

TRANSCRIPT OF PROCEEDINGS

1           IN THE WORKERS' COMPENSATION COURT  
2                   OF THE STATE OF MONTANA

3   ALEXIS RAUSCH,                   ) WCC No. 9907-8274R1  
4   CHARLES FISCH,                 ) WCC No. 2000-0023R1  
5   THOMAS FROST,                 ) WCC No. 2000-0030R1  
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14           BE IT REMEMBERED, that the proceedings in the  
15   above-captioned matter was heard before the  
16   Honorable Mike McCarter, at the offices of the  
17   Workers Compensation Court, 1625 Eleventh Avenue,  
18   Helena, Montana, on the 25th day of June, 2003,  
19   beginning at the hour of 1:10 p.m., before Laurie  
20   Crutcher, Registered Professional Reporter, Notary  
21   Public.

22                                   \* \* \* \* \*

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1 A P P E A R A N C E S :

2 APPEARING FOR THE CLAIMANTS:

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9 1946 Stadium Dr., Suite 1  
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11 APPEARING FOR THE STATE FUND:

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17 MR. GREG E. OVERTURF  
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24

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1           A P P E A R A N C E S (CONTINUED)

2   ALSO PRESENT:  
3   MR. MARK CADWALLADER  
4   Legal Counsel  
5   Department of Labor and Industry  
6   Legal Services Division  
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8   Helena, MT   59624-1728

9   MR. GEOFFREY C. ANGEL  
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11  125 West Mendenhall  
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13  MR. LARRY W. JONES  
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17  MR. VIC HALVERSON  
18  Attorney at Law  
19  P.O. Box 1817  
20  Billings, MT   59103

21  MS. CAROL GLEED

22  MS. CHRIS McCOY (By telephone)

23  
24  
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1 Whereupon, the following proceedings were  
 2 had:  
 3 \* \* \* \* \*  
 4 (Mr. Halverson not present)  
 5 (Ms. McCoy not present)  
 6 Mr. Martello not present)  
 7 THE COURT: Let's start. This is the  
 8 matter of Fisch, Frost, and Rausch, and another  
 9 conference. And I guess this case is impacted by  
 10 the decision that I made in Ruhd. And in that  
 11 case, I made Monte and the rest of claimants'  
 12 Counsel, Lon and Steve, intervenors -- or what did  
 13 I call them. I joined them as intervenors so that  
 14 you would have a right to appeal in that case, and  
 15 I assume you're going to appeal that case. That's  
 16 my assumption.  
 17 MR. BECK: No. Well, we're going to  
 18 appeal. That will be one of the things. We're  
 19 ready to file a notice of appeal today with the  
 20 Court.  
 21 But we have something else in mind to  
 22 advise the Court of. We probably will be filing a  
 23 writ under the original Frost, Fisch, Rausch case,  
 24 and attaching the Ruhd decision, or putting it  
 25 both captions.

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1 THE COURT: Somewhere I have a request  
 2 for a subpoena. It was sort of floating around.  
 3 It was in my basket. I'm not sure it even made  
 4 it to the file. It should have made it to the  
 5 file. Okay. I do have it. It's a May 20 letter,  
 6 and it says that you request the Court provide a  
 7 subpoena requesting the department to provide  
 8 information to me that would identify individual  
 9 claimants.  
 10 And I thought since I had that request,  
 11 what I would do would be to deny that request by  
 12 written order for the reasons set out in Ruhd,  
 13 bifurcate that, and certify it. And then it may  
 14 be the easiest thing to do in the alternative to  
 15 request a writ in case they didn't consider that  
 16 a final order, but I think if I bifurcated it. I  
 17 haven't had any trouble with certifying final  
 18 orders.  
 19 MR. DALE: The only problem with that,  
 20 Your Honor, would be that it would still be -- it  
 21 would be an appeal, and it would be -- of course,  
 22 recognizes a final issue; but the writ might  
 23 provide us with a more expeditious ruling than  
 24 that.  
 25 THE COURT: Than an appeal?

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1 THE COURT: That may be able to make  
 2 your job easier, by filing just a writ. I have  
 3 thought about that. It seemed to me that you have  
 4 a request for a subpoena before me, and I think  
 5 it's in letter form, but I would consider it a  
 6 formal request for a subpoena for all of the --  
 7 what was it -- What was the subpoena for? Oh, it  
 8 was for department records.  
 9 MR. DALE: Department of Labor records.  
 10 MR. BECK: We asked the Department of  
 11 Labor. We had done some preliminary work I think  
 12 at one of our meetings. We talked about going to  
 13 the department to try to find out some information  
 14 to get raw numbers, find out how many permanently  
 15 totally disabled claimants there really were in  
 16 the state, both in terms of Plan 1 and Plan 2  
 17 carriers.  
 18 And we got some information. We had to  
 19 hire a computer analyst to get this information.  
 20 We got some raw stuff. And then in followup we  
 21 also asked is there ways to get even more specific  
 22 information, and we were advised that yes, there  
 23 is, and to please -- but to comply with the  
 24 department rules, they suggested we get a  
 25 subpoena, and that's where it is right now.

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1 MR. DALE: Than a direct appeal, in what  
 2 we're looking at.  
 3 THE COURT: Why don't you tell me what  
 4 you want me to do. I'll do it either way, because  
 5 it seems to me -- I want to get that issue  
 6 resolved as early as possible, so I'm all for  
 7 expediting things.  
 8 (Mr. Halverson enters)  
 9 MR. BECK: I think that might help if  
 10 you just go ahead and deny that request, and then  
 11 we can use that as an issue.  
 12 THE COURT: Do you want me to just deny  
 13 it, and do nothing else with it, or do you want me  
 14 to deny it, bifurcate it and certify it?  
 15 MR. BECK: Well, certifying it for  
 16 appeal purposes?  
 17 THE COURT: Yes.  
 18 MR. BECK: I haven't really thought  
 19 about it. I think the procedure that that we were  
 20 contemplating at least going up to the Supreme  
 21 Court would be to ask that the Court direct the  
 22 lower Court on the proper interpretation of Fisch,  
 23 Frost, and Rausch, what the interpretation -- does  
 24 it include all permanently totally disabled  
 25 claimants within the state, regardless of whether

4 (Pages 4 to 7)



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1 they were insured by the State Fund or not, or was  
2 the order confined only to the State Fund.

3 And I thought that if the Supreme Court  
4 would give the Court direction as to what it meant  
5 in the Fisch, Frost, Rausch matter, that then  
6 would help resolve some of these other issues, and  
7 maybe moot the appeal in the Ruhd case. It may  
8 not, depending on what the Court does. But with  
9 the subpoena also that's another way to --

10 THE COURT: To get --

11 MR. BECK: Yes. And Judge, I feel that  
12 since we did send out these notices of lien early  
13 on to all these carriers, and I just got the list  
14 of 600 some carriers, and we did that under the  
15 Fisch, Frost caption, and we told all those  
16 carriers to hold back a certain amount, our  
17 thinking was that they're probably abiding by  
18 that. I think Liberty is.

