IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 54

WCC No. 9907-8274R1

ALEXIS RAUSCH, et al.

Petitioners

vs.

MONTANA STATE FUND

Respondent/Insurer

and

JEREMY RUHD

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

ORDER ON PAYMENT OF INTERIM ATTORNEYS' FEES

Summary: The Court requested briefing to determine the issue of granting interim attorneys' fees.

Held: Interim attorneys' fees are granted pursuant to the following procedure: (1) the common fund attorneys (CFA) shall communicate with each insurer involved in these proceedings to determine the applicable common fund claimants; (2) the CFA shall then make an assessment as to what is a reasonable fee concerning the work related to the common fund issues on a per-insurer basis; (3) after the CFA has determined what it believes to be reasonable attorneys' fees, the CFA and the specific insurer shall petition this Court for a judicial determination of whether the fees are reasonable; and (4) all

nonparticipating claimants shall be given the opportunity to object to any attorneys' fees assessment.

This Order applies retroactively to claims within the parameters established by this Court's decision in *Flynn v. Montana State Fund*,[1] presently pending on appeal before the Montana Supreme Court.

BACKGROUND

¶ 1 In *Rausch v. State Compensation Ins. Fund,*[2] the Supreme Court held that claimants' common fund attorneys (CFA) are entitled to common fund attorneys' fees for the creation or preservation of a common fund.[3] The Supreme Court then remanded the matter to this Court for determination of reasonable fees.[4] Insofar as this matter pertained to Montana State Fund claimants, this Court then entered an Order awarding fees to the CFA pursuant to the common fund doctrine.[5] After this Order was entered, the Supreme Court decided *Ruhd v. Liberty Northwest Ins. Corp.,*[6] in which it held that "the common fund for attorneys' fees created by *Rausch* includes fees culled from all claimants regardless of insurer."[7]

¶ 2 This Court then requested briefing to determine the issue of granting interim attorneys' fees. Briefs were submitted by the CFA, Liberty Northwest Insurance Corporation (Liberty), counsel representing twenty-nine insurers and employers which will collectively be referred to in this Order as "AIG,"[8] and counsel representing nine insurers

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[1] *Flynn*, 2006 MTWCC 31.

[2] *Rausch*, 2002 MT 203, 311 Mont. 210, 54 P.3d 25.

[3] *Rausch*, 2002 MT 203, ¶ 48.

[4] *Rausch*, 2002 MT 203, ¶ 48.

[5] *Rausch v. Montana State Fund*, 2001 MTWCC 16A-2.

[6] *Ruhd*, 2004 MT 236, 322 Mont. 478, 97 P.3d 561.

[7] *Ruhd*, 2004 MT 236, ¶ 25.

[8] AIG National Insurance Co.; AIU Insurance Company; American General Corp.; American Home Assurance Company; American International Insurance Co.; American International Pacific Insurance Company; American International Specialty Lines Insurance; American General Corp.; American Home Assurance Company; Birmingham Fire Insurance Company; Commerce & Industry Insurance Company; Granite State Insurance Company; Illinois National Insurance Co.; Insurance Company of the State of Pennsylvania; National Union Fire Insurance Company of Pittsburgh, PA; New Hampshire Insurance Company; Affiliated FM Insurance Company; Factory Mutual Insurance Company; FedEx Ground Package System, Inc.; Hartford Accident & Indemnity Co.; Hartford Casualty Insurance Co.; Hartford Fire Insurance Co.; Hartford Insurance Co. of the Midwest; Hartford Underwriters Insurance Co.; Property & Casualty Insurance Co. of Hartford; Sentinel Insurance Company Ltd.; Trumbull Insurance Co.; Twin City Fire Insurance Co.; and

and employers which will collectively be referred to as "ASARCO."[9] The arguments as set forth in the briefs shall each be addressed in turn.

CFA Argument in Favor of Interim Fees

¶ 3 The CFA assert that interim attorneys' fees can be awarded in common fund cases and that it is appropriate to award them in the present case. Toward that end, they cite the case of *Kuhn v. State of Colorado,*[10] as persuasive authority regarding the award of interim attorneys' fees in cases where a common fund has been established. In *Kuhn,* the Colorado Supreme Court noted that justification for interim attorneys' fees lies in the often long lapse of time between the initial filing of a complaint and the final disposition of the case.[11] The CFA contend that it is this long lapse of time between the initial filing of the petition and the final disposition – i.e., identification of and payment to the final *Rausch* beneficiaries – that makes payment of interim attorneys' fees appropriate.

AIG Argument

¶ 4 AIG argue that payment of attorneys' fees cannot be awarded until final resolution of the case. They contend that the common fund doctrine does not create any liability for litigation costs and attorneys' fees in excess of those incurred in creating the common fund. They argue that the only compensation to which the CFA are entitled is the original fee which they have already earned from the active claimant. It is the active claimant who is then entitled to reimbursement from the nonparticipating beneficiaries. Each nonparticipating beneficiary is only liable for such fees in proportion to the benefit he has actually received. Until the case is finally resolved, therefore, AIG argue that it is impossible to determine how much each individual nonparticipating beneficiary will owe the active claimant in attorneys' fees.

