

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 38

WCC No. 2002-0500

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JEREMY RUHD

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

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DECISION AND ORDERS GRANTING MOTION TO AMEND,  
DETERMINING ATTORNEY FEE ENTITLEMENT,  
PERMITTING INTERVENTION, AND  
CERTIFYING FOR APPEAL

**REVERSED AND REMANDED**

**Summary:** Claimant and his attorney request class certification and common fund attorney fees with respect to impairment awards payable by Liberty Northwest Insurance Corporation to permanently totally disabled claimants as a result of the Supreme Court decisions in *Rausch v. State Compensation Ins. Fund*, 2002 Mont. 203, 311 Mont. 210, 54 P.3rd 25 and in this case. The attorneys in *Rausch* assert that they are entitled to common fund fees with respect to the claimants benefits and any benefits payable to Liberty claimants as a result of the decisions.

**Held:** The attorney for claimant in this case is entitled to fees from his client and to common fund fees with respect to Liberty claimants benefitting from the Supreme Court decision in this case. The *Rausch* attorneys are entitled to common fund attorney fees only with respect to State Fund claimants entitled to additional benefits as a result of the decision in *Rausch*. Class certification is denied without prejudice. The informal procedures followed in *Murer, Broeker*, and other cases will be followed in this case to identify permanently totally disabled claimants entitled to impairment awards from Liberty.

**Topics:**

**Attorney Fees: Common Fund.** For purposes of common fund attorney fees, the common fund consists only of those claimants entitled to receive benefits from the respondent insurer as a result of the precedent established in the case. The common fund doctrine

does not entitle the successful attorneys to fees from all claimants who may benefit from the precedent.

**Attorney Fees: Common Fund.** Where an attorney pursues benefits despite an adverse precedent in another case brought against another insurer, and ultimately prevails after the adverse precedent is reversed by the Supreme Court, he is entitled to common fund attorney fees with respect to claimants of the respondent insurer who are benefitted by his efforts.

**Class Actions.** Where informal proceedings such as those followed in *Murer* and *Broeker* can accomplish the same end as a class action, those procedures will be followed in lieu of class certification. See *Miller v. Liberty Mutual Fire Ins. Co.*, 2003 MTWCC 6.

¶1 This case is on remand from the Supreme Court. *Ruhd v. Liberty Northwest Ins. Corp.*, 2002 MT 290N.

#### Background

¶2 The initial issue presented in this case was the same issue presented in the companion cases of *Rausch*, *Fisch*, and *Frost*<sup>(1)</sup> versus State Compensation Insurance Fund (State Fund). In those cases this Court held that permanently totally disabled (PTD) claimants are not entitled to impairment awards. Following that decision, this Court entered a similar determination in this case, dismissing the petition. Appeals by Rausch, Fisch, and Frost followed my determination in those cases; an appeal followed my determination in this case.

¶3 In *Rausch v. State Compensation Ins. Fund*, 2002 Mont. 203, 311 Mont. 210, 54 P.3rd 25 (Rausch), the Supreme Court held that I had erroneously interpreted provisions governing impairment awards and that PTD claimants injured between July 1, 1991 and June 30, 1999, are entitled to impairment awards. The decision in that case issued September 5, 2002. On December 10, 2002, the Supreme Court issued its decision in this case, holding that the claimant, who is PTD as a result of a November 23, 1999 industrial injury, is similarly entitled to an impairment award.

#### Issues on Remand

¶4 The remand requires this Court to consider *Ruhd's* requests for class certification and common fund attorney fees. *Id.*, ¶ 15-16. His requests are complicated by a demand for common fund fees by the attorneys in *Rausch*, *Fisch*, and *Frost*. They claim they are entitled to common fund fees from all claimants benefitted by the precedent in *Rausch*, including *Ruhd* and any PTD claimants entitled to immediate impairment awards from Liberty Northwest Insurance Corporation (Liberty). The attorney for the claimant in this case disputes their claim, urging that their entitlement is limited to claimants entitled to

benefits from the State Fund. He urges that he is entitled to common fund attorney fees with respect to PTD claimants covered by Liberty and that he should be allowed to pursue impairment awards on behalf of those claimants.