19 I think there's been a couple of other  
20 contacts even to the Court, as I recall, to Pat  
21 here, inquiring, "What should we do?" And I think  
22 that the word was, and basically everyone is  
23 saying, "Please pay what's undisputed," but they  
24 are withholding 25 percent.

25 So we think that it's unfair, especially

1 to consider.

2 THE COURT: I think you probably could  
3 get involved in the meantime at least by amicus  
4 because you have an equal interest in whichever  
5 case it goes up on.

6 Well, I'll issue an order denying. Why  
7 don't you talk over whether or not you want me to  
8 certify it for the purposes of appeal, and just  
9 leave it be, and then you can take a writ. From  
10 my perspective, it doesn't make any difference.  
11 The important thing is that they review this and  
12 review it soon, because it's hanging out there.  
13 It really affects the proceedings, not only in  
14 this case, but in almost every single other case  
15 that we've got, if you've got a common fund fee  
16 claim or a class action type of claim. So I think  
17 that's real important.

18 MR. DALE: I think that's a good idea,  
19 Your Honor, probably to do that, and then you  
20 could put that in your certification, the reasons  
21 that you're certifying it. That might help us to  
22 try to get an early decision out of the Court,  
23 because I think Tom is right. We have had some  
24 writs that you would think that they would be  
25 faster, but the decision actually doesn't end up

1 in light of how we see this proceeding on the  
2 common fund issues and the agreements, and that  
3 the Court may or may not approve this for attorney  
4 fees. It may be holding back benefits that would  
5 otherwise be paid out, and that probably should  
6 be.

7 And our thought was why not get that  
8 issue to the Supreme Court earlier than later  
9 through what will take a lot longer time in the  
10 Ruhd matter.

11 THE COURT: You're preaching to the  
12 choir because I would like to see some guidance  
13 from the Supreme Court, and I'd like to see it  
14 sooner rather than later. I'd hate to have this  
15 hang around for two or three years, and I think  
16 all of us agree on that. So whatever we can do to  
17 expedite it and get up there and get a decision is  
18 fine with me.

19 MR. ANGEL: In a recent writ, I had  
20 decided it certainly didn't appear to get  
21 processed any faster than in an appeal. It was  
22 more than a year, I believe. But if they file a  
23 notice of appeal, obviously I want to be involved  
24 in the briefing, rather than somehow that getting  
25 stayed. So I don't know if that's just something

1 being rendered any faster than a regular appeal.

2 And so if you would deny the request and  
3 then certify it, and then say the reasons that you  
4 are certifying it in the order, that would  
5 probably give us a good shot at trying to get an  
6 early decision out of the Court.

7 THE COURT: Maybe what you can do in  
8 case there's any doubt about whether or not it's  
9 an appealable order is in the alternative request  
10 a writ. You've got it sort of both ways.

11 MR. DALE: Right. That's what I thought  
12 we might do.

13 THE COURT: Let's do it that way.

14 MR. ANGEL: Can I ask. Since these  
15 folks were joined in the appeal of Ruhd, could you  
16 do the same and join that case, so that does  
17 actually move faster?

18 THE COURT: Sure. I don't see why not.  
19 Do you have any objections to that?

20 MR. BECK: No, I don't have an objection  
21 to Geoff appearing in our case. I think that he  
22 has his argument that he's going to make one way  
23 or the other, and however he gets there is fine.

24 What we would sort of thought and had in  
25 mind was to attach that decision and send it to

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1 you.  
 2 MR. ANGEL: It would keep us to one  
 3 briefing, too, which would be nice.  
 4 THE COURT: That way everybody is  
 5 involved in it. So that makes that easy. That  
 6 was the primary thing that's on my mind.  
 7 (Mr. Martello enters)  
 8 THE COURT: We've got bunch of other  
 9 issues, and I'm not sure which one of them  
 10 surfaced in this case as a result of the State  
 11 Fund agreement and the payment of the benefits in  
 12 this case. Some of those other issues really are  
 13 issues that would have to be raised by other  
 14 insurers if they came in, aren't they, like the  
 15 retroactivity and --  
 16 MR. LUCK: I think we have resolved all  
 17 of those issues, and there is pending and fully  
 18 briefed the '87 to '91 issue.  
 19 THE COURT: That's what I want. That's  
 20 the other thing.  
 21 MR. LUCK: That's fully briefed at this  
 22 point. I think the only thing that's left, Your  
 23 Honor, is that issue, and working through the  
 24 attorney fee hearing situation.  
 25 THE COURT: And I've read those briefs,

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1 MR. BECK: Well, February 4, '03.  
 2 THE COURT: Here's the State Fund's.  
 3 They filed their reply on February 20th.  
 4 MR. DALE: That wasn't '02.  
 5 MR. BECK: I'm sorry. '03. Yes.  
 6 MR. LUCK: Is that the language that  
 7 links entitlement awards to PPD?  
 8 THE COURT: Yes, I think it is. Oh,  
 9 it's the payback language. If you receive an  
 10 impairment award, and then you revert to permanent  
 11 total disability status, you have to pay it back.  
 12 Do you remember that language? That's the  
 13 language that's just killing me right now.  
 14 And I know what -- I think your response  
 15 to it was, well, it says it may. They may require  
 16 you to pay it back, and that doesn't mean you  
 17 must. But the fact that they could exercise that  
 18 and they're entitled to exercise that is the thing  
 19 that's giving me absolute heartburn, and trying to  
 20 say that permanently totally disabled claimants  
 21 are entitled under pre-1991 law.  
 22 MR. LUCK: Since the law is different,  
 23 it shouldn't necessarily give you heartburn.  
 24 THE COURT: Well, it gives me heartburn  
 25 because of the Supreme Court language about

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1 and I looked at them, and I wanted to talk about  
 2 that a little bit because I don't know what the  
 3 Supreme Court is going to do with the '87. And my  
 4 trouble is the Supreme Court, when they reviewed  
 5 the '91 accident, talked about sort of a  
 6 ridiculous interpretation if they went one way.  
 7 But in the pre-1991 act, we've got that  
 8 language -- and I can't remember the exact  
 9 language -- which it seems to me that if I were to  
 10 not give effect to it would bring in that  
 11 ridiculous interpretation, the absurd --  
 12 ridiculous isn't the right word. Absurd is the  
 13 right word. I'm not sure which --  
 14 MR. OVERTURF: Absurd result.  
 15 THE COURT: -- the absurd result. But  
 16 that one -- that language. Where is the brief?  
 17 Brad, you latched on to that language and rode it  
 18 for quite away. Do you remember?  
 19 MR. LUCK: I'm not tracking with you,  
 20 Judge.  
 21 MR. BECK: Well, it was on your -- We  
 22 filed a -- and it's February 4th of '02, which  
 23 would have been when we put our response regarding  
 24 pre-1991 claims, and --  
 25 THE COURT: Where is that?

