IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 75

WCC No. 2000-0222
WCC No. 2003-0771

ROBERT FLYNN

and

CARL MILLER, Individually and on Behalf of Others Similarly Situated

Petitioners

vs.

MONTANA STATE FUND

Respondent/Insurer

and

LIBERTY NORTHWEST INSURANCE CORPORATION

Intervenor.

DECISION AND ORDER REGARDING DISCLOSURE OF CLAIMANT INFORMATION

Summary: Following the Supreme Court decision in *Flynn v. State Comp. Ins. Fund,* 2002 MT 279, 312 Mont. 410, 60 P.3d 397, the petitioner's attorney sought common fund fees with respect to other, nonparty claimants benefitted by the decision. The request was consolidated with a second, parallel case brought by the attorney. Ultimately, the parties entered into a settlement agreement, approved by the Court, which provided that the respondent insurer (State Compensation Insurance Fund) will identify other claimants entitled to *Flynn* benefits and pay the benefits due them. The agreement also concedes petitioner's attorney's entitlement to common fund attorney fees.

The settlement agreement provides for disclosure of information regarding nonparty claimants who may be entitled to *Flynn* benefits. The Workers' Compensation Court approved the disclosure subject to strict confidentiality rules precluding further dissemination of the information to others. After approving the agreement, the Supreme Court decided *St. James Community Hosp., Inc. v. Dist. Court of Eighth Jud. Dist.*, 2003 MT 261, 317 Mont. 419, 77 P.3d 534, which held that the constitutional right of privacy, as well as statutes, precluded disclosure of the identity and other information of patients of a hospital which had overcharged its patients and others for copies of medical records. The parties in this case now seek direction concerning what can and cannot be disclosed in this case.

Held: The right of privacy extends only to information as to which an individual has a reasonable expectation of privacy as measured by societal expectations. *Pengra v. State,* 2000 MT 291, 302 Mont. 276, 14 P.3d 499; *Jefferson County v. Montana Standard*, 2003 MT 304, 318 Mont. 173, 79 P.3d 805. Claimants in workers' compensation cases do not have a reasonable expectation of privacy with respect to their identities and information pertaining to their entitlement to benefits, at least with respect to attorneys who have established their entitlement to further benefits under the common fund doctrine and where the attorneys are prohibited from disseminating information regarding their identities and claims to others.

Topics:

> **Constitutions, Statutes, Rules, and Regulations: Montana State Constitution: Art. II, section 10.** The right of privacy extends only to information as to which an individual has a reasonable expectation of privacy as measured by societal expectations. *Pengra v. State,* 2000 MT 291, 302 Mont. 276, 14 P.3d 499; *Jefferson County v. Montana Standard*, 2003 MT 304, 318 Mont. 173, 79 P.3d 805. Claimants in workers' compensation cases do not have a reasonable expectation of privacy with respect to their identities and information pertaining to their entitlement to benefits, at least with respect to attorneys who have established their entitlement to further benefits under the common fund doctrine and where the attorneys are prohibited from disseminating information regarding their identities and claims to others.

¶1 Prior proceedings in this case established the right of the petitioner, Robert Flynn (claimant), to a credit against the social security offset[1] taken with respect to his workers' compensation benefits. The credit is for one-half of the attorney fees and costs he

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[1]The social security offset provisions are currently found in §§ 39-71-701(5) and -702(7), MCA (2003).

expended in securing the social security benefits. *Flynn v. State Comp. Ins. Fund,* 2002 MT 279, 312 Mont. 410, 60 P.3d 397.

¶2 Following that determination, the claimant sought common fund attorney fees with respect to other, nonparty claimants who will benefit from the main decision. This case was consolidated with a parallel action brought by Flynn's attorney – *Miller v. Montana State Fund*, WCC No. 2003-0771.

¶3 The Montana State Fund (State Fund) contested the claimant's request for common fund certification. The issues raised by the State Fund were determined by order of this Court on August 5, 2003, which is reported at *Flynn v. State Comp. Ins. Fund,* 2003 MTWCC 55. In that decision this Court held that the Supreme Court's decision found at 2002 MT 279 applied retroactively and that Flynn's attorney is entitled to common fund fees with respect to other claimants who benefit from the precedent established in that decision.

¶4 The State Fund appealed my common fund decision. However, the parties thereafter entered into a mutually agreeable settlement which resulted in the dismissal of the appeal. The terms of the settlement provide that the State Fund will identify and indemnify other similarly situated claimants. Under the agreement, the claimants' attorney is entitled to claim common fund attorney fees with respect to the additional benefits and credits due the nonparty claimants. The agreement was reviewed, approved, and adopted by this Court.

¶5 Pursuant to a strict confidentiality agreement[2] approved by this Court, the State Fund has provided the claimants' counsel with the names of the *Flynn* claimants it has identified. Claimants' counsel is under a strict obligation precluding him from disclosing the shared information to others. His role, as contemplated by the parties and this Court, is to assist in assuring that claimants entitled to *Flynn* benefits are in fact identified and that the additional benefits and/or credits due them are properly calculated and paid.

¶6 Following this Court's approval of the agreement regarding the sharing of information, the Montana Supreme Court decided *St. James Community Hosp., Inc. v. Dist. Court of Eighth Jud. Dist.*, 2003 MT 261, 317 Mont. 419, 77 P.3d 534. In that case, the Court held that medical providers are constitutionally and statutorily prohibited from disclosing medical information, *including the identity of patients,* to a plaintiff's counsel in a class action even though the class action potentially benefitted the very patients whose identity was protected. *Id.*, ¶¶ 8, 9. In light of the decision in *St. James,* the parties now seek guidance regarding further disclosure of information.

