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**FILED**

**JUN 14 2004**

OFFICE OF  
WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

KELLY WILD,

Petitioner,

vs.

MONTANA STATE WORKERS'  
COMPENSATION,

Respondent.

and

MARK MATHEWS,

Petitioner,

vs.

LIBERTY NORTHWEST INSURANCE  
CORPORATION,

Respondent.

WCC NO. 2001-0286

WCC NO. 2001-0294

**RESPONDENT'S UNOPPOSED  
MOTION TO WITHDRAW AND  
REPLACE THE STIPULATION  
REGARDING PROSPECTIVE CLAIMS,  
WITH SUPPORTING BRIEF**

COMES NOW the Respondent, Montana State Fund ("State Fund"), pursuant to Administrative Rules of Montana 24.5.316, and hereby moves the Court for an order

withdrawing the Stipulation Regarding Prospective Claims (Nov. 5, 2003) and replacing it with the Revised Stipulation Regarding Prospective Claims and Common Fund Fees. The State Fund's motion is supported by the following brief.

## ARGUMENT

Consistent with the Court's instruction in this matter and in the other pending common fund cases, the parties entered into a Stipulation Regarding Prospective Claims, a copy of which is attached hereto as Ex. "A." However, the stipulation mistakenly failed to acknowledge the recent legislative changes which prohibit the payment of common fund fees on claims occurring on or after April 21, 2003. The present motion seeks to rectify that previous omission.

### **THIS COURT SHOULD WITHDRAW THE STIPULATION REGARDING PROSPECTIVE CLAIMS (NOV. 5, 2003) BECAUSE ITS PROVISIONS ARE CONTRARY TO MONTANA LAW.**

Litigants cannot enter into agreements which are contrary to express provisions of law. See Mont. Code. Ann. § 28-2-701 (2003); *Lewis v. Huyser* (1994), 264 Mont. 141, 147, 870 P.2d 95, 99. Here, the Stipulation Regarding Prospective Claims (Nov. 5, 2003) potentially allows the attorneys for Wild and Mathews to recover common fund fees on claims arising from April 21, 2003 through April 28, 2003. However, recent legislative changes to Montana's Workers' Compensation Act prohibit the award of common fund fees on claims occurring on or after April 21, 2003. See Mont. Code. Ann. § 39-71-611(3) (2003) ("Attorney fees may be awarded only under the provisions of subsection (1) and may not be awarded under the common fund doctrine or any other action or doctrine in law or equity."); Mont. Code Ann. § 39-71-612(4) (2003) ("Attorney fees may be awarded only under the provisions of subsections (1) and (2) and may not be awarded under the common fund doctrine or any other action or doctrine in law or equity."); SB 450, § 6 (noting that the prohibition on common fund fees was effective on the date of passage and approval, which occurred on April 21, 2003).

Accordingly, the stipulation previously approved by this Court should be withdrawn because it is contrary to the recent legislative amendments, which prohibit attorneys from recovering common fund fees on claims occurring on or after April 21, 2003. The Revised Stipulation Regarding Prospective Claims and Common Fund Fees clearly explains prospectivity and is compliant with the legislative prohibition on the payment of common fund fees for claims arising on or after April 21, 2003. Therefore, the State Fund requests this Court to withdraw the prior Stipulation Regarding Prospective Claims (Nov. 5, 2003) and replace it with the Revised Stipulation Regarding Prospective Claims and Common Fund Fees.

RESPONDENT'S UNOPPOSED MOTION TO WITHDRAW AND  
REPLACE THE STIPULATION REGARDING PROSPECTIVE CLAIMS,  
WITH SUPPORTING BRIEF

For the Court's review and consideration, the original Revised Stipulation Regarding Prospective Claims and Common Fund Fees is filed concurrently herewith.

DATED this 11 day of June, 2004.

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By

  
Bradley J. Luck

CERTIFICATE OF MAILING

The undersigned, an employee of the law firm of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for the Respondent, hereby certifies that on this 11<sup>th</sup> day of June, 2004, a true copy of the foregoing Respondent's Unopposed Motion to Withdraw and Replace the Stipulation Regarding Prospective Claims, With Supporting Brief, was mailed, postage prepaid, to the following:

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