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FILED

MAY - 2 2003

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

ROBERT FLYNN, Petitioner, vs. STATE COMPENSATION INSURANCE FUND, Respondent/Insurer.	WCC NO. 2000-0222 RESPONDENT'S BRIEF RE: COMMON FUND ATTORNEY FEES
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COMES NOW Respondent State Compensation Insurance Fund (hereinafter State Fund), by and through its counsel of record, Thomas E. Martello, and hereby responds to the Petitioner's NOTICE OF ATTORNEYS' LIEN.

Claimant is not entitled to "*Murer*-type" common fund attorney's fees.

The Common Fund Doctrine came into workers' compensation prominence with the *Murer* decision.

As a result of our decision in **Murer II**, the State Fund became obligated to increase the rate of benefits payment to a substantial number of workers' compensation claimants who were neither parties to, nor directly involved in the **Murer** litigation. . . .

Claimants and their attorneys asserted a lien against those increased payments. In recognition of that lien, the State Fund withheld 20% from the amounts paid to the absent claimants. Claimants also moved the Workers' Compensation Court to award them attorney's fees pursuant to the common fund doctrine.

Murer v. State Compensation Mutual Insurance Fund (1997) 283 Mont. 210, 221, 942 P.2d 69.

Based on these legal principles and authorities, we conclude that when a party, through active litigation, creates a common fund which directly benefits an ascertainable class of non-participating beneficiaries, those non-participating beneficiaries can be required to bear a portion of the litigation costs, including reasonable attorney's fees. Accordingly, the party who creates the common fund is entitled, pursuant to the Common Fund Doctrine, to reimbursement of his or her reasonable attorney fees from that fund.

283 Mont. at 223.

Murer began as a group of claimants that sought, but were denied, class certification. From the onset, the insurer was put on notice that the litigation was not confined to a single claimant, but involved multiple parties. Although denied class certification, claimant's attorneys proceeded with the litigation, asserting a lien on all increased benefits due to the *Murer* litigation pursuant to the Common Fund Doctrine. 283 Mont. at 221. Without question, the litigation was instituted on behalf of the named claimants and as representatives of non-participating beneficiaries. "Claimants initiated this litigation as representatives of a class of injured claimants similarly situated." 283 Mont. at 215.

The recent decision of Rausch, Fisch and Frost vs. State Compensation Insurance Fund (RFF) (2002), 311 Mont. 210, 54 P.3d 25 carried forward the notice provisions of *Murer* specifying that the action was being brought on behalf of other similarly situated. "Claimants attorneys contend they are entitled to attorney fees pursuant to the common fund doctrine for all similarly situated permanently totally disabled claimants who have been denied immediate impairment awards by the State Fund...." 54 P.3d at 34.

Other than usage of the verbiage "common fund," Flynn carries none of the earmarks of a class action or an action on behalf of others similarly situated. From the onset, Flynn's allegation and claim for attorney fees was confined solely to his case. A review of the history of this case strikingly bears this out.

A dispute exists between the parties. Claimant contends that the Respondent is responsible for a pro rata share of attorney fees incurred to obtain his social security benefits. Respondent has claimed an offset for the entire social security award received by claimant, but refuses to give credit for any portion of the fees incurred to obtain the social security award. (Petition for Hearing, page 1).

Within the Petition for Hearing, Claimant sought: "An Order holding that Respondent's refusal to acknowledge its obligation to pay a pro rata share of claimant's attorney fees incurred to obtain his social security benefits and Respondent's unilateral reduction of total disability benefits was unreasonable and awarding costs, a penalty and attorney's fees for each delay and refusal which the court finds was unreasonable." (Petition for Hearing, page 3).

Claimant's opening brief claimed attorney's fees only from Flynn's social security disability award. "Flynn's social security award directly benefits State Fund by permitting State Fund to reduce total disability benefits by one-half of the social security award. Flynn incurred \$4,000 in attorney's fees to establish his social security claim. Flynn contends State Fund should bear one half of these fees since it received one half of the benefits." (Petitioner's Opening Brief, page 3).