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1 keeping the permanently totally disabled claimant  
 2 from impairment awards, and they use that absurd  
 3 language saying it was absurd to do that. I don't  
 4 see why that wouldn't carry over to the pre-1991  
 5 act.  
 6 The problem is the language is  
 7 different. I absolutely agree with you. That's  
 8 why I'm having heartburn. I'm having a hard time  
 9 reconciling the language that the Supreme Court  
 10 used in striking down -- not striking down -- but  
 11 interpreting the 1991 statute with the 1987  
 12 statute, and what it seemingly does. This  
 13 probably is going to get appealed anyway, isn't  
 14 it?  
 15 MR. OVERTURF: I think that was even in  
 16 the stipulation.  
 17 MR. LUCK: I think we agreed because we  
 18 needed a final answer.  
 19 MR. DALE: It's absolutely going to be  
 20 appealed by one side or the other by virtue of our  
 21 agreement, so that there would be a ruling.  
 22 THE COURT: So maybe what I ought to do  
 23 is just rule on that. When I went to the Judicial  
 24 College, and took the evidence courts, they said  
 25 "Rule and run." They said you've got a 50 percent

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1 chance of being affirmed, and since the appellate  
 2 courts always are trying to find a reason to  
 3 affirm the lower courts, your chances are probably  
 4 about 90 percent of being right.  
 5 MR. LUCK: You could say it's different,  
 6 "Rule and run with a smile on your face knowing  
 7 that you are correct."  
 8 MR. DALE: We had something else in  
 9 mind.  
 10 MR. BECK: We were hoping that they  
 11 wouldn't appeal that issue, and I know they have  
 12 it in the settlement stipulation that they can  
 13 appeal and will appeal, and so forth. I think,  
 14 as I understood the State Fund's position -- I'm  
 15 not meaning to speak for you, and I know Brad will  
 16 let me know that shortly --  
 17 But the idea was that we just --  
 18 everybody thought we just needed a firm rule.  
 19 What is the rule? What is the Court saying about  
 20 that time block '87 to '91? Tell us what the  
 21 rules are, seems to be a common theme of everybody  
 22 that's defending these cases.  
 23 And our thought in response to this, why  
 24 I see why 87 permanently totally disabled people  
 25 ought to be receiving their impairment award are

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1 just going to the fundamental issues that were  
 2 addressed in this matter, and that is, it seems to  
 3 not make very much sense that a permanently  
 4 totally disabled person somehow gets less than a  
 5 permanently partially disabled person.  
 6 THE COURT: I can accept that language  
 7 even -- Whether or not I disagree with that  
 8 language, I can accept that language. The problem  
 9 is when I take that language and then I run flat  
 10 into this other provision that says if you're  
 11 permanently totally disabled, you have to pay back  
 12 this thing if they request it to be paid back.  
 13 That's where I have the irreconcilable conflict.  
 14 That's where I'm just going nuts, to be honest  
 15 with you.  
 16 Well, why don't I do this. I suppose it  
 17 probably doesn't matter. I guess what you're  
 18 arguing is if I decide it your way, there's less  
 19 likelihood that they'll appeal; and if I decide it  
 20 their way, then there's more likelihood that  
 21 you'll appeal. Is that the sum and substance?  
 22 MR. BECK: We would have to.  
 23 MR. LUCK: We talked about one way  
 24 streets this morning a lot. That's okay.  
 25 THE COURT: LeGrande Boulevard.

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1 MR. OVERTURF: I think either way it  
 2 goes, it's got to get appealed, because even if it  
 3 goes against us, we cannot appeal it, but then  
 4 some of the other insurers may want to raise that  
 5 issue later. If it goes to the Supreme Court,  
 6 it's decided, it's done.  
 7 THE COURT: I think that's right. I  
 8 think that language is so point blank that  
 9 somebody is going to appeal it no matter what  
 10 someday, and I hate that situation like we had in  
 11 the independent contractor cases. Do you remember  
 12 several years ago I decided the Larry Bolden case,  
 13 and I said the independent contractor exemption  
 14 means what it says, you can't have workers  
 15 compensation benefits.  
 16 And I think a lot of people accepted  
 17 that decision, it wasn't appealed, and then Geoff  
 18 comes along, and Luke comes along several years  
 19 later, and they say, "We don't accept this," and  
 20 by golly, they get the thing reversed, and we've  
 21 got five years of water under the bridge. So I  
 22 think the sooner the better to get it resolved, to  
 23 be honest with you.  
 24 What I'll do is I'll go ahead and decide  
 25 that issue one way or the other, and actually that

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1 takes care of everything except the attorney fees,  
 2 which is just the question of the amount; am I  
 3 right? That's only other issue that's out there  
 4 for me? So there's no reason if I -- that's a  
 5 completely separate issue. There's no reason not  
 6 to bifurcate that issue, too, and certify that,  
 7 so I'll just bifurcate both of those things and  
 8 let it go up.  
 9 MR. LUCK: Okay.  
 10 THE COURT: So I'll probably issue those  
 11 orders simultaneously. Isn't it wonderful the law  
 12 is always so clear?  
 13 MR. OVERTURF: Keeps us working.  
 14 THE COURT: Do we have anything else to  
 15 talk about?  
 16 MR. BECK: Well, I'd like to bring up  
 17 one thing. I don't know how you're interpreting  
 18 this, Judge. One of the issues that I don't know  
 19 -- this is certainly not clear, but it is an issue  
 20 now with me and Larry Jones -- is whether or not  
 21 unaccrued impairment awards are entitled to be  
 22 paid in a lump sum, and whether or not if you  
 23 receive it in lump sum once you have the  
 24 impairment rating -- or if you do receive a lump  
 25 sum, whether or not they can discount it. And I

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1 don't know if anybody wants to jump in here,  
 2 but --  
 3 THE COURT: I've made a ruling  
 4 essentially on that in other cases, and I haven't  
 5 -- it's not anything that's any secret, but  
 6 basically the way I've ruled is that those  
 7 impairment awards are accrued. So once they're  
 8 given, any amount that's accrued up to the date  
 9 that they're paid, you pay in a lump sum.  
 10 So if you have an impairment award that  
 11 was given in 1997, you would accrue all of that  
 12 since that date of the impairment award, and you  
 13 would pay that in a lump sum, and that's not a  
 14 discount issue. There's no discount for that.  
 15 So the only remaining question would be:  
 16 Is the remaining portion of that a lump sum? And  
 17 I haven't ruled on that. But I think under the  
 18 741 -- Well, I think you'd probably have to look  
 19 at 741, and make a determination what that  
 20 requires you to do.  
 21 I don't think that -- I don't remember  
 22 what 741 says on that. I think it allows it to be  
 23 paid. But is there a discount? Is that the deal?  
 24 MR. JONES: Your Honor, I think it went  
 25 out yesterday. A declaratory judgment action was