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[2](*Confidentiality Agreement,* WCC No. 2000-0222 (approved September 24, 2003).)

Discussion

A. Background

¶7 Where a court decision establishes the right of other nonparty claimants to additional benefits, a common fund is created. *Murer v. State Comp. Mut. Ins. Fund,* 283 Mont. 210, 222-23, 942 P.2d 69, 76-77 (1997); *Rausch v. State Comp. Ins. Fund*, 2002 MT 203, ¶¶ 45-48, 311 Mont. 210, 54 P.3d 25. The common fund extends to all claimants benefitted by the decision irrespective of which insurer (or self-insured) is liable for the benefits. *Ruhd v. Liberty Northwest Ins. Corp.*, 2004 MT 236, ¶ 25 (*Ruhd II.*)[3].

¶8 In *Ruhd II,* the Supreme Court specifically directed the Workers' Compensation Court to "supervise enforcement of the common fund pursuant to *Rausch*,[4] and all court-approved agreements stemming from it, from all insurers involved." 2004 MT 236, ¶ 25 (footnote added). Thus, this Court has a duty to assure that claimants benefitted by court decisions are identified and paid the benefits owing them, and to then determine the amount of attorney fees due the prevailing claimants' attorneys.

¶9 While the common fund doctrine is predicated on the right of the attorneys bringing the principal litigation to collect attorney fees from nonparties who benefit from the litigation, *Murer,* 283 Mont. at 222, 942 P.2d at 76, and *Rausch*, 2002 MT 203, ¶ 45, the rationale for the doctrine is the proverbial tail that wags the dog. Before attorney fees can be determined, the claimants who are due additional benefits must be identified and the amounts due them must be calculated. Such identification and calculation is **the** major undertaking in any common fund case. In contrast, the calculation of attorney fees is simply a matter of determining a reasonable and appropriate percentage or amount to be paid the successful attorneys.

¶10 This Court has extensive experience in supervising the enforcement of common fund rights. It has supervised common fund proceedings following *Murer v. State Comp. Mut. Ins. Fund, supra.*; *Broeker v. State Comp. Mutual Ins. Fund*, 275 Mont. 502, 914 P.2d 967 (1996); *Rausch v. State Comp. Ins. Fund, supra.*; and in this case. The *Murer* case involved 3,200 claimants and is still not closed, although the case is getting very near to finalization.

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[3]*Ruhd II* is the second of two *Ruhd* cases. In the first case, the Supreme Court applied *Rausch v. State Comp. Ins. Fund,* 2002 MT 203, 311 Mont. 210, 54 P.3d 25.

[4]*Rausch v. State Comp. Ins. Fund,* 2002 MT 203, 311 Mont. 210, 54 P.3d 25.

¶11 Based on my experience in common fund cases, I respectfully disagree with the Supreme Court's statement in *Ruhd* that "[e]forcement in a specific case is not a necessary element of the common fund doctrine." *Ruhd,* ¶ 23. Lacking enforcement, i.e., identification of benefitted claimants and the amounts of additional benefits due them, the beneficiaries of the common fund cannot be identified and attorney fees cannot be determined.

¶12 In each of the common fund cases I have supervised, including this one, I have enlisted the parties and their counsel in a cooperative endeavor to identify benefitted claimants, calculate the additional benefits due them, pay the additional benefits, and ultimately determine the attorney fees due claimants' counsel. By acting in concert, we have avoided time-consuming, costly discovery, as well as further, contentious litigation. We have spent hours around conference tables identifying the most efficient and effective means for identifying affected claimants and for calculating the benefits due them. The process in each of the cases has been efficient and effective. On the other hand, the time and effort spent by claimants' counsel in each of these cases has far exceeded the time and effort they spent in establishing the precedent giving rise to the common fund.

¶13 In *Ruhd,* the Supreme Court noted that there are "*only* 165 permanently totally disabled claimants" affected by the decision. *Ruhd*, ¶ 24 (italics added). Such a small number of claimants may suggest that enforcement of the common fund doctrine will be simple and straightforward. However, information furnished to this Court in a post-remand conference held on October 5, 2004, with counsel and officials of the Department of Labor and Industry (DLI) indicates that more than 165 claimants are affected by the *Ruhd* decision. Additional, difficult work needs to be done to identify **all** of the affected claimants. I have attached a copy of my minute entry of the conference. A copy of the minute entry is also posted on the Court's WEB site, http://wcc.dli.state.mt.us. A copy of the transcript of the conference is also posted on the Court's WEB site and with this reference is made a part of the record in this case.

¶14 The information furnished at the conference illustrates the difficulty and time-consuming nature in enforcing the common fund doctrine. The DLI's initial data identified 377 permanently totally disabled (PTD) claimants. One hundred sixty-seven (167) are insured by the State Fund. That leaves another 210 claimants who are insured by 57 insurers, *excluding* the Uninsured Employers' Fund and the Western Guaranty Insurance Fund.[5] Moreover, the DLI's data is incomplete. It covers only PTD claimants who filed

[5]The Western Guaranty Fund covers claimants of insolvent insurers.

claims after March 1995 or who were paid benefits after April of 1995.[6] The decisions in *Ruhd* and *Rausch* affect claimants injured after July 1, 1991, thus there is a period of four years for which there is incomplete data.