Universal Underwriters Group. (*See* Docket Item Nos. 306 & 310.)

[9] ASARCO, Inc.; Benefis; Crawford and Company; Continental Casualty Company; Golden Sunlight Mines; Northwest Healthcare, Corp.; Plum Creek Timber Company, L.P.; F.H. Stoltz Land & Lumber Co.; and Safeway. (*See* Docket Item No. 308.)

[10] *Kuhn,* 924 P.2d 1053 (Colo. 1996).

[11] *Kuhn*, 924 P.2d at 1059.

¶ 5 In support of their argument, AIG refer the Court to two common fund Supreme Court cases: *Flynn v. State Comp. Ins. Fund*[12] and *Murer v. State Comp. Mut. Ins. Fund.*[13] In *Flynn*, the Supreme Court stated:

> Generally, the common fund doctrine authorizes assigning responsibility for fees among those individuals who benefit from the litigation which created the common fund. The doctrine entitles the party who created the fund to reimbursement of his or her reasonable attorney fees from the common fund. . . . We enforce this doctrine because equity demands that all parties receiving a benefit from the common fund share in the cost of its creation.[14]

In *Murer*, the Supreme Court stated:

> Based on the facts in this case, we conclude that claimants, through active litigation, created a common fund which has directly benefitted an ascertainable class of absent workers' compensation claimants and, therefore, that those absent claimants should be required to contribute, in proportion to the benefits they actually received, to the cost of the litigation, including reasonable attorney fees.[15]

¶ 6 When viewed in a vacuum, the language which AIG cites to this Court appears to support their argument. The fundamental flaw in AIG's argument, however, is that it is premised upon a misinterpretation of the common fund doctrine as that doctrine has consistently been applied to Montana Workers' Compensation cases for more than the past ten years. Boiled down, that just is not the way it has worked. Although AIG apparently wishes this Court would revisit the issue, that horse left the barn more than a decade ago, an entire herd has followed, and I am reluctant to pick up AIG's lasso at this point.

¶ 7 The flaw in AIG's argument is readily apparent from reviewing the actual application of the common fund doctrine in the very cases upon which AIG relies in purported support of its argument. In *Murer,* the attorneys who represented the active claimants filed a lien on increased payments awarded to nonparticipating claimants. In recognition of this lien, State Fund withheld 20% of the payments disbursed to the nonparticipating claimants for

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[12] *Flynn*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397.

[13] *Murer*, 283 Mont. 210, 942 P.2d 69 (1997).

[14] *Flynn*, 2002 MT 279, ¶15 (citations omitted).

[15] *Murer*, 283 Mont. at 224, 942 P.2d at 77.

attorneys' fees.[16] In addressing this issue on appeal, the Supreme Court stated, "In essence, therefore, claimants request that they be awarded a reasonable percentage of the amounts which have actually been paid to an identifiable class of absent claimants."[17] The Supreme Court then reversed this Court's decision denying claimants' motion for reasonable attorney fees pursuant to the common fund doctrine. Though the challenge that AIG raises in the instant case was not specifically put before the Supreme Court in *Murer*, it is clear from the Court's ruling that the claimants' attorneys were entitled to recover a fee from the nonparticipating beneficiaries.

¶ 8 The intent of the Supreme Court's holding in *Murer* is made even more obvious upon reviewing how the matter was addressed by this Court on remand. When determining the appropriate fees for Petitioner's counsel, this Court held as follows:

> The petitioning claimants' attorney initially asserted a 20% lien on any amount determined payable as a result of this action. However, the attorney agreed to accept a 15% fee, if approved by the Court.
>
> ***All claimants subject to the 15% fee have benefitted from [Petitioner's counsel's] vigorous and competent representation in this case.*** The responses the Court has received from claimants, both in writing and at the hearing, indicate that they are aware of the benefits they may receive from his efforts; importantly, the responses indicate that they appreciate his efforts and overwhelmingly agree that ***he should receive 15% of any benefits they may receive as a result of his efforts in this case.***[18]

¶ 9 Ultimately, this Court ruled that Petitioner's attorney was entitled to a 15% fee from all additional benefits which were paid to the nonparticipating beneficiaries.[19]

¶ 10 Further assessing the rationale of AIG's argument, it is equally instructive to note that, when determining the basis for awarding common fund attorneys' fees, the Supreme Court reasoned in *Murer*:

> Application of the common fund doctrine is especially appropriate in a case like this where the individual damage from an institutional wrong may not be sufficient from an economic viewpoint to justify the legal expense

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[16] *Murer,* 283 Mont. at 223, 942 P.2d at 77.

[17] *Murer*, 283 Mont. at 223-24, 942 P.2d at 77.