1 rating; and one we're not sure where he's at.  
 2 That leaves 14, and we will, but have  
 3 not, sent them out for ratings, and we just  
 4 verified that yesterday. We thought maybe we were  
 5 a little bit farther along with the actual rating  
 6 process. We're not, but we're getting on it now.  
 7 There's 14 people that will be set up for  
 8 appointments for ratings, and we're trying to  
 9 figure out a process at this point.  
 10 MR. BECK: And then that would lead into  
 11 the issue about when are you going to ask them to  
 12 determine MMI? For purposes of accrued, if for  
 13 instance, these claimants have been sitting for  
 14 years without ever having a rating, but in fact  
 15 their injury has occurred so many years ago, they  
 16 would have -- in most cases they've reached  
 17 maximum medical, six months, a year max, unless  
 18 they've had surgery or something. But the issue  
 19 will be: What will you ask the doctors to do in  
 20 terms of determining the date of MMI?  
 21 THE COURT: Let me make a suggestion on  
 22 that. In some of those cases, the attorneys are  
 23 going to be able to look at that and have a pretty  
 24 fair idea about when MMI is reached. If they've  
 25 gone to back to work, and depending on the time of

1 drafted in our office to ask that that question be  
 2 answered.  
 3 THE COURT: Is Monte on it?  
 4 MR. JONES: Yes, it's that case.  
 5 THE COURT: So then I can address it in  
 6 there. But the first part of it I think I've  
 7 answered several times.  
 8 MR. BECK: I think we all are in  
 9 agreement. Anything that's accrued, they have no  
 10 basis to discount it. They should have had the  
 11 money the week that it was supposed to be paid.  
 12 THE COURT: It sounded like the two of  
 13 you could probably brief that out and lay that out  
 14 for me, and I'll decide it.  
 15 MR. BECK: Then lastly, we just have  
 16 the issue of unrated claimants, and a procedure,  
 17 and we wanted to talk about that. And there was  
 18 just going to be -- someone was going to tell us  
 19 what we were going to do here today.  
 20 MR. LUCK: We have 17 unrated claimants.  
 21 One, we received an impairment rating on. Three  
 22 are problems, because one of them is dead; one of  
 23 them in the area that he lives, no physician will  
 24 see him, refuses to see him, and so there's some  
 25 difficulty about how we can get an impairment

1 injury, dealing with something that goes back to  
 2 1991, and they haven't received it by 1994,  
 3 you probably don't even need to ask that question.  
 4 You know that anything is going to be accrued.  
 5 So you might take a look at those files  
 6 before you even start that process. You may be  
 7 able to agree on them. So that would be my first  
 8 suggestion.  
 9 If it looks like there is an issue on  
 10 MMI for purposes of accrual, then I suppose we  
 11 have to figure out a process for doing that, and I  
 12 don't know where you're at in your discussions on  
 13 that.  
 14 MR. LUCK: I don't think we have  
 15 discussed that.  
 16 THE COURT: To some extent, it seems to  
 17 me that it's the claimant's option. Ordinarily  
 18 you ask the treating physician to do an impairment  
 19 rating, so --  
 20 MR. OVERTURF: I would hope that in the  
 21 majority of the claims, you'd be able to go in  
 22 there, and you'd find a date when they had been  
 23 found to be at MMI. The problem would be if you  
 24 have a case where you don't find that in the file.  
 25 THE COURT: We're dealing with



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1 permanently totally disabled people. They can't  
 2 have returned to work. I misspoke myself.  
 3 MR. OVERTURF: I was going to point that  
 4 out.  
 5 THE COURT: You were going to point that  
 6 out.  
 7 MR. OVERTURF: The problem would come  
 8 in if you did have a claim where for some reason  
 9 you don't have any medical anywhere in the file,  
 10 that you have a finding of MMI, and then I guess  
 11 have to ask a doctor.  
 12 MR. DALE: Or we could just presume  
 13 pretty much impairment from the date of injury,  
 14 have some kind of agreement as between yourselves  
 15 as to what an MMI date would be.  
 16 THE COURT: On something like this, I  
 17 would perfectly happy to approve some sort of  
 18 compromise that will take care of it without all  
 19 sorts of unnecessary work being done.  
 20 MR. LUCK: The question also arises what  
 21 JAMA guide is applicable. Would it be the one in  
 22 effect on the date of injury or is it the present  
 23 one?  
 24 MR. DALE: I think it's the fifth  
 25 edition.

1 interpreting that, if the current guide means the  
 2 current guide in effect at the time of the injury  
 3 if that's the way you interrupt it.  
 4 MR. LUCK: But that's what that statute  
 5 said when they were all hurt also, I think, is  
 6 what I'm saying. It said that at the time. So if  
 7 entitlement attaches as of the date of injury,  
 8 well, then, that current one at that time would be  
 9 the one.  
 10 THE COURT: Let me cut through this just  
 11 a little bit. I think in Broecker, we used the  
 12 last guides, did we not? Not for Broecker. What  
 13 was the case that we --- There was a case that we  
 14 used the last guides in. Basically I think  
 15 everybody realized -- I don't even think we --  
 16 MR. MARTELLO: Is that your Montana  
 17 Power case?  
 18 THE COURT: Yes, it's probably the  
 19 Montana Power case where they're using the last  
 20 guides.  
 21 MR. DALE: It is, Your Honor. That's  
 22 where this issue came up.  
 23 THE COURT: And as a practical matter,  
 24 that may be the easiest, most expeditious thing to  
 25 do, and I suppose if the claimant really squawks

1 MR. BECK: We talked about that, too.  
 2 We just think it would be such a hassle to try to  
 3 get the various books to doctors for each year,  
 4 and we thought well, whatever happens.  
 5 MR. DALE: Isn't it statutory current  
 6 edition?  
 7 THE COURT: Well, the question is is it  
 8 the edition in effect at the time of the injury.  
 9 MR. LUCK: It's the law in effect at the  
 10 time of the injury. Technically that would be the  
 11 right one to use. Whether that works or is --  
 12 MR. DALE: I don't know if it is,  
 13 though, because we just had this issue come up in  
 14 another case. The statute, in effect, on the  
 15 guides I think says current guides.  
 16 MR. LUCK: But if the law in effect on  
 17 the date of entitlement is a law that rules for  
 18 the claim all the way through, the current guide  
 19 in effect on the date of entitlement I think would  
 20 be the construction, and seems like it would be a  
 21 reasonable construction.  
 22 MR. DALE: Except that there is a  
 23 statute on it, Brad. I thought the same way you  
 24 did, but there's a statute.  
 25 THE COURT: But is it a question of

1 about it, we can address it then. And I think  
 2 what you'd have to show would be that there was a  
 3 different impairment rating to start out with, but  
 4 I think it's a good place to start.  
 5 I suppose the only danger would be --  
 6 There's two dangers. One, you might have give you  
 7 more money than you're entitled to, or it might  
 8 give you less money than you're entitled to. The  
 9 difference in those is probably not going to be  
 10 great. I wonder if it's ever going to create an  
 11 issue.  
 12 MR. OVERTURF: That's what I wonder, if  
 13 that makes more sense here. Since we're probably  
 14 going to be dealing with 16, 17 people, it's not a  
 15 huge amount of people. There is a little bit of  
 16 difference between the guides. Generally the  
 17 fifth is a little more generous.  
 18 But for our purposes, one concern we  
 19 might have is we don't want to set a precedent in  
 20 how we do it here. So maybe if we could reach an  
 21 agreement, just stipulate how it's going to be  
 22 done, then we haven't necessarily conceded the  
 23 issue if we think it becomes a big issue down the  
 24 road.  
 25 MR. DALE: And that is that statute -- I

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1 didn't bring that with me, and I can't recall.  
 2 But if we look at the statute right now, I think  
 3 it answers the question, if I recall from my --  
 4 MR. LUCK: All I'm saying is I think it  
 5 said the same thing every single year, and  
 6 therefore on the date of injury, that statute said  
 7 the current one; and if it's right, that  
 8 entitlement attaches as of the date of injury.  
 9 Current at that time would have been the old one.  
 10 That's all I mean.