The "common fund" Flynn's attorney claimed was not created from a group of non-participating, beneficiaries, such as *Murer* or *RFF*. Instead the common fund was solely Flynn's lump sum social security disability award and the beneficiaries were not absent claimants, but the State Fund. "The State Fund contends that the Common Fund Doctrine enunciated in *Murer* does not apply here because '[n]o common fund has been established in the case at hand [and] there is no class beneficiaries'. This ignores the genesis of this dispute. Specifically, State Fund claims it is entitled to receive over \$14,000.00 due to the retroactive lump sum social security award which Flynn established through active litigation. The lump sum social security award is the common fund of which Flynn and State Fund are beneficiaries." (Emphasis supplied); (Petitioner's Reply Brief, page 1).

This Court clearly understood that no "Murer type common fund" monies were being sought by Flynn.

Claimant argues that *Stahl* is no longer good law in light of *Murer v. State Compensation Insurance Fund*, 282 Mont. 210, 942 P.2d 69 (1997). *Murer* held that where a claimant brings an action on his own behalf and others similarly situated to establish an entitlement to benefits under the Montana Workers' Compensation Act, and succeeds in that action, the attorney for the claimant bringing the action is entitled to collect attorney fees from benefits he or she has established **as do other benefiting claimants**. At issue in *Murer* was the *common fund doctrine*. That doctrine has no application here. Claimant is not seeking attorney fees for others who may benefit by this decision. Rather, he is seeking attorney fees with respect to his own entitlement. . . .

Robert Flynn v. State Compensation Insurance Fund, 2001 MTWCC 24 at ¶ 8.

Even on appeal, Flynn maintained and solidified this position. Citing the above passage, Flynn indicated:

From this statement, it appears that the lower court misunderstands the *common fund* doctrine. This doctrine is not limited to situations where other injured workers benefit from the establishment of an entitlement. *Murer* certainly makes no such suggestion.

For purposes of the Common Fund Doctrine, there is no rational distinction between a group of claimants, as in *Murer*, and an insurance company benefiting from the fund created by the litigation of another party.

(Appellant's Opening Brief, pages 11-12).

In his Supreme Court Reply Brief, Flynn continued to assert that his "common fund" entitlement only involved his social security disability award. "State Fund argues that the common fund doctrine does not apply because 'there is no class of beneficiaries'." It does not explain what it means by this. It does, however, infer that there must be more than two beneficiaries in order to trigger the doctrine. It provides no authority for this inference and fails to even discuss the authority provided by Flynn. This authority demonstrates the application of the Common Fund Doctrine to a single insurer or lien holder which benefits from the litigation of a single injured party." (Emphasis supplied). (Appellant's Reply Brief, page 2).

In its decision, the Montana Supreme Court stated the issue regarding attorney fees as follows: "Should the State Fund bear a proportionate share of the attorney fees incurred by Flynn to recover social security disability benefits based on the common fund doctrine?" Flynn v. State Compensation Insurance Fund, (2002) 312 Mont. 410, 60 P.3d 397, 399. Its decision enunciated a different form of common fund. Unlike *Murer* and *RFF*, where the common fund benefited an ascertainable class of non-participating beneficiaries, Flynn's "common fund" was restricted to his lump sum social security award and the one non-participating beneficiary was the State Fund. "Consequently, we hold that Flynn's SSD award constitutes an existing, identifiable monetary fund or benefit in which an ascertainable, non-participating beneficiary maintains an interest." (Emphasis supplied). 60 P.3d at 400.

Only after the Supreme Court's December 5, 2002 decision and Notice of Remitter did claimant's attorney raise for the first time "fees applicable to non-participating beneficiaries" along with a Notice of Attorney's Lien. (See Exhibit A attached).

Claimant is Estopped From Asserting Attorney's Fees Pursuant to a "... common fund created and to be created which has directly benefited all ascertainable absent workers' compensation claimants."

ARM 24.5.301(3) states that:

Any claim for attorney fees and/or penalty with respect to the benefits or other relief sought by the Petitioner shall be joined and pleaded in the petition. Failure to join and plead a claim for attorney fees and/or penalty with respect to the benefits or other relief sought in the petition shall constitute a waiver and shall bar any future claim with respect to such attorney fee and/or penalty.