¶15 Moreover, the Supreme Court has under advisement an appeal in *Rausch* in which the petitioners contend that all PTD claimants injured since **1987** are encompassed in the decision. The original decision in *Rausch* applied only to claimants injured on or after July 1, 1991. Depending on the outcome of the appeal, this Court may have to expand the proceeding to encompass PTD claimants injured between 1987 and 1991, thus requiring the additional mining of data.

¶16 Additional data mining will require either compelling each Montana insurer and self-insured (there are over 600 of them) to identify other PTD claimants and/or resorting to an old database maintained by the Division of Workers' Compensation (Division) prior to its demise in 1989. 1989 Mont. Laws, ch. 613. The Division database is commonly referred to as the DB02 database. For a period of time after the Division was dissolved, the State Fund maintained the database.

¶17 In *Rausch,* the Court was also alerted to the fact that some PTD claimants may in fact be improperly classified as temporarily totally disabled. If the common fund is extended to encompass such improperly classified claimants, the data mining will have to expanded.[7]

¶18 Finally, in *Ruhd* and *Rausch* the Court will have to hale at least fifty-seven insurers before the Court to determine whether they have paid the affected claimants the impairment awards required by law. It will then have to compel payment of those impairment awards not already paid.

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[6]*See* October 18, 2004 letter of Diana Ferriter, Bureau Chief of the Workers' Compensation Assistance Bureau, Department of Labor and Industry, a copy of which is attached to this Decision and Order. The letter was in follow-up to the October 5, 2004 conference in *Ruhd* and *Rausch.*

[7]In *Rausch*, the State Fund agreed to attempt to identify temporary total disability (TTD) claimants who should be reclassified as PTD. It did so by running a computer query identifying claimants who had been receiving TTD benefits for one year or more. It then reviewed the files for those claimants and identified thirty-five claimants who should have been classified as PTD. While I question whether the mandate in *Rausch* and *Ruhd* can be expanded to encompass misclassified claimants, I also note that identification of such claimants in conjunction with the *Rausch-Ruhd* proceedings will avoid further litigation later on. Avoidance of further litigation was one of the considerations expressed by the Supreme Court in its *Ruhd II* decision.

¶19 *Ruhd* and *Rausch* are not the only common fund cases pending in this Court. This Court has previously held that the common fund doctrine applies to *Schmill v. Liberty Northwest Ins. Corp.*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290 (striking down the apportionment provision of the Occupational Disease Act), and *Stavenjord v. Montana State Fund,* 2003 MT 67, 314 Mont. 466, 67 P.3d 229. *Schmill v. Liberty Northwest Ins. Corp.*, 2004 MTWCC 47; *Stavenjord v. Montana State Fund,* 2004 MTWCC 62. Those cases involve thousands of claimants – the State Fund alone has identified 3,500 potentially affected claimants. *Stavenjord,* 2004 MTWCC 62, ¶ 25.

¶20 I have set out the above information to illustrate the nature of the tasks involved in enforcing the common fund doctrine. The information provides the background and setting for the *St. James* issue.

B. The *St. James* Issue

¶21 To facilitate the enforcement of the common fund doctrine, in each of the common fund cases I have handled to date, I have authorized insurers to provide the claimants' counsel with information and documents identifying affected claimants and showing the basis for calculating the additional benefits due them. The dissemination of the information has been subject to strict confidentiality agreements. Claimants' attorneys in each of the cases have been integrally involved in the enforcement process and have made major contributions to the process. Indeed, their assistance has been essential to the process. And, they have honored the confidentiality requirements.

¶22 *St. James*, however, raises questions as to whether I can authorize insurers to share information with claimants' counsel. Both parties in the instant case agree these questions must be addressed before proceeding further with the implementation of their agreement.

¶23 *St. James* was a class action seeking "monetary damages predicated upon excessive fees allegedly charged for copies of patients' medical records from 1993 to 1999." 2003 MT 261, ¶ 2. The District Court held that the defendant medical providers had overcharged patients and their representatives, i.e., attorneys, for copies of medical records. It certified a class consisting of patients and others who had obtained copies of records and gave notice to the potential class members, apparently without disclosing individual identities. The District Court gave class members an option to "opt-out" of the class; members who failed to expressly "opt-out" were automatically included in the class.

¶24 Following the class determination and notice to class members, plaintiffs filed discovery requests seeking information as to the identity of patients within the class and the charges they had incurred for copies of records. The District Court ordered the health care providers to provide the information. The providers then sought a writ of supervisory control quashing that order.

¶25 In considering the writ, the Supreme Court noted that all patients who had not expressly elected to "opt-out" of the class had in theory become clients of the plaintiffs' attorneys but that "[i]n essence, plaintiffs' counsel are seeking to identify their own clients . . . [to enable them] to compute damages and notify the class members." 2003 MT 261, ¶ 6. The Court went on to hold that the provisions of the Montana Health Care Information Act and, "[m]ore importantly, Article II, Section 10" of the Montana Constitution protected the patients from the non-consensual release of information identifying them. *Id.*, ¶ 8. Finally, the Court held that failure of patients to reply to an opt-out notice did not constitute consent to release their names and other information to plaintiffs' attorneys.

¶26 The Court in *St. James* recognized that its decision created a dilemma as to how to enforce the constitutional and statutory privacy rights of the class members while advancing their rights to damages for copying overcharges. It resolved the dilemma by requiring the District Court to provide an "opt-in" notification. An "opt-in" notification assured that the class members expressly consented to the release of identifying information to plaintiffs' attorneys.

¶27 In the present case, the State Fund has expressed concern that *St. James* precludes the release of claimant information to the claimants' attorney. It has suggested that the Court follow an opt-in procedure similar to that required in *St. James*.