11 MR. DALE: I understand the argument,  
 12 Brad, and I thought the same way until I read the  
 13 statute, and then it's -- I don't think there's  
 14 any question on it.

15 THE COURT: The problem is we all read  
 16 these statutes differently.

17 MR. OVERTURF: My interpretation of it  
 18 was you use the guide that's current at the time  
 19 they're at MMI. Does someone have that?

20 MR. MARTELLO: I think that's the  
 21 interpretation. And what you're doing here is  
 22 you're going back and trying to project an MMI  
 23 date.

24 THE COURT: I think there's probably a  
 25 good argument that it means the one that's in

1 want to --

2 MR. LUCK: Good point.

3 THE COURT: My suggestion is to use the  
 4 fifth, to agree to use the fifth, and let the  
 5 claimants know that it is based on the fifth, and  
 6 if they contest the impairment rating given under  
 7 the fifth or the percentage, that they can do so.  
 8 That's their right to do so.

9 But at least we'll get it to the point  
 10 where we've got a rating, and we'll be able to  
 11 realistically get a rating, and going back and  
 12 saying to a doctor, "I want an impairment rating  
 13 based on a third guide" may get you into trouble  
 14 just getting an impairment rating. So at least  
 15 we'll get the impairment rating, we'll get that  
 16 paid, and then if there's any protest on the  
 17 amount along the lines that we're talking about,  
 18 then we can address it then.

19 MR. DALE: Were we done on that? I  
 20 wanted to go back to one of Brad's comments, Your  
 21 Honor.

22 THE COURT: Did he make a bad one?

23 MR. LUCK: That would be unusual.

24 MR. DALE: The fellow that's dead, I  
 25 think that there has -- As I understand it from

1 effect at the time of the impairment rating. But  
 2 our problem is -- here's another glitch. If  
 3 that's so, impairment ratings being given now, but  
 4 if they would have been rated when they should  
 5 have been, a different current one might have been  
 6 in effect. Now is the fifth.

7 The fifth isn't that old. The statute  
 8 says the impairment rating must be based on the  
 9 current edition of the guide for evaluation of  
 10 permanent impairment. It doesn't say when. I  
 11 would at first blush read that to mean that when  
 12 you give the impairment rating, you do that.

13 MR. DALE: Right. And that's the one in  
 14 effect at the time. And so that if a carrier  
 15 delays in getting it, and the guides become more  
 16 liberal, then they're doing that at their peril.

17 MR. MARTELLO: Judge, doesn't this cut  
 18 both ways, though? They're talking about the  
 19 accrued amount, then you put the impairment rating  
 20 out here, you don't have the accrued amount. If  
 21 you're putting the impairment rating back, there  
 22 may be some accrued amount, and then you don't  
 23 have to worry about the argument with regard to  
 24 payment of a lump sum or the discount at least.  
 25 So I think it cuts both ways, depending on how you

1 our discussions on this, if you get an impairment,  
 2 if you had one coming, then that's your best. And  
 3 the fact that he didn't have a rating should not  
 4 work against him or his estate.

5 And I think that there would have to be  
 6 a paper review of that particular individual's  
 7 file to determine, based upon the medical records  
 8 as best can be done, a determination of what the  
 9 impairment is; and I think that that person's  
 10 estate would be entitled to the benefit.

11 MR. LUCK: I think that's right.

12 THE COURT: I think we'll all agree with  
 13 that. So that's easy. You'll have to just try to  
 14 get the physician to do it.

15 MR. OVERTURF: We had even contemplated,  
 16 looking at that guy, we thought the most  
 17 expeditious way we could have done it is if we had  
 18 sufficient medical records, you can get a paper  
 19 review and impairments done on all of them.

20 THE COURT: Is everybody in agreement on  
 21 using the fifth?

22 MR. BECK: I think it's the easiest.

23 THE COURT: At least for purposes,  
 24 subject to the claimant objecting to it.

25 MR. BECK: Our standpoint is we wouldn't



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1 have an objection, would we, Lon?  
 2 MR. DALE: No.  
 3 MS. BUTLER: That limits the purpose of  
 4 this case.  
 5 MR. LUCK: I think that makes sense.  
 6 THE COURT: By agreement. I'm not going  
 7 to order it if we all agree to it. I think we can  
 8 do it.  
 9 MR. LUCK: And to the extent it's  
 10 unusual, but just to be safe, either side could  
 11 make an objection. Say, the claimant could make  
 12 an objection. If it's reviewed, and there's  
 13 substantial problem caused to the State Fund,  
 14 maybe we could then bring that before you. But I  
 15 don't anticipate this being a problem. Just so  
 16 it's a little open ended, and allows us to get the  
 17 process moving, and if it does become a problem in  
 18 application, then we can try to get it worked out,  
 19 or talk to you about it. Is that all right?  
 20 THE COURT: I think maybe what we could  
 21 agree to is if after obtaining the impairment  
 22 award, based on the fifth edition, if there's  
 23 disagreement over the impairment award, or use of  
 24 the fifth, a claimant or party can raise that at  
 25 that time, and I'll decide what to do.

1 treating still around for whatever reason, we  
 2 would probably have to do like an IME, find  
 3 somebody in the right specialty, and set them up  
 4 an appointment, do a paper review if there's no  
 5 preference. We're happy to set them up with  
 6 somebody, but --  
 7 MR. BECK: I would object to a paper  
 8 review unless somebody here can try to set a  
 9 gooneyometer (phonetic) to the paper in the file.  
 10 MR. LUCK: I could.  
 11 MS. BUTLER: I think if we disagree, I  
 12 think that they could have a treating, and the  
 13 treating is still practicing, then we would set  
 14 them up with their treating. If not, we would  
 15 set them up with an appropriate specialty, kind of  
 16 an IME type impairment. And then the deceased  
 17 person we would have to do a paper review. And  
 18 the fellow that no physician will see, he's in  
 19 Arizona, and so I don't know if you would have  
 20 any objection to a paper review, and then seeing  
 21 what you think of it.  
 22 THE COURT: I think the claimant is  
 23 going to have to -- should make that election. I  
 24 suppose the guy that's long gone --  
 25 MS. BUTLER: And the unlocated person.

