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WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

ROBERT FLYNN and CARL MILLER,
 Individually and on Behalf of Others
 Similarly Situated,

Petitioners,

vs.

MONTANA STATE FUND,

Respondent/Insurer,

and

LIBERTY NORTHWEST INSURANCE
 CORPORATION,

Intervenor.

WCC No. 2000-0222

**RESPONDENTS' BRIEF ON ISSUE
 OF 25% ATTORNEY FEE LIEN**

COMES NOW the above listed Respondents ("Respondents") and, pursuant to this Court's order of February 17, 2006 (Document # 465 on this Court's *Flynn* website), submit this brief regarding the percentage of attorney's fees to be withheld from claimants who benefitted from the *Flynn* Litigation.¹

¹ By submitting this brief on the amount of attorney's fees to be withheld from *Flynn* beneficiaries, Respondents do not concede the entitlement of claimants to any such benefits. The entitlement issue has yet to be decided by this Court, but, as permitted by the *Summons* in this action, Respondents disputed the entitlement in their Response to *Summons* filed with this Court on June 20, 2005.

I. INTRODUCTION

As this Court is aware, there are several common fund actions currently pending in which attorney fee liens have been asserted for fixed percentages against the benefits due non-participating claimants. That percentage is routinely 25%. In this case, following the Supreme Court's decision in *Flynn v. State Compensation Insurance Fund*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397, Petitioner's counsel asserted an attorney fee lien of 25% of benefits due non-participating claimants.

II. COMMON FUND DOCTRINE DOES NOT PERMIT A 25% ACROSS THE BOARD FEE LIEN

Petitioner's attorney relies on the common fund doctrine as authority for the attorneys fee lien he seeks. However, his assertion of a 25% lien against the benefits due non-participating beneficiaries of the *Flynn* decision is a misapplication of the common fund doctrine as adopted by Montana.

The common fund doctrine does not state that the Petitioner's attorney is entitled to a fixed percentage of the common fund created through litigation. Rather, the common fund doctrine is simply an exception to the American Rule that permits a litigant to recover his attorney fees. *Mountain West Farm Bureau Mut. Ins. Co. v. Hall*, 2001 MT 314, ¶ 14, 308 Mont. 29, ¶ 14, 38 P.3d 825, ¶ 14 ("[o]ne of the recognized equitable exceptions to the American Rule is the common fund doctrine"). Indeed, in *Flynn*, the very case at issue, the Supreme Court stated as follows:

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.

Flynn v. State Compensation Ins. Fund, 2002 MT 279, ¶ 15, 312 Mont. 410, ¶ 15, 60 P.3d 397, ¶ 15 (citations omitted). Thus, to the extent that Petitioner's attorney may assert an attorney fee lien against the common fund created in *Flynn*, it may only be for the amount of such reasonable fees actually incurred by Petitioner in the *Flynn* litigation. Moreover, each non-participating beneficiary is only liable for such fees in proportion to the benefit he has actually received. *Murer v. State Compensation Mut. Ins. Fund* (1997), 283 Mont. 210, 224, 942 P.2d 69, 77. Thus, in determining the amount owed by the non-participating beneficiaries, in satisfaction of the attorney fee lien asserted, we

must first determine the amount of such fees actually incurred by the Petitioner in the *Flynn* litigation.

III. THE ATTORNEY FEE LIEN IN THIS CASE MAY NOT EXCEED 25% OF MR. FLYNN'S RECOVERY BECAUSE THAT IS THE MAXIMUM AMOUNT OF ATTORNEY FEES HE COULD HAVE INCURRED

Significantly, the amount of attorney's fees actually incurred by the Petitioner, Mr. Flynn, in this case is easily determined. Montana regulations expressly address the attorney's fees that may be charged by attorneys representing workers compensation claimants.

...an attorney representing a claimant on a workers' compensation claim who plans to use a contingent percentage fee arrangement to establish the fee with the claimant, may not charge a fee above the following amounts:

(b) For cases that go to a hearing before the workers' compensation judge or the supreme court, twenty-five percent (25%) of the amount of additional compensation payments *the claimant* receives from an order of the workers' compensation judge or the supreme court due to the efforts of the attorney.²

§ 24.29.3802(3), A.R.M. Therefore, to determine the Petitioner's attorney fees, which must be reimbursed under the common fund doctrine, we must determine the additional compensation that Mr. Flynn received by order of the Supreme Court due to the efforts of his attorney.