As noted above, a claim for attorney fees was only asserted against one beneficiary, State Fund. No claim for attorney fees from "all ascertainable absent workers' compensation claimants" was made by Flynn at either the Workers' Compensation Court or Supreme Court. The claim for attorney fees made in the December 26 lien filing could have been developed and pursued before this Court. However, it was not done. The failure to do so bars any attempt at this time. In many respects, the claim for attorney fees is similar to the facts in Heisler v. State Compensation Insurance Fund, 1998 MTWCC 25, ¶ 31:

It should be abundantly apparent from the foregoing discussion that Heisler was provided a full and fair opportunity to pursue his claim for attorney fees and a penalty, and chose not to do so. This Court's prior judgment dismissed those claims, the decision on appeal did not reverse that dismissal and it therefore stands as a law of the case. Heisler cannot re-litigate the matter." State v. Woods, 945 P.2d 918, 921 (Mont. 1997) ("Under the doctrine of the law of the case, a prior decision of this Court resolving a particular issue between the same parties in the same case is binding and cannot be re-litigated. State v. Black, 245 Mont. 39, 44, 798 P.2d 530, 533 (1990). We hold that this Court's previous resolution of the issue concerning the second hearing remains binding.)

Likewise, Claimant's counsel should be bound by acts and his judicial admissions.

In Plouffe we relied on Section 26-1-601, MCA for the following conclusive presumption; we have previously held that a party may not benefit from asserting one position during pre-trial discovery and later assert a contrary position to the detriment of its opponent at trial or on appeal. Plouffe v. Burlington Northern, Inc. (1986) 730 P.2d 1148, 1153. [T]he truth of a declaration, act, or omission of a party, as against that party in any litigation arising out of such declaration, act, or omission, whenever he has, by such declaration, act, or omission, intentionally led another to believe a particular thing true and to act upon such belief. Section 26-1-601, MCA; Plouffe, 730 P.2d at 1153.

We have also previously held that a counsel's admissions in court proceedings bind the client to those statements. Kohne v. Yost (1991), 818 P.2d 360. In

Kohne, defense counsel admitted in closing arguments that both parties in that case were negligent . . .

Discussing defense counsel's statement, we recognized that a counsel's admissions bind his or her client. Kohne, 818 P.2d at 361-62. A judicial admission is an express waiver made in court by a party or his attorney conceding the truth of an alleged fact. It has conclusive affect upon the party who makes the admission, and no further evidence can be introduced to prove, disprove, or contradict the admitted fact. Kohne, 818 P.2d at 362 (citing 9 Wigmore, evidence, Secs. 2588, 2590; (Chadburn Rev. 1981)). We also held that such admissions may occur at any point during litigation. Kohne, 818 P.2d at 362.

Based on principles of estoppel and judicial admissions, we conclude that the State Fund is bound by its counsel's statements during trial that it was not relying on the defense of fraud, and that it cannot, after an adverse result, move for a new trial so that it can allege the affirmative defense of fraud. The State Fund led Rasmusson to believe that it was not asserting fraud as a defense. It repeatedly skirted the court's questions on this issue and, on at least one occasion, stated that it was not asserting fraud. Therefore, counsel conceded for purposes of trial that fraud was not an issue. Rasmusson should not have to spend the time and assume the expense of a trial on the assumption that the State Fund's position is as represented by its attorney, only to find out after the result that the whole proceeding must be proceeded based on a different theory.

Rasmussen v. Heebs Food Center (1995) 893 P.2d 337, 339-340.

As in the case at bar, the State Fund should be entitled to rely upon representations made by claimant's attorney to the Workers' Compensation Court and Supreme Court that no common fund was being sought from non-participating beneficiaries. Flynn should not be able to change his position and assert a new theory post Supreme Court decision.

Recently, claimant's attorney filed a Petition for Hearing in the matter of Carl Miller (WCC No. 2003-0771). This pleading is an acknowledgement and a judicial admission that Flynn was not pled a common fund on behalf of others similarly situated. Miller through his attorney, Rex Palmer, attempts to plead an action "individually and on behalf of others similarly situated" citing multiple times within the petition the Flynn decision. If in fact Flynn established an entitlement to Murer-like common fund monies, there is no need to file in Miller since payment of such monies would flow from the Flynn decision.

Flynn's attempt to obtain attorney's fees pursuant to a common fund for an ascertainable class of non-participating beneficiaries is barred by *res judicata*.