¶28 An opt-in procedure will complicate and delay identification and payment of claimants entitled to *Flynn* benefits. It may also result in the imposition of additional administrative burdens on the Court, which would be tasked with undertaking its own independent inquiry with respect to benefits due those who fail to expressly opt-in. I therefore concluded that I will adopt an opt-in procedure only if it is legally required by *St. James*.

¶29 The decision in *St. James* has both constitutional and statutory underpinnings. The constitutional foundation is Article II, section 10 of the Montana Constitution. The statutory foundation is the Uniform Health Care Information Act, § 50-16-501, *et seq.*, MCA (2003).

¶30 Article II, section 10 of the Montana Constitution provides: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." The section neither defines what is encompassed in the right of privacy or what constitutes a compelling state interest. A review of Montana Supreme Court decisions arising under the section indicates that most cases have involved searches and seizures in criminal cases.

¶31 The seminal federal case concerning the right to privacy is *Katz v. United States,* 389 U.S. 347, 353 (1967), which, like most Montana privacy cases, involved a search and seizure issue. In that case, the FBI used a recording device on the outside of a telephone booth to record the defendant's telephone conversation. The FBI urged that its recording

of the conversation did not constitute a search and seizure because its electronic surveillance did not involve a physical intrusion into the phone booth. The Supreme Court rejected the argument and held that the test as to whether a search had occurred was whether the defendant had a justifiable expectation of privacy regarding his conversations.

¶32 Although not discussed in *St. James,* Montana has adopted the "expectation of privacy" test as the benchmark for determining whether the privacy protections under Article II, section 10 apply. In *Pengra v. State,* 2000 MT 291, 302 Mont. 276, 14 P.3d 499, it expressly held that the constitutional right of privacy guaranteed by Article II, section 10 of the Montana Constitution extends only to matters involving a "reasonable expectation of privacy." Moreover, the expectation of privacy must not only be reasonable but it must be reasonable **in light of societal expectations**. *Id.,* ¶ 15.

¶33 *Pengra* involved an action by the husband and children of a wife and mother who had been brutally raped and murdered. The complaint alleged that negligence of the State of Montana contributed to the rape and murder. The Pengras and the State ultimately settled but the Pengras sought to seal the settlement agreement, arguing that disclosure of the settlement violated their rights of privacy. The District Court refused the request and on appeal the Supreme Court affirmed. In its analysis of the privacy claim, the Supreme Court held that in light of the prosecution of their legal action against the State, the Pengras could not have had a subjective expectation of privacy concerning any resolution of the case. 2000 MT 291, ¶ 18.[8] Second, the Court reasoned that even if they had a subjective expectation of privacy, such expectation was unreasonable:

> As to whether society is willing to recognize the Pengras' privacy expectation as to the amount of their tort settlement with the State, the

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[8]The Court said:

> ¶ 18 The claim that the Pengras have a subjective expectation of privacy in the settlement amount is, moreover, discredited by the surrounding circumstances of this case. Pengra took no steps to keep private his lawsuit against the State, and in fact requested a jury trial in the District Court. Pengra's counsel admitted at oral argument before this Court that if the settlement amount had not been sufficient, his client would have gone forward with the public jury trial of this case. The District Court opined that any harm to the Pengras by publicity had already occurred and that there was no basis for a conclusion that disclosure of the amount of the settlement would cause greater harm to the Pengras than had already been caused by the previous disclosures of the facts of the crime. We agree.

> enactment of the disclosure requirement in § 2-9-303, MCA [requiring public disclosure of settlement agreements involving the State], indicates that it is not.

Id., ¶ 19.

¶34 In *Jefferson County v. Montana Standard*, 2003 MT 304, 318 Mont. 173, 79 P.3d 805, a case decided **after** *St. James*,[9] the Montana Supreme Court reiterated the twin tests laid out in *Pengra*, holding:

> In order to determine if the individual has a protected privacy interest under Article II, Section 10, of the Montana Constitution, it is appropriate to apply a two-part test. First, one considers whether the individual has a subjective or actual expectation of privacy. Secondly, one determines whether society is willing to recognize that expectation as reasonable.

2003 MT 304, ¶ 15 (citations omitted). In that case, the Court held that a public official – a county commissioner – does not have a reasonable expectation of privacy with respect to arrest information pertaining to driving under the influence of alcohol, at least where the official subsequently pled guilty to the charge. The Court noted that public officials should expect release of information pertaining to their ability to make good judgments in their official capacity. It noted that a willing violation of the law is relevant to the ability of a county commissioner to perform her duties.

¶35 In *St. James, supra.,* the Supreme Court did not analyze the expectation of privacy. However, the confidentiality of medical information has long been protected under rules of evidence and by statute, hence the reasonable expectation of privacy concerning that information is well established and needs no explication. *State v. Nelson*, 283 Mont. 231, 941 P.2d 441 (1997), cited in *St. James*, ¶ 8, as authority for the Court's statement that Article II, section 10 of the Montana Constitution "encompasses confidential 'informational privacy,'" similarly involved personal medical information.

¶36 As should be evident from the foregoing discussion, it would be a mistake to read *St. James* as holding that the constitutional right of privacy protects any and all information concerning the identification of potential class members and their entitlement to class benefits. As the decision in *Pengra* shows, not all claims of privacy are equal. Accordingly, I must consider the privacy interests at issue in **this *case***.

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[9]*St. James*, 2003 MT 261, was decided on September 25, 2003. *Jefferson County*, 2003 MT 304, was decided November 6, 2003.