In *Flynn*, the Montana Supreme Court held that when a workers' compensation claimant obtains social security disability benefits through the efforts of counsel, the workers compensation insurer is benefitted to the extent that it may reduce the claimant's TTD or PTD benefits under §§ 39-71-701(5) and 702(4), MCA, and thus, under the common fund doctrine, must reimburse the claimant for one-half of his attorneys fees incurred in obtaining the social security disability benefits. Therefore, the additional compensation payments Mr. Flynn received in this case, from an order of the Supreme Court and due to the efforts of his attorney, was reimbursement for one-half of his attorney fees incurred in obtaining the social security disability benefits. Accordingly, under § 24.29.3802(3), A.R.M., the maximum allowable attorneys fees that could have been incurred by Mr. Flynn is 25% of one-half of his attorneys fees incurred in obtaining social security benefits.

² Even if an attorney is engaged under an hourly rate agreement, his fees may not exceed the schedule set forth in § 24.29.3802(3), A.R.M. § 24.29.3802(4), A.R.M. Thus, under no circumstances are workers' compensation attorney's fees permitted to exceed 25% of the claimant's recovery.

During the February 16 hearing on this matter, Petitioner's attorney, Mr. Palmer, stated that the average *Flynn* benefit due to State Fund's *Flynn*-type claimants was \$1,304.00. Mr. Palmer also stated that Mr. Flynn's recovery was also in the neighborhood of \$1,304.00. 25% of \$1,304.00 is \$326.00. Thus, because Mr. Flynn's attorney's fees are capped at 25% of the additional benefits received through efforts of counsel (i.e., \$1,304.00), his attorney's fees may not exceed \$326.00.³ Therefore, under the common fund doctrine the attorney's fees which must be reimbursed to Mr. Flynn, and therefore, the amount of the attorneys fee lien asserted, may not exceed \$326.00.

IV. THE UNFAVORABLE RESULTS OF ADOPTING PETITIONERS ACROSS THE BOARD PERCENTAGE

A. Every Dollar Put in Mr. Flynn's Attorney's Pocket is a Dollar Removed from a Disabled Claimant's Pocket.

As discussed, Mr. Flynn is entitled to his attorneys fees incurred in the *Flynn* litigation. No more, no less. However, by asserting an attorneys fee lien consisting of a fixed 25% assessed all against benefits due non-participating beneficiaries, Mr. Flynn's attorney seeks a windfall over and above the maximum attorneys fees that could be charged in the *Flynn* litigation under § 24.29.3802, A.R.M. Quite simply, Mr. Flynn's attorney seeks to increase his attorney's fees by a multiple equal to the number of non-participating beneficiaries. By asserting an attorneys fee lien in the amount of 25% of the benefits due non-participating beneficiaries, Petitioner's attorney seeks to force each such beneficiary to pay an amount equal to the entire amount of attorney's fees incurred by Mr. Flynn. The 25% across-the-board assessment, favored by Mr. Flynn's attorney, certainly simplifies the computation of the attorney's fee lien. However, it does so at the cost of injured workers whose benefits would be reduced in excess of that required to reimburse the litigating claimant for his attorney's fees. Indeed, applying a 25% assessment and given the average recovery of \$1,304.00 for the 273 State Fund *Flynn* beneficiaries already identified, those persons will pay \$88,998.00 to Mr. Palmer in attorneys fees - \$88,672 above the fees he is entitled to under the common fund doctrine. This windfall comes at the expense of those non-participating beneficiaries whose benefits are reduced in order to fund an award to Mr. Flynn's attorney far in excess of the \$326 to which the common fund doctrine entitles him. Recall that in this case, the non-participating beneficiaries are workers' compensation claimants whose injuries are so severe as to have caused them to be disabled enough to qualify for SSDI. Thus, the windfall sought by Mr. Flynn's attorney is funded by seriously disabled persons whose injuries prevent them from earning an income.