### Discussion

¶15 Initially, I reject the notion that the Supreme Court's holding in *Rausch* is dispositive of the issues in this case. See Answer Brief of Rausch, Fisch and Frost Counsel at pages 3-4. The Court did **not** hold that the attorneys in that case are entitled to common fund attorney fees from every claimant who may be benefitted by the *Rausch* decision or that the common fund created in that case encompassed impairment awards **other than** those payable by the State Fund. In *Rausch* the Court's discussion regarding common fund fees is expressly limited to claimants of the State Fund:

Pursuant to *Murer*, we conclude that claimants' attorneys in this case are entitled to common fund attorney fees. The attorneys representing Rausch, Fisch and Frost all engaged in active litigation which preserved the benefit of immediate impairment awards to permanently totally disabled claimants. The attorneys incurred legal costs and fees in the preservation of that right, and the common fund will benefit an ascertainable class of workers who were denied immediate payment of an impairment award by the **State Fund** which they were legally entitled to receive. Those absent claimants will receive the benefit "even though they were not required to intervene, file suit, risk expense, or hire an attorney." *Murer*, 283 Mont. at 223, 942 P.2d at 77. Accordingly, claimants' attorneys are entitled to reasonable attorney fees for the creation or preservation of a common fund, and those fees should be divided among the three firms involved in this case. This case is remanded to the Workers' Compensation Court for a determination of a reasonable fee. [Emphasis added.]

*Rausch*, ¶ 48. Certainly, as the *Rausch* attorneys argue, permanently disabled workers receiving benefits from other insurers and self-insureds may benefit from the precedent established in that case, however, it is clear from the quoted and emphasized language that the common fund envisioned by the Court was that fund of benefits payable **by the State Fund** as a result of the Court's decision.

¶16 Three criteria must be met for an award of common fund attorney fees. Those criteria were most recently summarized in *Flynn v. State Compensation Ins. Fund*, 2002 MT 279, 312 Mont. 410, as follows:

1) an active beneficiary must create, reserve, or increase a common fund; 2) the active beneficiary must incur legal fees in establishing the common fund; and 3) the common fund must benefit ascertainable, non-participating beneficiaries.

*Flynn*, ¶ 15. The first requirement is the creation of a common fund. In *Rausch* the petitioners demonstrated that the State Fund improperly denied immediate payment of

impairment awards to PTD claimants. The *Rausch* petitioners satisfied the first criteria by litigating the State Fund's liability for those benefits and thereby creating a common fund consisting of impairment awards previously delayed or denied by the State Fund. The petitioners incurred legal fees in that litigation, thus satisfying the second requirement. Finally, they satisfied the third criteria because the common fund beneficiaries are readily ascertainable: The State Fund is a party to the action and subject to Court supervised discovery to identify PTD claimants to whom impairment awards are owed. Indeed, those beneficiaries have already been identified in post-appeal proceedings in *Rausch*, *Fisch*, and *Frost*.

¶7 The situation with regard to claimants covered by **other** insurers and self-insureds is different. Initially, the other insurers and self-insureds are not parties in *Rausch*, *Fisch*, or *Frost*. There is no way to identify which other insurers and self-insureds owe impairment awards to PTD claimants short of their volunteering the information, being made parties to pending or new litigation, or the Court issuing subpoenas to compel the information. Thus, as to those other insurers, the petitioners in *Rausch* have **done nothing more than establish** a precedent.

¶8 In *Murer v. State Compensation Ins. Fund*, 283 Mont. 210, 942 P.2d 69 (1997), the Supreme Court rested its common fund determination on much more than the mere establishing of a legal precedent. The Court said:

Claimants have engaged in complex, lengthy, and expensive litigation. As a result, they were able to establish, in *Murer II*, a legal precedent which directly benefits a substantial number of workers' compensation claimants who were neither parties to, nor directly involved in the *Murer* litigation. **However, claimants have also accomplished significantly more than just the establishment of a favorable legal precedent.** Additionally, claimants established a vested right on behalf of the absent claimants to directly receive immediate monetary payments of past due benefits underpayments; and based on the establishment of those vested rights, the State Fund became legally obligated to make the increased benefits payments. [Emphasis added.]