¶37 The question I must answer in this case is whether claimants who may be entitled to *Flynn* benefits have a reasonable expectation of privacy with respect to their identities and their entitlement to *Flynn* benefits. The reasonableness of any such expectation must in turn be measured by societal expectations.

¶38 In beginning my analysis, I note that workers' compensation benefits are provided by statute; there is no common law entitlement to such benefits. The Montana legislature has provided a detailed statutory scheme regulating the entitlement to benefits and how they are secured. A claimant who seeks benefits does so subject to those statutes.

¶39 Statutes governing workers' compensation have numerous provisions in derogation of any "reasonable" claim of privacy in the context of this case. Initially, a claimant is required to report any industrial injury to his or her employer. § 39-71-603, MCA (2003). Thus, the claimant's identity is immediately disclosed to the employer, who is not under any proscription as to further disclosure of the information.

¶40 A claimant is further required to file a written claim for compensation with the employer's workers' compensation insurer, § 39-71-601, MCA (2003), and disclose information necessary to the adjustment of his or her claim. Moreover, a claimant must release pertinent medical information regarding the injury to the insurer. Section 39-71-604, MCA (2003), provides in relevant part:

> **Application for compensation – disclosure and communication without prior notice of health care information.** (1) If a worker is entitled to benefits under this chapter, the worker shall file with the insurer all reasonable information needed by the insurer to determine compensability. It is the duty of the worker's attending physician to lend all necessary assistance in making application for compensation and proof of other matters that may be required by the rules of the department without charge to the worker. The filing of forms or other documentation by the attending physician does not constitute a claim for compensation.
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> (2) A signed claim for workers' compensation or occupational disease benefits authorizes disclosure to the workers' compensation insurer, as defined in 39-71-116, or to the agent of a workers' compensation insurer by the health care provider. The disclosure authorized by this subsection authorizes the physician or other health care provider to disclose or release only information relevant to the claimant's condition. Health care information relevant to the claimant's condition may include past history of the complaints of or the treatment of a condition that is similar to that presented in the claim, conditions for which benefits are subsequently claimed, other conditions related to the same body part, or conditions that may affect recovery. A release of information related to workers' compensation must be

consistent with the provisions of this subsection. Authorization under this section is effective only as long as the claimant is claiming benefits. This subsection may not be construed to restrict the scope of discovery or disclosure of health care information, as allowed under the Montana Rules of Civil Procedure, by the workers' compensation court or as otherwise provided by law.

(3) A signed claim for workers' compensation or occupational disease benefits or a signed release authorizes a workers' compensation insurer, as defined in 39-71-116, or the agent of the workers' compensation insurer to communicate with a physician or other health care provider about relevant health care information, as authorized in subsection (2), by telephone, letter, electronic communication, in person, or by other means, about a claim and to receive from the physician or health care provider the information authorized in subsection (2) without prior notice to the injured employee, to the employee's authorized representative or agent, or in the case of death, to the employee's personal representative or any person with a right or claim to compensation for the injury or death.

¶41 The Uniform Health Care Information Act, which was cited in *St. James,* also contains a provision authorizing disclosure of medical information necessary to the adjustment of claims. Section 50-16-527, MCA (2003), provides:

Patient authorization – retention – effective period – exception – communication without prior notice for workers' compensation purposes. (1) A health care provider shall retain each authorization or revocation in conjunction with any health care information from which disclosures are made.

(2) Except for authorizations to provide information to third-party health care payors, an authorization may not permit the release of health care information relating to health care that the patient receives more than 6 months after the authorization was signed.

(3) Health care information disclosed under an authorization is otherwise subject to this part. An authorization becomes invalid after the expiration date contained in the authorization, which may not exceed 30 months. If the authorization does not contain an expiration date, it expires 6 months after it is signed.

(4) Notwithstanding subsections (2) and (3), a signed claim for workers' compensation or occupational disease benefits authorizes disclosure to the workers' compensation insurer, as defined in 39-71-116, or to the agent of a workers' compensation insurer by the health care provider. The disclosure authorized by this subsection authorizes the physician or other health care provider to disclose or release only information relevant to

the claimant's condition. Health care information relevant to the claimant's condition may include past history of the complaints of or the treatment of a condition that is similar to that presented in the claim, conditions for which benefits are subsequently claimed, other conditions related to the same body part, or conditions that may affect recovery. A release of information related to workers' compensation must be consistent with the provisions of this subsection. Authorization under this section is effective only as long as the claimant is claiming benefits. **This subsection may not be construed to restrict the scope of discovery or disclosure of health care information as allowed** under the Montana Rules of Civil Procedure, **by the workers' compensation court,** or as otherwise provided by law.

(5) A signed claim for workers' compensation or occupational disease benefits or a signed release authorizes a workers' compensation insurer, as defined in 39-71-116, or the agent of the workers' compensation insurer to communicate with a physician or other health care provider about relevant health care information, as authorized in subsection (4), by telephone, letter, electronic communication, in person, or by other means, about a claim and to receive from the physician or health care provider the information authorized in subsection (4) without prior notice to the injured employee, to the employee's authorized representative or agent, or in the case of death, to the employee's personal representative or any person with a right or claim to compensation for the injury or death.

(Emphasis added.) Under subsections (4) and (5), filing and pursuit of a workers' compensation claim constitutes consent to the release of pertinent medical information to the insurer **and** its agents.[10] Importantly, subsection (4) also provides the Workers' Compensation Court with authority to order disclosure of additional medical information not specifically authorized in that subsection. That authority is, of course, subject to a claimant's constitutional expectation of privacy concerning the information, hence it is not unlimited.