1 That takes care of that. What are you  
 2 going to do, just try to go back to the treating  
 3 physicians on the 14 that are out there, and ask  
 4 them?  
 5 MR. LUCK: We've talked about whether  
 6 it's appropriate for a paper review if the  
 7 information is there, and a consultant would do  
 8 that. Each circumstance is going to be a little  
 9 bit different, trying to get a live exam now,  
 10 depending on the date of the claim and those kind  
 11 of things. I don't think there is a firm process  
 12 agreed to, other than we've got -- we do know we  
 13 have to get moving on it.  
 14 THE COURT: How about this. What if you  
 15 notify claimants, give them the option of  
 16 returning to their treating physician, or having a  
 17 paper review or even having an IME do it. Let it  
 18 be their election since there's only 14 of them.  
 19 MR. LUCK: I defer to my client.  
 20 MS. BUTLER: I think just setting them  
 21 up with the treating, but everybody was still with  
 22 us, so if we could try that option.  
 23 THE COURT: Do you want to try that  
 24 first?  
 25 MS. BUTLER: Then if there's not a

1 There may be some of these others that will turn  
 2 up, difficult to find ones, when we start sending  
 3 the letters, but we'll just have to take that as  
 4 it comes, so --  
 5 THE COURT: So refer them back to their  
 6 treating; if the treating won't do it, set up an  
 7 IME; and then they'll be notified, they should be  
 8 notified that if they contest the impairment  
 9 rating in any event, they're free to do that.  
 10 Then we'll take it up here. If you want, you can  
 11 draft something and I'll look at it.  
 12 MR. DALE: The cover letter that goes to  
 13 these people, what are you going to tell them?  
 14 Are you going to tell them that they're entitled  
 15 -- I think they should be told they are going to  
 16 receive a benefit if they do this.  
 17 MR. OVERTURF: Well, I think it would  
 18 say something -- they should have already gotten a  
 19 copy of the attorney fee hearing, so it shouldn't  
 20 be completely new to them. They would notice  
 21 that. And I guess our letter would say something  
 22 to effect of, "Due to this decision, you're  
 23 entitled to an impairment award, and need to set  
 24 up an appointment."  
 25 THE COURT: Why don't you draft a letter

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1 and run it by Monte and Lon, and then if the two  
 2 of you agree on it, and want me to look at it,  
 3 and approve it, I'll do that. If you're perfectly  
 4 happy and delighted with it, don't want me to look  
 5 at it, then that's okay with me, too. Let me know  
 6 that you've agreed on it, and send me a copy so  
 7 I've got it in the file.  
 8 MR. BECK: Then on sort of a related  
 9 thing, maybe someone knows, but I got a sample of  
 10 letters I think to the various claimants that  
 11 you're starting the process now, and I don't think  
 12 it's been done yet, but it didn't have a cover  
 13 letter that explains what it was, but it looks  
 14 like something that Chris wrote sort of saying,  
 15 "Dear Mr. Claimant or Ms. Claimant: Impairment  
 16 rating shows 'X' percent, and we're ready to  
 17 distribute this."  
 18 But as I understand it, none of these  
 19 letters -- no payments have been made to any  
 20 claimant, even though they have an impairment  
 21 rating in the file.  
 22 MR. OVERTURF: I think we have started  
 23 making payments. I think that's why you're  
 24 getting the letter. What we should do is talk to  
 25 Chris, and see where we are on the process, but we

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1 started going through them how long ago.  
 2 MR. MARTELLO: We've started the process  
 3 of going through these --  
 4 MR. OVERTURF: Three or four weeks ago?  
 5 MR. MARTELLO: I think been about four  
 6 weeks. And that was also my understanding, was  
 7 that the payments were going to commence.  
 8 MR. OVERTURF: I think the payments are  
 9 going out and we're withholding 25 percent, the  
 10 attorney fee, the 25 percent pending.  
 11 MR. MARTELLO: Withholding 15.  
 12 MR. OVERTURF: That's right.  
 13 MR. BECK: Okay.  
 14 THE COURT: Why don't you look at that,  
 15 and if there's issues about it --  
 16 MR. BECK: I can give you a sample. And  
 17 it didn't an have address, and some of them it  
 18 looks like it's a draft, but I just don't know.  
 19 MR. LUCK: Was that sent to a claimant,  
 20 Monte?  
 21 MR. BECK: I just don't know, because it  
 22 doesn't look like it is because it doesn't have an  
 23 address. It looks like it's just a proposed  
 24 letter, a form letter.  
 25 MR. MARTELLO: What we're thinking here,

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1 and just thinking out loud, is that this is a  
 2 process that involves the claim adjuster who is  
 3 assigned to this claim, and then Chris McCoy, who  
 4 is overseeing the payments of these; and I think  
 5 that the form that -- the letter, which really  
 6 doesn't have the information with regard to  
 7 address and everything, is given to the adjuster  
 8 to complete, to send out, but that Chris McCoy  
 9 would be handling the payment end of that.  
 10 THE COURT: Why don't you check on it.  
 11 MR. MARTELLO: We will.  
 12 THE COURT: And let them know.  
 13 MR. BECK: I would also point out that  
 14 you're using -- on monies that are going to be  
 15 paid biweekly or a lump sum is discounted by 5.02  
 16 percent, and the new discount rate is 4.6 percent  
 17 as of July 1. So if you were going to make  
 18 payments after July 1, you don't use the 5.2  
 19 percent, you use the 4.61 percent. Right, Mark?  
 20 Is that what your new Department of Labor shows  
 21 for the new discount rate?  
 22 MR. CADWALLADER: I'll defer to Carol.  
 23 MS. GLEED: 4.61 or 4.961, of the two  
 24 lower than 5.02.  
 25 MR. OVERTURF: We'll need to apply a

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1 different discount rate after July 1.  
 2 MR. LUCK: It makes sense. We'll get as  
 3 many paid in June as possible.  
 4 THE COURT: They're earning their fees.  
 5 MR. BECK: Thank you, Your Honor.  
 6 THE COURT: If there's some letters that  
 7 have actually gone out to claimants, maybe you can  
 8 get them a copy of what the actual letter says, if  
 9 this is just a draft.  
 10 MR. LUCK: I suspect that's the form  
 11 letter that's being used and just filled in.  
 12 We'll verify that. I suspect they all say this,  
 13 with the proper address on it.  
 14 THE COURT: Then have an amount that  
 15 they're being paid, or is that a separate letter  
 16 going out with payment?  
 17 MR. MARTELLO: Judge, I just talked to  
 18 Chris McCoy, and she said we've been making  
 19 payments for about a month.  
 20 What I was wondering, if you've got the  
 21 speaker phone, maybe we could patch her in, and  
 22 she could explain this letter that you're getting.  
 23 THE COURT: I think we can do it. Is  
 24 she on the line or is she --  
 25 MR. MARTELLO: No. I've got her phone



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1 number here. I told her we were going to try and  
 2 call her back.  
 3 MR. LUCK: Monte, are all those -- are  
 4 they individually addressed, the other letters?  
 5 THE COURT: Chris, this is Judge  
 6 McCarter. How are you.  
 7 MS. McCOY: Good afternoon, Judge. I'm  
 8 very well. Thank you.  
 9 THE COURT: We're putting you on the  
 10 floor, the telephone at least. We've got a crowd  
 11 in here. And I guess we had a couple of  
 12 questions.  
 13 MS. McCOY: What can I help with?  
 14 THE COURT: Tom I think asked you about  
 15 a letter that was sort of a form letter that's  
 16 being used. I was just handed a couple here. It  
 17 looks like the amount that they're owed is  
 18 actually in this letter. Did you have -- do they  
 19 have these?  
 20 MR. LUCK: Those are Monte's.  
 21 THE COURT: So what are the questions  
 22 that we have for her?  
 23 MR. BECK: Well, the first one was the  
 24 letters that I received, and it didn't have a  
 25 cover letter on it, Chris, but it does have the