¶9 It is one thing to assess attorney fees against claimants entitled to benefits from the insurer which is party to the action establishing liability. However, it is a huge leap to assess fees against claimants receiving benefits from 600 other, non-party insurers and self-insureds.<sup>(2)</sup> To do so would require this Court to oversee payment by 600 insurers and self-insureds. I have found no Montana case which has extended the common fund doctrine to beneficiaries of non-parties.<sup>(3)</sup> Lacking such precedent, I hold that the attorneys in *Rausch* are not entitled to common fund fees from either *Ruhd* or from other PTD claimants entitled to immediate impairment awards from insurers other than the State Fund.

¶10 The next issue is whether *Ruhd*'s attorney is entitled to pursue benefits on behalf of other Liberty claimants and to collect common fund fees from them. In determining his entitlement to common fund fees, the three factors outlined earlier apply.

¶11 In applying the three factors, a history of the four cases is important. That history is taken from the Court files in *Rausch v. State Compensation Ins. Fund*, WCC No. 9907-8274; *Fisch v. State Compensation Ins. Fund*, WCC No. 2000-0023; and *Frost v. State Compensation Ins. Fund*, WCC. No. 2000-0030, as well as the Court file in this case.

¶12 *Rausch* was the first filed case, filed in this Court on July 15 1999. *Fisch* and *Frost* were not filed until seven months later, *Fisch* on February 7, 2000, and *Frost* on February 14, 2000. All three claimants were represented by different attorneys. All three cases alleged that PTD claimants are entitled to impairment awards upon reaching maximum medical improvement (MMI).

¶13 Prior to the filing of *Fisch* and *Frost*, counsel in *Rausch* agreed to submit their dispute for decision upon stipulated facts. The agreement was reached in early September 1999, however, the actual stipulation of facts (entitled "Stipulation") was not filed until February 17, 2000. After receipt of the Stipulation this Court set a briefing schedule. (Briefing Order, March 3, 2000.) That Order permitted counsel in *Fisch* and *Frost* to submit amicus briefs.

¶14 Shortly after the issuance of the Briefing Order, the Court held further discussion with counsel and determined it would be best to consolidate the three cases. On March 10, 2000, it issued its Consolidation Order.

¶15 The issues were then briefed. Oral argument was held on May 3, 2000, and on November 13, 2000, the Court entered an Order and Decision Disposing of Non-Constitutional Issues. In that Order I held, erroneously, that claimants, as a matter of statutory construction, were not entitled to impairment awards. The constitutional challenges to the denial of impairment awards was then briefed and orally argued, resulting in a further decision finding that it was not unconstitutional to deny impairment awards to PTD claimants. (Order and Judgment Regarding Constitutional Challenge, April 4, 2001.) An appeal followed and ultimately, on September 5, 2002, the Supreme Court held that PTD claimants are entitled to impairment awards under the 1991 through 1997 versions of the Workers' Compensation Act.

¶16 Meanwhile, *Ruhd* filed his petition alleging that Liberty had similarly refused to pay him an impairment award because he was PTD rather than permanently partially disabled. That petition was filed on January 23, 2002, well after this Court had issued its final judgments in *Rausch*, *Fisch*, and *Frost*, but several months prior to the Supreme Court decision reversing those judgements. On August 7, 2002, this Court granted summary judgment to Liberty. *Ruhd* appealed the judgment two days later, on August 9, 2002.

¶17 The foregoing history shows that Ruhd pressed forward with his claim for an impairment award **despite** this Court's adverse decision in *Rausch, Fisch, and Frost*. And, he did so against a different insurer. Liberty agreed that he had a 74% impairment rating; it denied his request for an impairment award because he was permanently totally disabled, relying on this Court's analysis in *Rausch, Fisch, and Frost* in defending its denial.