[18] *Murer v. State Comp. Ins. Fund*, 1998 MTWCC 14, ¶¶ 18 and 19 (emphasis added).

[19] *Murer*, 1998 MTWCC 14, ¶ 23.

> necessary to challenge that wrong. The alternative to the doctrine's application is simply for the wrong to go uncorrected.[20]

¶ 11 If this Court were to adopt AIG's interpretation of the common fund doctrine, it would undermine the very basis for an award of common fund attorneys' fees as expressed by the Supreme Court in *Murer*. Applying AIG's interpretation, the only compensation to which the claimant's counsel would be entitled is the original fee which has already been earned from the active claimant. Therefore, there would be no incentive for a claimant's counsel to challenge an institutional wrong because, "from an economic viewpoint," they would be pursuing the claims of all nonparticipating claimants with no further compensation for their efforts. This would result in the institutional wrong going uncorrected – a result the Supreme Court specifically sought to avoid.

Liberty and ASARCO Argument

¶ 12 In its brief, Liberty stated: "In principal [sic], Liberty has no objection to an interim award of attorney fees after the retroactive application issue is finally resolved."[21] However, until the retroactive application issue is finally resolved in *Flynn v. Montana State Fund*,[22] including resolution of a possible appeal, Liberty contends that the issue of payment of interim attorneys' fees cannot be resolved. ASARCO also argue that this Court's – and perhaps the Supreme Court's – decision relative to the retroactive application issue in *Flynn* will control any dispute regarding payment of attorneys' fees in this matter. After Liberty and ASARCO filed their briefs, this Court addressed the retroactive application issue in *Flynn v. Montana State Fund*.[23] Therefore, I view these arguments by Liberty and ASARCO to be resolved by my ruling in *Flynn*, presently on appeal before the Supreme Court.

Procedure for Award of Interim Attorneys' Fees

¶ 13 Having reviewed the arguments, both for and against an award of interim attorneys' fees, as set forth above, I find the CFA's argument to award interim attorneys' fees to be well taken. Therefore, I turn to the specific procedure for awarding interim attorneys' fees. The CFA has proffered a specific procedure for this Court's consideration. I note that no objections have been submitted to the procedure. Rather, as discussed above, all

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[20] *Murer*, 283 Mont. at 222-23, 942 P.2d at 76.

[21] Liberty Northwest's Answering Brief at 2. (*See* Docket Item No. 317.)

[22] WCC No. 2000-0222.

[23] *Flynn v. Montana State Fund,* 2006 MTWCC 31 (presently on appeal to the Montana Supreme Court).

objections were either to the underlying principle of the common fund doctrine or to the award of interim attorneys' fees pending resolution of the retroactive application issue.

¶ 14 The CFA's proposed procedure by which interim attorneys' fees could be determined is as follows: The CFA would first communicate with each insurer involved in these proceedings to identify the applicable common fund claimants. The CFA would then make an assessment as to what is a reasonable fee concerning the work related to the common fund issues on a per-insurer basis. Once an attorneys' fee request has been determined by the CFA, the CFA and the specific insurer would petition this Court for a judicial determination of reasonable attorneys' fees. As part of this process, unrepresented claimants would be given the opportunity to object to an attorneys' fee assessment.

¶ 15 In cases in which a claimant is represented by an attorney, the CFA request the Court to enter an order stating that, when a claimant is represented by an attorney, the CFA and the claimant's individual attorney may agree on an appropriate fee without court intervention or administration, provided the fee charged does not exceed the 25% maximum allowable by law.

¶ 16 I find the procedure proposed by the CFA to be acceptable except as it pertains to the handling of claimants who are represented by an attorney. When the Supreme Court remanded this case, it was with the specific instruction that this Court was to determine a reasonable fee.[24] The CFA's suggested Order regarding represented claimants would result in this Court prospectively abdicating this responsibility in contravention of the Supreme Court's directive. I find no legal basis, therefore, to cull represented claimants from the procedure set forth above in ¶ 14.

ORDER

¶ 17 Interim attorneys' fees shall be awarded pursuant to the following procedure:

¶ 17a The CFA shall communicate with each insurer involved in these proceedings to determine the applicable common fund claimants.

¶ 17b The CFA shall then make an assessment as to what are reasonable fees concerning the work related to the common fund issues on a per-insurer basis.

¶ 17c After the CFA has determined what it believes to be a reasonable attorneys' fee, the CFA and the specific insurer shall petition this Court for a judicial determination of whether the fees are reasonable.

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[24] *Rausch*, 2002 MT 203, ¶ 48.

¶ 17d All nonparticipating claimants shall be given the opportunity to object to any attorneys' fees assessment.

¶ 18 This Order applies retroactively to claims within the parameters established by this Court's decision in *Flynn v. Montana State Fund*,[25] presently pending on appeal before the Supreme Court.

DATED in Helena, Montana, this 11th day of December, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Parties of Record Via Website
Submitted: February 6, 2006

[25] *Flynn*, 2006 MTWCC 31.