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1 name of the claimant, but it doesn't have address  
 2 or the city or anything like that. It just has a  
 3 "Dear" blank. Is that --  
 4 We wondered, is that just a letter that  
 5 you drafted for the adjusters to then fill in that  
 6 pertinent information? And since it doesn't have  
 7 a date on it, we wondered: Have actual letters  
 8 been sent out to claimants, and if so, how many?  
 9 And that's one question.  
 10 And then the second one dealt with the  
 11 discount rate that would be used, if they request  
 12 lump sum, but it doesn't come back to the State  
 13 Fund after July 1, we have different discount.  
 14 That's the second question.  
 15 MS. McCOY: Kind of taking them one at a  
 16 time, the copies that I forwarded to you are the  
 17 draft that I prepare; and then I run a copy for  
 18 you and one for the Court; forward it on to the  
 19 adjuster, who fills out the address box and the  
 20 signature block.  
 21 MR. BECK: All right.  
 22 MS. McCOY: Other than that, it should  
 23 be exactly the same letter that's going out to the  
 24 claimant.  
 25 THE COURT: Chris, does the check then

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1 get cut, and is it enclosed with this letter?  
 2 MS. McCOY: Actually I do the warrant  
 3 before the letter goes. It's the same day, but  
 4 I've already prepared and released the warrant.  
 5 MR. BECK: Have any of them been sent?  
 6 MS. McCOY: The letters?  
 7 MR. BECK: Yes, because I just received  
 8 them yesterday.  
 9 MS. McCOY: To the best of my knowledge,  
 10 they're all sent. Anything you've received has  
 11 already gone out in the mail.  
 12 MR. BECK: Okay.  
 13 MS. McCOY: And then I think your second  
 14 question was the discount rate?  
 15 MR. BECK: Yes. If you have some of  
 16 these claimants say, "Yes, I'd like to take it in  
 17 a lump sum," but it will be discounted at a rate.  
 18 We just pointed out that the rate had changed as  
 19 of just recently in the last week or so.  
 20 MS. McCOY: Well, it will change July 1,  
 21 but we will honor or stand by whatever rate is in  
 22 the letter. Right now we're using 5.02. Even if  
 23 it came back, say, July 15th, it will be at the  
 24 5.02.  
 25 MR. BECK: The new rate is 4.61.

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1 MS. McCOY: Okay. Luck of the draw.  
 2 THE COURT: You'll have to use that. Is  
 3 that all the questions we've got for Chris?  
 4 MR. DALE: I'm kind of wondering, Your  
 5 Honor, just so we could review these letters, I  
 6 notice from the information we have, we do have on  
 7 the ones that -- there are MMI's on a lot of  
 8 these, the dates, MMI dates. But we should maybe  
 9 have something where they get that explained to  
 10 them.  
 11 I notice on this Cunningham one, it  
 12 seems like this is the guy that's dead, because  
 13 the letter, it mentions his estate. And if yet  
 14 they were going to do the discount, and it seems  
 15 to me that they're saying that it hadn't all  
 16 accrued, and he's at 99 percent impairment.  
 17 And so it would appear if the guy is  
 18 dead, that there wouldn't be -- there would be an  
 19 obligation to pay it in lump sum instead of  
 20 biweekly.  
 21 MR. MARTELLO: The fact that he's  
 22 deceased doesn't change how the payout would  
 23 occur.  
 24 MR. OVERTURF: Isn't that still the  
 25 choice of the claimant?

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1 MR. BECK: He was injured in 1997,  
 2 according to this, if you go by the date of  
 3 accident number, 0397. So I don't know if it  
 4 would have accrued before he died or not, or  
 5 accrued to this date. But that's six years ago  
 6 that he was injured.  
 7 MR. MARTELLO: Yes, but you have an MMI  
 8 date after the date of injury, and you could have  
 9 a portion of it accrued, and then you could have a  
 10 portion that would have been paid out post-death.  
 11 And I think that that is -- that's appropriate.  
 12 You apply a discount for the --  
 13 MR. BECK: Sure, but we don't know what  
 14 the MMI date is from this letter, and neither  
 15 would the estate or anybody, right?  
 16 MR. DALE: I guess I'm back to the  
 17 arguments -- and this goes back a little bit --  
 18 but to State Fund's arguments before that they  
 19 were going to start these at age 65. Do you  
 20 remember that situation, Your Honor, where they  
 21 said that that's when they were going to make  
 22 impairment payments.  
 23 And it was my understanding that the  
 24 evidence or the discussion from some experts was  
 25 that if the person was deceased at that time, and

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1 THE COURT: Right. I think everybody  
 2 agrees to that.  
 3 MR. BECK: I have another question. So  
 4 Chris, will you do that, if even though these  
 5 people don't get back to you until July 15, when  
 6 you apply the 4.61 discount rate?  
 7 MS. McCOY: If that's the decision, yes,  
 8 we would.  
 9 MR. BECK: Thank you. I have another  
 10 question, though. The packet of letters that I  
 11 have seem to start -- now I don't know if this  
 12 will fit in with your computer -- goes from 50 to  
 13 68 on the listing of claimants. Could you explain  
 14 -- Are you doing this in some fashion? And would  
 15 you just explain it to me, how you selected these  
 16 claimants.  
 17 MS. McCOY: Initially the first group  
 18 that were audited and paid were the ones who would  
 19 sunset first, either the impairments -- they were  
 20 already retired where the impairment is due, and  
 21 we wanted to address those before the entire  
 22 liability was paid out. So I started with those.  
 23 And I think there were seven or eight.  
 24 After that, it was basically starting at  
 25 the top of the list and working my way down.

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1 you were delaying paying the IR's, that then it  
 2 would be paid in a lump sum. But I don't know. I  
 3 guess it's just a point of discussion. We can  
 4 talk about that some more. We're not going to  
 5 resolve --  
 6 THE COURT: Yes, we can talk about it.  
 7 MR. BECK: I do have another question  
 8 for you, Chris.  
 9 MS. McCOY: Well, on the one you were  
 10 just talking about, Robert Cunningham, we did have  
 11 an MMI date on his, and the estate did request the  
 12 lump sum conversion on the balance. We've already  
 13 paid that.  
 14 MR. BECK: Okay.  
 15 THE COURT: We don't need to deal with  
 16 that, it sounds like.  
 17 MR. DALE: Except for the discount rate.  
 18 MS. McCOY: It would have been 5.02.  
 19 THE COURT: Except as to whether the  
 20 discount -- Well, it sounds like to me it's  
 21 probably up to the estate to raise that issue,  
 22 don't you think, at this point?  
 23 MR. BECK: Well, I just think that if  
 24 payments -- if the request comes in after July 1,  
 25 I think you're obligated to use the 4.61 percent.