An excellent discussion of the doctrine of *res judicata* and its applicability to the present matter is contained in Robert Cheetham, Jr. v. Liberty Northwest Insurance Corporation, 201 MTWCC 65, ¶¶ 27 and 28. (See also Michael Miller v. State Compensation Insurance Fund, 2000 MTWCC 72, ¶ 9).

Liberty argues that the claimant could and should have raised his entitlement to domiciliary benefits in his first petition to this court. It cites decisions of both the Supreme Court and this Court holding that where a party could have raised a claim in a prior proceeding, but failed to do so, the party is barred from raising it in a subsequent proceeding. Liberty's argument is not easily dismissed.

"[R]es judicata is a final judgment which, when rendered on the merits, is an absolute bar to a subsequent action between the same parties or those in privity with them, upon the same claim or demand." *Scott v. Scott* (1997), 283 Mont. 169, 175, 939 P.2d 998, 1001 (citing *Fiscus v. Beartooth Electric Cooperative, Inc.* (1979), 180 Mont. 434, 436, 591 P.2d 196, 197). The doctrine bars a party from re-litigating a matter that the party has already litigated **and from re-litigating a matter that the party had the opportunity to litigate in an prior case.** *City of Bozeman v. AIU Ins. Co.* (1995), 272 Mont. 349, 354, 900 P.2d 929, 932 (quoting *State ex rel. Harlem Irrigation District v. Montana Seventeenth Judicial District Court* (1995), 271 Mont. 129, 894 P.2d 943, 946). Res judicata is based on the policy that there [296 Mont. 68] must be some end to litigation. *Glickman v. Whitefish Credit Union Ass'n*, 1998 MT 8, ¶ 20, 287 Mont. 161, ¶ 20, 951 P.2d 1388, ¶ 20. A claim is res judicata if: (1) the parties or their privies are the same; (2) the subject matter of the claim is the same; (3) the issues are the same and relate to the same subject matter; and (4) the capacities of the persons are the same in reference to the subject matter and issues. *Glickman*, ¶ 20 (citing *Loney v. Milodragovich, Dale & Dye, P.C.* (1995), 273 Mont. 506, 510, 905 P.2d 158, 161).

In re Ramond W. George Trust, 1999 MT 223, ¶ 47, 296 Mont. 56, 986 P.2d 427 (1999) (emphasis added).

The "opportunity to litigate" rule is discussed in *Harlem Irrigation District*, 271 Mont. 129, 894 P.2d 943 (1995). The discussion is quoted in the subsequent case of *City of Bozeman v. AIU Insurance Co.*, 272 Mont. 349, 354, 900 P.2d 929, 932 (1995). That discussion is as follows:

However, the doctrine of res judicata bars not only issues that were actually litigated, but also those that could have been litigated in a prior

proceeding. *Mills v. Lincoln County*, (1993) 262 Mont. 283, 864 P.2d 1265, 1267. A party should not be able to litigate a matter that the party already had the opportunity to litigate; public policy dictates that there must be some end to litigation. [Citations omitted.] Once a party has had an opportunity to present a claim, the judgment in a previous case is final as to the issues that were raised, as well as those that could have been raised. See *Burgess v. Montana* (1989), 237 Mont. 364, 366, 772 P.2d 1272, 1273. This notion arises from public policy designed to prevent endless piecemeal attacks on previous judgments. *Wellman v. Wellman* (1982), 198 Mont. 42, 46 643 P.2d 573, 575. We conclude that the theories of recovery alleged in this cause of action could have been litigated in the prior proceeding.

As set forth in the above quoted language, the "opportunity to litigate" rule is tied to the specific issues raised in the prior litigation. *Rafenelli v. Dale*, 1998 MT 331, ¶ 12, 292 Mont. 277, 971 P.2d 371. The doctrine prohibits a party in subsequent litigation from raising a new legal theory or ground with respect to the issues raised in the prior case. Consistent with that doctrine, I held in *Miller v. State Compensation Fund*, 2000 MTWCC 72, that where a claimant brought an action seeking to reopen a settlement agreement, the judgment rejecting his request barred a subsequent action again seeking to reopen the same settlement but on different grounds.