¶18 In pressing forward with his claim, Ruhd established Liberty's liability for benefits it had denied him and other PTD Liberty claimants, thus creating a common fund with respect to Liberty claimants. That liability had not been previously established. Thus, I find that the first factor is satisfied. Ruhd also incurred attorney fees in that pursuit, thereby satisfying the second factor. Finally, as a result of his litigation, he established a readily identifiable class of beneficiaries entitled to further benefits. As in *Rausch, Fisch, and Frost*, the transgressing insurer (Liberty) is a party to this action and is subject to discovery procedures which can identify other PTD claimants entitled to impairment awards. I therefore conclude that Ruhd and his attorney have created a common fund consisting of impairment awards due PTD claimants of Liberty. Accordingly, Ruhd's attorney is entitled to common fund attorney fees with respect to those benefits.

¶19 Entitlement to common fund attorney fees carries with it a concomitant responsibility to assure that non-participating beneficiaries are identified and paid the benefits they are owed. As in *Murer, Broeker*, and even *Rausch, Fisch, and Frost*, that responsibility can be carried out without resort to formal class action procedures. As I pointed out recently in *Miller v. Liberty Mutual Fire Ins. Co.*, 2003 MTWCC 6:

¶2 The Workers' Compensation Court does not have a rule for class actions, however, it is clear from *Murer v. Montana State Compensation Mutual Ins. Fund*, 257 Mont. 434, 849 P.2d 1036 (1993) (*Murer I*), that the Court has the authority to follow class action rules laid out in the Montana Rules of Civil Procedure. In *Murer I* the Supreme Court said:

Although the Workers' Compensation Court rules do not provide for class action certification, the Workers' Compensation Court applied Rule 23, M.R.Civ.P., to this question. We have previously approved the Workers' Compensation Court seeking guidance from the Montana Rules of Civil Procedure. See *Moen v. Peter Kiewit & Sons, Co.* (1982), 201 Mont. 425, 434, 655 P.2d 482, 486.

257 Mont. at 436, 849 P.2d at 1037.

¶3 The purpose of any class action is to identify and pay benefits owed to similarly situated claimants. In *Murer* the potential class consisted of claimants who were due additional benefits on account of the expiration of a temporary cap on their benefits. In *Broeker* the potential class consists of claimants whose social security offsets were improperly calculated because of the inclusion of social security COLA's. In both cases, following the establishment of the legal precedents giving rise to the additional entitlements, this Court

has overseen proceedings to assure that the claimants entitled to the additional benefits are identified and paid. See *Murer v. State Compensation Mutual Ins. Fund*, 283 Mont. 210, 942 P.2d 69 (1997) for discussion of the process followed in *Murer*. It has done so without resort to the technical and cumbersome rules governing class actions, and without resort to extended discovery. In both cases, with the oversight and approval of the Court, the parties have worked together to gather the necessary information to identify affected claimants and to get them paid. The process relies on cooperation and communication. A similar process is in place in another case - *Gonzales v. Montana Power Co.*, WCC No. 9803-7941.

¶14 My experience in these cases tells me that more is accomplished faster through a cooperative process than through adherence to formal class action rules. Montana workers' compensation insurers are not ordinary defendants: they have a direct duty to pay claimants. §§ 39-71-407(1), -2203, MCA (2001). Disputes between insurers and claimants regarding benefits is within the exclusive jurisdiction of the Workers' Compensation Court, thus insurers appear regularly before the Court. The workers' compensation bar is small and well versed in workers' compensation law and with the practices and procedures of the Workers' Compensation Court. I expect that in future class-action type cases the same spirit of cooperation will prevail that has prevailed in *Broeker*, *Murer* and *Gonzales*. I therefore decline to adopt the class action provisions of the Montana Rules of Civil Procedure. However, where the rules provide helpful guidance, the Court will certainly look to them for assistance in determining a proper course of action. [Footnotes omitted.]

¶20 I find it appropriate to follow the procedure outlined in *Miller*. I am therefore denying the motion to amend and for class certification without prejudice but retain jurisdiction to oversee the identification and payment of impairment awards Liberty owes to other PTD claimants. I also retain jurisdiction to determine the amount of common fund fees due Ruhd's attorney.