¶42 In addition to the foregoing disclosure requirements, section 39-71-225, MCA (2003), requires insurers to report basic claim information to the Montana Department of Labor and Industry. In turn the DLI is expressly authorized to release "current and prior claim information to law enforcement agencies for purposes of fraud investigation or prosecution." § 39-71-225(2)(c), MCA (2003). It is also authorized to release limited information, including the identity of the claimant and essential facts regarding the claim, to other insurers. Section 39-71-225(2)(b), MCA (2003), provides:

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[10]Agents may include, for example, medical case managers and vocational consultants.

(2) Data collected must be used to provide:

. . .

(b) current and prior claim information to any insurer that is at risk on a claim, or that is alleged to be at risk in any administrative or judicial proceeding, to determine claims liability or for fraud investigation. The department may release information only upon written request by the insurer and may disclose only the claimant's name, claimant's identification number, prior claim number, date of injury, body part involved, and name and address of the insurer and claim adjuster on each claim filed. Information obtained by an insurer pursuant to this section must remain confidential and may not be disclosed to a third party except to the extent necessary for determining claim liability or for fraud investigation . . . .

¶43 Section 39-71-225, MCA (2003), does not authorize unfettered release of information **to the general public**. Moreover the DLI's authority to publically disseminate information concerning claimants and claims is subject to the specific limitations of section 39-71-224, MCA (2003), which provides:

Records exempt from disclosure – separation of exempt material from nonexempt. (1) In assuring that the right of individual privacy so essential to the well-being of a free society shall not be infringed without the showing of a compelling state interest, the following public records of the department are exempt from disclosure:

(a) information of a personal nature such as personal, medical, or similar information if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

(b) any public records or information, the disclosure of which is prohibited by federal law or regulations.

(2) If any public record of the department contains material which is not exempt under subsection (1) of this section, as well as material which is exempt from disclosure, the department shall separate the exempt and nonexempt and make the nonexempt material available for examination.

¶44 Subsection (a) of 39-71-224(1), MCA (2003), does indicate that *personal* information may not be disseminated to the general public. In determining what constitutes "personal information" subject to the protection, I note that the term "personal information" is in grammatical series with "medical" and "similar" information. That series indicates that the personal information protected is information as to which individuals have an expectation of privacy similar to their expectation regarding medical information. Certainly, personal

information such as financial information regarding the claimant's financial affairs (other than benefits), or information relating to the claimant's IQ and proficiency levels in mathematics and reading, is personal information which cannot be publically disseminated.

¶45 But subsection (a) is limited to the dissemination of information to the general public. As clearly demonstrated by the fact that the section expressly concerns information *already gathered* by the DLI, it does not create an absolute expectation of privacy. Thus, while claimants may have a reasonable expectation that personal information will not be disseminated to the general public, they do not have a similar expectation with respect to dissemination of information to the DLI and other direct players in the workers' compensation system.

¶46 In *Pengra,* the Supreme Court relied on Montana statutes in determining whether the plaintiffs' subjective expectation of privacy was reasonable in light of societal expectations:

> As to whether society is willing to recognize the Pengras' privacy expectation as to the amount of their tort settlement with the State, the enactment of the disclosure requirement in § 2-9-303, MCA, indicates that it is not. The reasons on the other side of the balance-the merits of public disclosure-explain that unwillingness.

Pengra, 2000 MT 291, ¶ 19. Section 2-9-303, MCA, upon which the Court's determination rested, required disclosure of the terms of settlement in any case involving the State of Montana.[11] The workers' compensation statutes provide for more limited disclosure but

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[11]Section 2-9-303, MCA (2003), presently provides:

> **Compromise or settlement of claim against state.** (1) The department of administration may compromise and settle any claim allowed by parts 1 through 3 of this chapter, subject to the terms of insurance, if any. A settlement from the self-insurance reserve fund or deductible reserve fund exceeding $10,000 must be approved by the district court of the first judicial district except when suit has been filed in another judicial district, in which case the presiding judge shall approve the compromise settlement.
>
> (2) All terms, conditions, and details of the governmental portion of a compromise or settlement agreement entered into or approved pursuant to subsection (1) are public records available for public inspection unless a right of individual privacy clearly exceeds the merits of public disclosure.

show that claimants do not have a reasonable expectation of *absolute* privacy with regard to their identities and information regarding their claims and benefits.

¶47 Any expectation of privacy is further diminished by the fact that benefits payable to claimants are statutory entitlements, not mere damages. Insurers are affirmatively required to pay the benefits to which claimants are legally entitled, including those benefits encompassed in any common fund. *See Murer*, 283 Mont. at 223 ("[C]laimants established a vested right on behalf of the absent claimants to directly receive immediate monetary payments of past due benefits . . . ."). Moreover, under the common fund doctrine, which is well entrenched, attorneys establishing the right to the benefits are entitled to attorney fees out of the benefits. Unlike class actions, there is no "opt-out" available to claimants.

¶48 *Ruhd* expressly requires this Court to "supervise enforcement of the common fund," 2004 MT 236, ¶ 25, a directive that encompasses identifying benefitted claimants and ensuring they are paid the common fund benefits to which they are entitled. As previously noted, section 50-16-527(4), MCA (2003), acknowledges the authority of the Workers' Compensation Court to order disclosure of information where appropriate. As I read this provision, the Court may authorize dissemination of information necessary to its proceedings, including the proceedings to enforce common fund benefits and attorney fees. Thus, claimants in workers' compensation cases can reasonably expect that information regarding their entitlement to common fund benefits may be disclosed to common fund attorneys in conjunction with any common fund proceeding, so long as that information is protected from further, public disclosure.