Allowing Petitioner to maintain a claim for common fund attorney's fees from non-participating beneficiaries denies the State Fund Due Process of law

Finally, if Petitioner is allowed to maintain his common fund from non-participating beneficiaries, the State Fund has been denied due process of the law. Due process is a fundamental right of a party to be made aware of claims made against it. In this case Petitioner did not raise this issue until after the Supreme Court issued its decision.

Although the issue of a typical general fund state agency's entitlement to "due process" may be subject to judicial debate, such is not the case in the present matter. The State Fund clearly is more analogous to an insurance corporation than a typical state agency. The State Fund conducts its business like an insurance company, deriving its operating income from policyholders and not taxpayers of the state. In recognition of the "autonomy" of the State Fund and the requirement to conduct business similar to a public corporation, the legislature passed Senate Bill 360 (a copy is attached as Exhibit B).

A corporation is entitled to due process of the law. *Browning-Ferris Industry of Vermont Inc. v. Kelco Disposal, Inc.* (1989) 492 U.S. 257, 285, 109 S.Ct. 2909, 2925. Essential elements of due process are notice and an opportunity to be heard. *Byrd v.*

Columbia Falls Lion Club (1979) 183 Mont. 330, 332, 599 P.2d 366, 367; In re Marriage of Huotahi (1997), 284 Mont. 285, 291, 943 P.2d 1295, 1299.

In the instant matter, neither was met. There was no notice nor opportunity to be heard on the claim of common fund monies from non-participating beneficiaries. The State Fund, this Court and the Supreme Court relied upon the pleadings, briefs, and arguments. Petitioner should not now be allowed to raise an issue post litigation. Gallatin Trust Bank v. Darrah, (1968) 152 Mont. 256, 262-263, 448 P.2d 734; Lurie v. Gallatin County Sheriff (1997), 284 Mont. 207, 215, 944 P.2d 205.

If the claim for Murer type common fund attorney's fees is allowed, State Fund has been denied notice and the opportunity to be heard. More importantly, if this claim can be maintained by presenting the issue after the Supreme Court has rendered its decision, at what point are such claims barred? Is any decision with presidential value fair game for a claim of common fund fees years after the decision? Clearly, due process and justice require such claims to be freely litigated before this Court and the Supreme Court. An end run attempt to avoid the judicial process should not be allowed.

DATED this 2nd day of May 2003.

MONTANA STATE FUND

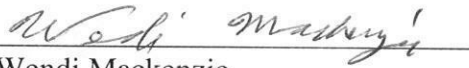
Thomas E. Martello
Thomas E. Martello
Legal Counsel

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing on the following parties:

Rex Palmer, Esq.
Attorneys Inc., P.C.
301 West Spruce
Missoula, MT 59802

by depositing the same in the United States Mail, postage prepaid, on this 2nd day of May 2003.


Wendi Mackenzie
Legal Administrative Assistant

ATTORNEYS INC., P.C.
A Professional Corporation

301 W Spruce • Missoula, MT 59802
(406) 728-4514 • Fax (406) 728-5601 • attorneysinc@montana.com • www.montana.com/attorney

pleading

REX PALMER
ROBERT STUTZ

VIA FACSIMILE @ (406) 444-5963 AND ORIGINAL BY MAIL

December 26, 2002

Ann E. Clark, Legal Counsel
Special Assistant Attorney General
Montana State Fund
PO Box 4759
Helena, MT 59604-4759

RECEIVED

DEC 30 2002

LEGAL

Re: *Flynn v. State Fund*
Claimant: Robert Flynn
SSN: 728-07-9086
Claim No: 03-1993-20753-5

Dear Ann:

I am writing to follow-up upon the voice mail I left at your office on Monday. I have received notice of remittitur and consequently submit the enclosed Notice of Attorneys' Lien.

When you get a chance to return my call, I would still like to engage in a dialog as to how we might best proceed regarding fees applicable to non-participating beneficiaries. I look forward to hearing from you.

Sincerely,
ATTORNEYS INC., P.C.

Rex Palmer/mm
Rex Palmer

RP:mm
Enclosure



Ing 12-30-02
WR

RECEIVED

DEC 30 2002

LEGAL

Rex Palmer
ATTORNEYS INC., P.C.
301 W Spruce
Missoula, Montana 59802
(406) 728-4514
ATTORNEYS FOR PETITIONER

3-93-20753-5

IN THE WORKERS' COMPENSATION COURT IN THE STATE OF MONTANA
BEFORE THE WORKERS' COMPENSATION JUDGE

Robert Flynn,)	WCC No. 2000-0222
Petitioner,)	
v.)	
)	NOTICE OF ATTORNEYS' LIEN
State Compensation Ins. Fund,)	
Respondent/Insurer for)	
)	
Salish Kootenai College,)	
Employer.)	