¶21 I note that this order directly impacts the attorneys in *Rausch*, *Fisch*, and *Frost*, as well as the further proceedings in those cases. Given the importance of a speedy and final resolution of the attorney fee issue, and the likelihood of appeal, I am formally joining the attorneys in *Rausch*, *Fisch*, and *Frost* as intervenors in this case. The joinder is with respect to the attorney fees claim only.

¶22 I am further certifying my determination concerning entitlement to attorney fees as final for purposes of appeal and bifurcating that issue from the class action/enforcement issue. It is the Court's intention to proceed with the identification and payment of PTD Liberty claimants entitled to impairment awards. If the original parties in this action wish to appeal my determination concerning those further proceedings, I will separately certify that issue as well.

¶23 My decision concerning common fund fees should not be read as relieving other insurers or self-insureds from their obligation to pay impairment awards to PTD workers. The *Rausch* decision is a binding precedent on all insurers. It holds unequivocally that all insurers are required by law to pay the impairment awards at issue in that case. Failure to do so may potentially subject non-complying insurers to penalties and additional attorney fees.

¶24 Finally, in light of the likelihood of an appeal of my determination concerning the limited extent of the common fund created in *Rausch*, all insurers and self-insureds are authorized to continue to withhold the amounts claimed by the *Rausch* attorneys in their notice of lien which was previously forwarded to them by this Court in *Rausch*.

#### ORDER

¶25 The attorneys in *Rausch*, *Fisch*, and *Frost* are **not** entitled to common fund attorney fees with respect to the impairment award payable to Ruhd or with respect to impairment awards payable by Liberty to other PTD claimants.

¶26 Ruhd's attorney, Mr. Geoffrey C. Angel, is entitled to attorney fees from Ruhd and to common fund attorney fees with respect to impairment awards payable by Liberty to other PTD claimants.

¶27 Ruhd's request for class certification is **denied without prejudice**. However, the Court retains jurisdiction to oversee the identification and payment of PTD claimants entitled to impairment awards from Liberty.

¶28 The attorneys in *Rausch*, *Fisch*, and *Frost*, namely Mr. Lon J. Dale, Mr. Monte D. Beck, and Mr. Stephen D. Roberts, are joined as intervenors with respect to their claim to attorney fees from *Rausch* and from other PTD claimants entitled to immediate impairment awards from Liberty.

¶29 The Order holding that the attorneys in *Rausch*, *Fisch*, and *Frost* are **not** entitled to common fund attorney fees with respect to the impairment award payable to Ruhd or with respect to impairment awards payable by Liberty to other PTD claimants, and that Ruhd's attorney is entitled to those fees, is bifurcated from other issues and certified as final for purposes of appeal.

¶30 The Court retains jurisdiction to oversee the identification and payment of PTD claimants entitled to receive impairment awards from Liberty. It also retains jurisdiction to determine the amount of common fund attorney fees.

¶31 In light of the likelihood of an appeal of my determination concerning the limited extent of the common fund created in *Rausch*, all insurers and self-insureds are authorized to continue to withhold the amounts claimed by the *Rausch* attorneys in their notice of lien which was previously forwarded to them by this Court in *Rausch*.

DATED in Helena, Montana, this 30<sup>th</sup> day of May, 2003.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Geoffrey C. Angel

Mr. Larry W. Jones

Mr. Lon J. Dale - Courtesy Copy

Mr. Monte D. Beck- Courtesy Copy

Mr. Stephen D. Roberts - Courtesy Copy

Mr. Greg E. Overturf - Courtesy Copy

Submitted: April 14, 2003

1. *Rausch v. State Compensation Ins. Fund.*, WCC No. 9907-8274; *Fisch v. State Compensation Ins. Fund.*, WCC No. 2000-0023; and *Frost v. State Compensation Ins. Fund.*, WCC No. 2000-0030.

2. In *Rausch* the Court requested the Department of Labor to furnish a list of worker compensation insures and self-insurers. The list identified over 600.

3. I have not looked for such cases in other jurisdictions and none are cited by the parties or the *Rausch*, *Fisch*, and *Frost* attorneys.