22/2001 and if no benefits were paid after that date, then it is paid in full and it is not part of the common fund. If a claim has a date of OD before 6/22/2001 and benefits were paid after that date, than it may be part of the common fund.
7. A settled claim or one paid in full will not be reviewed because it is not part of the common fund.
8. If the relevant information is electronically stored, it will be reviewed in that format. Each claim will be individually reviewed.
9. Cases in which apportionment was not made are not part of the common fund.
10. The remaining cases will be identified by claim number and the amount of the apportionment.
11. The apportionment will be divided into 25% as a possible common fund attorney fee and 75% as a possible common fund payment to the claimant.
12. A letter will be sent to the last known address of the claimant setting forth an explanation of why the claimant is eligible for a common fund payment and the amount of the payment. (The details of the contents of the letter will need to be worked out by the parties along the lines of the notice by publication information that was used in a State Fund case.) A copy of the letter will be sent to the common fund attorney.
13. Continental Casualty Insurance Co. will then make the common fund payment to the claimant and allocate the previously determined 25% as a possible common fund attorney fee.
14. Continental Casualty Insurance Co. will make an accounting to the Court of all those cases in paragraph 10 by claim number, each amount of apportionment, identify those claims in which a common fund payment was made to a claimant and the amount of possible common fund attorney fees withheld on that claim.
15. The Court will notify the parties if Continental Casualty Insurance Co. can release the common fund attorney fees or if a hearing will be held to determine if fees will be paid and if so, the amount.
16. The Court will issue a closure order ending Continental Casualty Insurance Co.'s responsibility to search for common fund cases and direct it to make a common fund review of a case, if any, that comes to its attention as a common fund case subject to payment such as one falling within the above inclusive dates and meeting the other criteria in which a payment was made after the date of the Court's closure order.

Dated this 21st day of July, 2016.



Todd A. Hammer
Attorney for Continental Casualty Insurance Company

Dated this 22 day of July, 2016.



Laurie Wallace
Attorney for Petitioner and *Schmill* Common Fund
Claimants