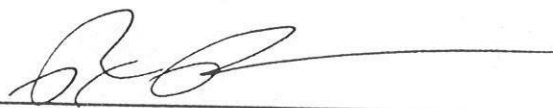
* * * * *

COMES NOW the undersigned, and herewith gives notice to the State Compensation Insurance Fund and its counsel of the undersigned's attorneys' lien upon the common fund created and to be created which has directly benefitted all ascertainable absent workers' compensation claimants. Those absent claimants should be required to contribute, in proportion to the benefits they receive or will receive, to the cost of the litigation, including reasonable attorney's fees allowable by law at the time of the claimants' respective industrial injuries.

//

COPY

DATED this 26 day of December 2002.



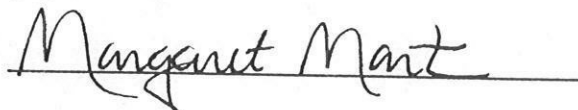
Rex Palmer
ATTORNEYS INC., P.C.
301 W Spruce
Missoula, MT 59802
(406) 728-4514
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of December 2002, a true and correct copy of the foregoing was served upon the following by U.S. mail, hand-delivery, Federal Express, or facsimile:

Ann Clark
State Compensation Ins. Fund
PO Box 4759
Helena, MT 59604-4759
(406) 444-7724
ATTORNEY FOR RESPONDENT

{X} U.S. Mail
{ } Hand Delivered
{ } Federal Express
{X} Facsimile



2003 Montana Legislature

[About Bill -- Links](#)

SENATE BILL NO. 360
INTRODUCED BY F. THOMAS

AN ACT REQUIRING THE STATE FUND TO INCLUDE A PROVISION IN EVERY POLICY OF INSURANCE ISSUED THAT INCORPORATES A RESTRICTION ON THE USE AND TRANSFER OF MONEY COLLECTED BY THE STATE FUND; PROHIBITING THE LEGISLATURE FROM TRANSFERRING THE ASSETS OF THE STATE FUND FOR CLAIMS FOR INJURIES OCCURRING ON OR AFTER JULY 1, 1990, TO OTHER FUNDS OR FOR OTHER PROGRAMS; AMENDING SECTIONS 39-71-2316, 39-71-2320, 39-71-2322, AND 39-71-2327, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 39-71-2316, MCA, is amended to read:

"39-71-2316. Powers of state fund. (1) For the purposes of carrying out its functions, the state fund may:

~~(1)~~(a) insure any employer for workers' compensation and occupational disease liability as the coverage is required by the laws of this state and, as part of the coverage, provide related employers' liability insurance upon approval of the board;

~~(2)~~(b) sue and be sued;

~~(3)~~(c) except as provided in section 21, Chapter 4, Special Laws of May 1990, enter into contracts relating to the administration of the state fund, including claims management, servicing, and payment;

~~(4)~~(d) collect and disburse money received;

~~(5)~~(e) adopt classifications and charge premiums for the classifications so that the state fund will be neither more nor less than self-supporting. Premium rates for classifications may only be adopted and changed using a process, a procedure, formulas, and factors set forth in rules adopted under Title 2, chapter 4, parts 2 through 4.

<http://data.opi.state.mt.us/bills/2003/billhtml/SB0360.htm>



5/2/2003

After the rules have been adopted, the state fund need not follow the rulemaking provisions of Title 2, chapter 4, when changing classifications and premium rates. The contested case rights and provisions of Title 2, chapter 4, do not apply to an employer's classification or premium rate. The state fund is required to belong to a licensed workers' compensation advisory organization or a licensed workers' compensation rating organization under Title 33, chapter 16, part 4, and may use the classifications of employment adopted by the designated workers' compensation advisory organization, as provided in Title 33, chapter 16, part 10, and corresponding rates as a basis for setting its own rates. Except as provided in Title 33, chapter 16, part 10, a workers' compensation advisory organization or a licensed workers' compensation rating organization under Title 33, chapter 16, part 4, or other person may not, without first obtaining the written permission of the employer, use, sell, or distribute an employer's specific payroll or loss information, including but not limited to experience modification factors.