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1 MR. BECK: Okay. That's all the  
 2 questions I have.  
 3 THE COURT: Does anybody else have any  
 4 questions for Chris?  
 5 (No response)  
 6 THE COURT: Chris, we're going to let  
 7 you off the hook.  
 8 MS. McCOY: Thanks.  
 9 (Hangs up telephone)  
 10 THE COURT: Now where are we?  
 11 MR. DALE: One question, Your Honor,  
 12 would be what about the Plan 1's and 2's that did  
 13 get lien notices, and now potentially have looked  
 14 at the Ruhd decision. Should we give them some  
 15 idea what's going on or --  
 16 MR. OVERTURF: You did.  
 17 THE COURT: I think -- Didn't I in the  
 18 Ruhd order basically continue my order allowing  
 19 them to withhold pending appeal and indicating?  
 20 MR. OVERTURF: Yes.  
 21 THE COURT: Did I even indicate that  
 22 they ought to probably do so?  
 23 MR. ANGEL: I think you told them that  
 24 they were authorized by you to continue the  
 25 withholding and await future.



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1 THE COURT: And I could do the same  
2 thing. I'll do the same authorization in this  
3 case, to repeat that. And then if you want to  
4 notify them of that, send them out the order,  
5 that's fine. That's not only for your protection,  
6 it's for their protection, too, so I have no  
7 problem with you doing that.

8 In fact, if you wanted to do it  
9 immediately, you could do it just based on the  
10 order in Ruhd, send them a copy of that order.

11 MR. BECK: It's difficult, but now we  
12 have the list, so we could do that. I think we  
13 should meet and discuss whether we really need to  
14 notify everybody all over again. I really doubt  
15 that very many carriers got a copy of the Ruhd  
16 decision, so I think they're still going with the  
17 original lien notice, would be my guess. I think  
18 they're calling up here and saying, "What does  
19 this mean?"

20 MR. OVERTURF: You were pretty clear in  
21 your decision, telling them.

22 THE COURT: Even if they got the Ruhd  
23 decision, and they read the whole thing, they'd  
24 probably get the message. I'll leave that up to  
25 you.

1 what do we order it on? Was there was a trial?  
2 It was just on the briefs, as I understand it.  
3 So there's really nothing to send up to the  
4 Supreme Court.

5 THE COURT: I decided that pretty much  
6 as a matter of law, so I don't think there's any  
7 factual record.

8 MR. BECK: So we don't need to order any  
9 transcript?

10 THE COURT: No. The only thing we did  
11 was we had the arguments, so that's the only  
12 transcript that there would be, is of the  
13 arguments. If you want a copy of the file, just  
14 let Pat know, and we'll make you a copy of the  
15 file. I don't think it's real thick.

16 MR. ANGEL: It's pretty thick.

17 THE COURT: We've run out of gas and  
18 questions?

19 THE CLERK: While everybody is here, you  
20 had discussed another status conference in 60  
21 days, which would be August 25th. That's a  
22 Monday, and I would just like to get that  
23 scheduled as soon as possible. Is Monday a good  
24 traveling day for everybody, or do --

25 THE COURT: Hold on, because this case

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1 THE CLERK: I had a question. Monte's  
2 office had called earlier, and Mickey took the  
3 phone call. Then I have one other issue after  
4 that.

5 THE COURT: Your office called, and your  
6 secretary asked about -- what was it -- something  
7 to do with the attorney fees, whether or not any  
8 briefs had been filed with respect to attorney  
9 fees. I think what she was asking about is  
10 whether any briefs had been filed in the Flynn  
11 case, where I invited amicus by everyone. Is that  
12 what you were looking for?

13 MR. BECK: Actually we were just getting  
14 ready -- We thought we might be talking about  
15 Fisch, Frost, and the upcoming hearing in July,  
16 whether there was any briefs or objections,  
17 written something, or something, because we  
18 haven't received anything.

19 THE COURT: We haven't gotten anything,  
20 have we?

21 THE CLERK: No.

22 MR. BECK: I know there was a second  
23 issue, and that is I don't know what's in the  
24 Ruhd file for purposes of preparing something for  
25 the appeal. If we have to order a transcript,

1 is different than the other cases. The other  
2 cases we were going to do a 60 day only because it  
3 had factual issues that are being developed for  
4 purposes of whether or not there's a common fund,  
5 and also for the retroactivity issue, and the  
6 Chevron issue. So I don't know as we need another  
7 conference in this case like that.

8 MR. LUCK: No.

9 MR. DALE: I don't think so.

10 THE COURT: So we will exclude Fisch,  
11 Frost, and Rausch.

12 THE CLERK: Right, but most everybody is  
13 still here, and I wasn't sure if they were  
14 leaving.

15 MR. LUCK: I would rather have it in the  
16 middle of that week because I'm going to be taking  
17 my daughter to school, and then I won't be in  
18 town. We already know that Tom can take over,  
19 though.

20 THE CLERK: We will set out a few days,  
21 I'll send out an email notice to everybody, and  
22 we'll get a day in that week, the week of the  
23 25th, because that's a Monday.

24 MR. DALE: But that doesn't apply to  
25 this?

15 (Pages 48 to 51)

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1 THE CLERK: No.  
2 THE COURT: But it applies to the other  
3 cases?  
4 THE CLERK: I apologize, Lon. Everybody  
5 was here, and I didn't know if they were going to  
6 stay.  
7 THE COURT: Your question went right  
8 over my head.  
9 Vic has been sitting back here very  
10 quietly, and I wonder if Vic has anything he wants  
11 to throw in, or any issue that you're involved  
12 with that you need to talk about.  
13 MR. HALVERSON: The only thing I was  
14 wondering, you're still on schedule for the July  
15 8th hearing, then, and the order that you had sent  
16 out the 6th of May with the proposed fee schedule?  
17 THE COURT: We are.  
18 MR. HALVERSON: That's all I was  
19 wondering about.  
20 THE COURT: We've still got it scheduled  
21 in here. I suspect we won't have that many  
22 people. There hasn't been a flurry of interest.  
23 Okay. If no one has anything else, we'll recess  
24 until the next one, which is not until 3:30.  
25 (The proceedings were concluded at 2:10 p.m.)

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1 CERTIFICATE  
2 STATE OF MONTANA )  
3 : SS.  
4 COUNTY OF LEWIS & CLARK )  
5 I, LAURIE CRUTCHER, RPR, Court Reporter,  
6 Notary Public in and for the County of Lewis  
7 & Clark, State of Montana, do hereby certify:  
8 That the proceedings were taken before me at  
9 the time and place herein named; that the  
10 proceedings were reported by me in shorthand and  
11 transcribed using computer-aided transcription,  
12 and that the foregoing -52- pages contain a true  
13 record of the proceedings to the best of my  
14 ability.  
15 IN WITNESS WHEREOF, I have hereunto set my  
16 hand and affixed my notarial seal  
17 this day of , 2003.  
18  
19 LAURIE CRUTCHER, RPR  
20 Court Reporter - Notary Public  
21 My commission expires  
22 March 9, 2004.  
23  
24  
25

16 (Pages 52 to 53)

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