¶49 I conclude that in common fund cases, claimants do not have a reasonable expectation of privacy with respect to the furnishing of information concerning their identities and benefit entitlement, including medical information relevant to benefits, to the attorneys who established their common fund entitlement, at least under the strict confidentiality provisions imposed by the Court on those attorneys. I further note that it is this Court's view that claimants' attorneys in common fund cases are assisting the Court in enforcing the common fund and are therefore acting as officers of the Court.

¶50 I therefore adhere to my prior authorization for the State Fund to provide the claimants' attorney with the names, addresses, telephone numbers, and other identifying information, including social security numbers, of all claimants who may be entitled to *Flynn* benefits and with all other information and documentation which will assist the claimants'

The language regarding the weighing of the "right of individual privacy" was added in 2001 (2001 Mont. Laws, ch. 172, § 2), after the *Pengra* decision.

attorney in analyzing those claimants' entitlement to *Flynn* benefits and in verifying what additional benefits or credits are due. The claims information and documents which may be furnished may include, but are not limited to:

- records of total disability payments;
- correspondence and documents from the Social Security Administration, including social security determinations and adjudications, and the medical information[12] within those determinations;
- notes of adjusters' conversations with the Social Security Administration;
- other correspondence and adjusters' notes concerning the social security offset;
- records and correspondence pertaining to any overpayments to the claimants so that it can be determined whether *Flynn* benefits will merely be a credit against the overpayments or result in the payment of additional benefits; and
- documents and other information showing that the claimants were represented in social security proceedings.

If there is any doubt as to the release of particular records, the parties may seek further guidance from the Court.

¶51 In light of the broad language in *St. James, supra.,* there are legitimate issues regarding this Court's authority to authorize release of information to common fund counsel. The issues will recur in other common fund cases. Since the affected common fund claimants are not parties to these common fund actions, insurers are the only parties in a position to protect the privacy rights of the nonparty claimants. Under these circumstances, even if it agrees with my determination in this Order, the State Fund has

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[12]Medical information and records are often an integral part of determining the claimant's entitlement to benefits. With respect to the social security offset, medical information in social security determinations may indicate whether the social security disability benefits were awarded wholly due to a workers' compensation injury (in which event the insurer is entitled to the offset) or due in whole or in part to a non-workers' compensation-related condition (in which case the insurer is not entitled to take a social security offset). §§ 39-71-701 and -702, MCA (limiting the offset to social security benefits "payable because of the [workers' compensation] injury").

a duty, on behalf of the affected common fund claimants, to petition the Supreme Court for a writ of supervisory control so the Supreme Court can either confirm my determination or provide me with further guidance in the handling of these cases.

DATED in Helena, Montana, this 5th day of November, 2004.

(SEAL)

JUDGE

c: Mr. Rex L. Palmer
Mr. Bradley J. Luck
Mr. Thomas J. Harrington
Ms. Nancy Butler
Mr. Thomas E. Martello
Mr. Larry W. Jones
Attachments: 10-5-04 Minute Entry and 10-18-04 Ferriter Letter
Submitted: October 5, 2004

WORKERS' COMPENSATION COURT

Hearing No. 3503
Volume XVII

Helena, Montana
October 5, 2004

ALEXIS RAUSCH
CHARLES FISCH
THOMAS FROST

Lon J. Dale
Monte D. Beck
Stephen D. Roberts

vs.

MONTANA STATE FUND

Bradley J. Luck &
Thomas J. Harrington

WCC No. 9907-8274R1
WCC No. 2000-0023R1
WCC No. 2000-0030R1

An in-person conference was held Tuesday, October 5, 2004, at 1:05 p.m., in the Workers' Compensation Court, Helena, Montana. The Honorable Mike McCarter, Judge of the Workers' Compensation Court, presided. Petitioners, Alexis Rausch, Charles Fisch, and Thomas Frost were represented by Mr. Stephen D. Roberts, Mr. Lon J. Dale, and Mr. Monte D. Beck. Respondent was represented by Mr. Bradley J. Luck and Mr. Thomas J. Harrington. Others parties present were Carol Gleed, Diana Ferriter, Mark E. Cadwallader, Carrie L. Garber, Larry W. Jones, and Greg E. Overturf. The court reporter in this matter was Ms. Kim Johnson.

Colloquy was held between all counsel regarding the notice issues. Judge McCarter asked Mr. Beck, Mr. Dale, and Mr. Roberts to draft a proposed letter to send the insurance companies within two weeks. The letter should also be sent to Mr. Jones and Mr. Cadwallader for review and input. Attached to these minutes is a memorandum outlining points made during the conference.

Court adjourned at 2:10 p.m.

MIKE McCARTER
Judge

Ruhd, Fisch, Frost, & Rausch Conference
October 5, 2004 - Helena
Judge McCarter Notes