~~(6)~~(f) pay the amounts determined to be due under a policy of insurance issued by the state fund;

~~(7)~~(g) hire personnel;

~~(8)~~(h) declare dividends if there is an excess of assets over liabilities. However, dividends may not be paid until adequate actuarially determined reserves are set aside.

~~(9)~~(i) adopt and implement one or more alternative personal leave plans pursuant to 39-71-2328;

~~(10)~~(j) upon approval of the board, contract with licensed resident insurance producers;

~~(11)~~(k) upon approval of the board, enter into agreements with licensed workers' compensation insurers, insurance associations, or insurance producers to provide workers' compensation coverage in other states to Montana-domiciled employers insured with the state fund;

~~(12)~~(l) upon approval of the board, expend funds for scholarship, educational, or charitable purposes;

~~(13)~~(m) upon approval of the board, including terms and conditions, provide employers coverage under the federal Longshore and Harbor Workers' Compensation Act (33 U.S.C. 901, et seq.), the federal Merchant Marine Act, 1920 (Jones Act, 46 U.S.C. 688), and the federal Employers' Liability Act (45 U.S.C. 51, et seq.);

~~(14)~~(n) perform all functions and exercise all powers of a private insurance carrier that are necessary, appropriate, or convenient for the administration of the state fund.

(2) The state fund shall include a provision in every policy of insurance issued pursuant to this part that incorporates the restriction on the use and transfer of money collected by the state fund as provided for in 39-71-2320."

Section 2. Section 39-71-2320, MCA, is amended to read:

"39-71-2320. Property of state fund -- investment required -- exception. ~~(1) Except as provided in subsection (2), all~~ All premiums and other money paid to the state fund, all property and securities acquired through the use of money belonging to the state fund, and all interest and dividends earned upon money

belonging to the state fund are the sole property of the state fund and must be used exclusively for the operations and obligations of the state fund. The money collected by the state fund for claims for injuries occurring on or after July 1, 1990, may not be used for any other purpose and may not be transferred by the legislature to other funds or used for other programs. However, state fund money must be invested by the board of investments provided for in 2-15-1808, and subject to the investment agreement with the board of investments, the earnings on investments are the sole property of the state fund as provided in this section.

~~—(2) The state fund shall pay to the general fund:~~

~~—(a) \$10 million in the fiscal year ending June 30, 1998; and~~

~~—(b) \$10 million in the fiscal year ending June 30, 1999."~~

Section 3. Section 39-71-2322, MCA, is amended to read:

"39-71-2322. Money in state fund held in trust -- disposition of funds upon repeal of chapter -- exception. ~~Except as provided in 39-71-2320, the~~ The money coming into the state fund must be held in trust for the purpose for which the money was collected. If this chapter is repealed, the money is subject to the disposition provided by the legislature repealing this chapter. In the absence of a legislative provision, distribution must be in accordance with the justice of the matter, due regard being given to obligations of compensation incurred and existing."

Section 4. Section 39-71-2327, MCA, is amended to read:

"39-71-2327. Earnings of state fund to be credited to fund -- improper use a felony -- exception. ~~Except as provided in 39-71-2320, all~~ All earnings made by the state fund by reason of interest paid for the deposit of funds or otherwise must be credited to and become a part of the fund, and the making of profit, either directly or indirectly, by any person out of the use of the fund is a felony. A person convicted of an offense under this section is punishable by imprisonment in the state prison for a term not to exceed 2 years or a fine of not more than \$5,000, or both."

Section 5. Effective date. [This act] is effective on passage and approval.

Section 6. Applicability. [This act] applies to policies issued or renewed by the state fund on or after [the effective date of this act].

- END -

Latest Version of SB 360 (SB0360.ENR)

Processed for the Web on April 29, 2003 (3:58pm)

New language in a bill appears underlined, deleted material appears stricken.

Sponsor names are handwritten on introduced bills, hence do not appear on the bill until it is reprinted.

See the [status of this bill](#) for the bill's primary sponsor.

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Prepared by Montana Legislative Services

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