- DLI statistics regarding PTD claimants is based on its database
  - 377 PTD claimants
  - 167 are SF claims
  - Other insurers = 210
- Limitations on DLI statistics
  - Database started in 1994
  - Since 1994, reports are required every 6 months. Those reports summarize indemnity benefits paid to individual claimants.
  - Prior to 1994, information concerning claims was maintained on a database system known as DBO2. That system was maintained by the old Division of Workers' Compensation. After dissolution of the Division and transfer of its responsibilities to the Department of Labor and Industry, the Montana State Fund assumed responsibility for maintaining the DB02 database.
  - In 1994, when the DLI established its present database regarding claims, it inputted information from the DB02 but only as to "open claims."
  - As a result, the present system may not capture all PT claimants back to 91, or back to 87 for that matter.
  - DBO2 system also limited – required insurers only to report change in indemnity benefits status, but such reporting should capture PT claimants.
- Classification Issues
  - Some insurers continue to pay PTD claimants TTD benefits, so reports may not capture some PTD claimants. (Claimants' attorneys noted that by paying TTD benefits insurers avoid COLA's.)
  - SF reviewed files of claimants who received TT benefits for 1 year or more and identified 35 claimants who should have been properly classified as PTD.
  - Question is whether 1 year is a good cut-off time for such review.
  - I asked SF to go back and review the 35 claims and determine the length of time TT benefits had been paid. Based on that information, we can determine whether a year is a good marker or whether a longer period is more reasonable.
  - I raised question as to whether review of TT classified claimant's is in the scope of my authority on remand. The State Fund agreed to engage in the analysis and I noted that it was a good idea. I noted that if it is not done now, then it will probably have to be done later as some claimant will bring

a class or common fund action alleging that some TTD claimant's should be reclassified as PTD. Why not deal with the problem up-front?

- DBO2 Issues
  - The DBO2 database is no longer on line
  - DLI may be able to obtain and query the database. Diana Ferriter is exploring that possibility.
  - State Fund, which was responsible for the DBO2 database after the legislature dissolved the old Division of Workers' Compensation, may be able to help. Diana and State Fund IT people will consult to determine what is available and what information can be accessed.

- Identifying benefitted claimants
  - I think the consensus was that we should try to identify claimants using DLI and DB02 sources. However, insurers will be requested to provide information identifying PTD claimants.
  - DLI compiled a list of PTD claimants in its database, as well as a list of the 57 insurers that reported one or more PTD claimants. The insurers include self-insureds. The list does not include information regarding claimants of guarantee funds for self-insureds and for Plan II insurers. Department information indicates that there are probably no self-insureds in that guarantee fund; the Western Guarantee Fund, which covers plan II bankrupts, may have PTD claimants. I also questioned whether the UEF may have PTD claimants. We agreed that the Western Guarantee Fund and the UEF should be notified and brought into our proceedings.
  - There was consensus that only the insurers identified by DLI (or later identified by further queries of the DBO2 database), along with the Western Guaranty Fund and the UEF, should be brought into the post-remand proceedings.

- Notice to Insurers
  - Counsel for claimants will draft a proposed notice to the affected insurers circulate it to the other attorneys, then submit it to me for review.

State of Montana

Department of Labor & Industry

Judy Martz, Governor

Employment Relations Division

WC Claims Assistance Bureau
Diana Ferriter, Bureau Chief

October 18, 2004

The Hon. Mike McCarter
Workers' Compensation Court
PO Box 537
Helena, MT 59624-0537

SENT BY E-MAIL AND MAILED HARDCOPY

RE: Jeremy Ruhd v. Liberty Northwest Insurance Corporation
WCC No. 2002-0500

Dear Judge McCarter:

At the in-person conference held on Tuesday, October 5, 2004, I agreed to provide additional information to you and the parties about claim information available from the Department. I have the following information to share with everyone at the conference.

The Department's current database (WCAP) went into production in April, 1995. Injury data was brought over from DB02 to populate WCAP. No benefit payment information was included in the conversion because insurer's reporting requirements changed from an event driven reporting method to a time driven reporting method. The two types of reporting for benefit payments were not compatible.

Earlier this year, we ran an extract of injuries from DB02 so we could locate "old" claim numbers assigned in the DB02 system. The extracted data was put into an Excel spreadsheet and is available. The extract contains the following fields – claimant name, SSN, birth date, accident date, employer name, part of body, claim number assigned in DB02, and the employer's policy number. No benefit payment information was extracted.

DB02 data can still be accessed. That system was archived by the Department of Administration. It could be put back online. The monthly cost for that access is $2,000 per month. In order to get an extract of the data, ERD would need to contract with a software contractor to write a query to pull the specific data needed. This is what we did to get the extract earlier this year. We contracted with Northrop Grumman. The cost for that contract was $80 an hour.

The Uninsured Employers Fund (UEF) claim information was converted from a Lotus spreadsheet to an Access application in 2000. This application tracks the compensation paid to claimants for uninsured claims expenses. The information that is recorded in the UEF application could be gained by a simple query, however, the data not recorded can be gathered from other areas but will take different methods to complete.

There are 484 claimants in the UEF Access database as of 10/12/04.
The UEF Access database tracks the Compensation Type, TTD, PTD, etc, for the payments made to a claimant.
The compensation paid is recorded for individual claimants but numbers could be compiled manually to determine payments paid for more than one year.
This application doesn't record the date of injury, or the First Report of Injury, but we could get that information from WCAP and match it to the records manually.
There are some records in the Lotus spreadsheet with data from the 80's that was not converted but could be researched and compiled manually.

At this time, I have not requested any of the information be compiled either electronically or manually. If you decide this information should be compiled, I will ask staff to begin putting the information together. I am available to answer any questions concerning the information in this letter or other issues or concerns any of the parties have regarding the information the Department can provide for the issues before the Court.

Sincerely,

Diana Ferriter
Bureau Chief

C: Stephen D. Roberts, Esq.
Lon J. Dale, Esq.
Monte D. Beck, Esq.
Bradley J. Luck, Esq.
Thomas Harrington, Esq.
Carrie L. Garber, Esq.
Larry W. Jones, Esq.
Greg E. Overturf, Esq.
Mark E. Cadwallader, Esq.
Carol Gleed