³ While Mr. Palmer has conceded that Mr. Flynn's recovery was in the neighborhood of \$1304.00, Mr. Palmer did not offer the exact amount of that recovery. Thus, Respondents concede that actual attorneys fees incurred by Mr. Flynn could be slightly different than \$326.00.

B. The 25% Assessment Disregards Montana Law Which Requires that Non-Participating Beneficiaries Contribute to The Active Litigants Attorneys Fees Only in Proportion to the Benefits They Received.

The Montana Supreme Court has held that non-participating beneficiaries must contribute to the active litigants attorneys fees only in proportion to the benefit received. *Murer v. State Compensation Mut. Ins. Fund* (1997), 283 Mont. 210, 224, 942 P.2d 69, 77 ("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 costs of the litigation, including reasonable attorney fees"). The across-the-board assessment of 25% disregards this holding to the detriment of the *Flynn* beneficiaries.

As stated by Mr. Palmer in the February 16 hearing, the *Flynn* benefits due non-participating beneficiaries vary in accordance with the amount of attorneys fees incurred in obtaining SSD benefits. Thus, the non-participating beneficiaries have benefited in different proportions and thus are liable to contribute to Mr. Flynn's attorney's fees in different proportions. Clearly, the across-the-board 25% assessment ignores this proportional liability and would have the effect of requiring smaller beneficiaries to contribute to Mr. Flynn's attorney's fees in the same proportion as beneficiaries who realized proportionally larger benefits. Thus, the larger beneficiaries are favored at the expense of the smaller. Some examples are appropriate.

In determining the amount of contribution owed by each beneficiary, we could simply divide the amount of attorney's fees by the number of beneficiaries to determine each beneficiary's contribution. For example, assuming \$326.00 in attorney's fees and 500 non-participating beneficiaries, each beneficiary's liability would be \$.65 (\$326 divided by 500 = .652). However, while closer to the mark than the 25% assessment, this method still does not weight each non-participating beneficiary's liability "in proportion to the benefits actually realized." Thus, the appropriate method of determining each beneficiary's liability is to first determine the dollar amount of the common fund (i.e., the aggregate of benefits due all *Flynn* beneficiaries) and each beneficiary's proportion thereof actually received. Then, the number of beneficiaries is divided by the attorney's fees. That figure will be the average liability for each non-participating beneficiary. That average liability is then multiplied by a factor above or below the average, indicating the proportional benefit received. The following example illustrates this method.

Attorneys Fees Incurred:	\$10.00
Number of Non-Participating Beneficiaries:	10

% of total common fund received by each non-participating beneficiary

Beneficiary No. 1	.25
Beneficiary No. 2	.10
Beneficiary No. 3	.10
Beneficiary No. 4	.05
Beneficiary No. 5	.25
Beneficiary No. 6	.10
Beneficiary No. 7	.08
Beneficiary No. 8	.02
Beneficiary No. 9	.02
Beneficiary No. 10	.03

The average liability for each beneficiary is \$1.00 (\$10 attorney fees divided by 10 non-participating beneficiaries = \$1). Beneficiary No. 1's proportion of the common fund is .25 thus he would pay two-and-a-half times the average liability or \$2.50. Beneficiary No. 2's proportion is .10 so he would pay merely the average liability. Beneficiary No. 3's proportion is .05 so he would pay only one-half the average or \$.50. Adding up each beneficiary's weighted liability then results in the exact payment of the attorney's fees in the correct proportions owed by each beneficiary.

Beneficiary No. 1	\$2.50
Beneficiary No. 2	\$1.00
Beneficiary No. 3	\$1.00
Beneficiary No. 4	\$0.50
Beneficiary No. 5	\$2.50
Beneficiary No. 6	\$1.00
Beneficiary No. 7	\$0.80
Beneficiary No. 8	\$0.20
Beneficiary No. 9	\$0.20
Beneficiary No. 10	\$0.20
Total paid by all beneficiaries	\$10.00

Clearly, the above method is the only means of complying with the common fund doctrine because it is the only means that ensures accurate payment of attorneys fees based upon each non-participating beneficiary's proportional benefit. Using this method nobody gets shortchanged by having their benefits reduced by a disproportional amount.

Moreover, recall that the insurers are liable to accurately pay the common fund benefits to the individual non-participating beneficiaries. Were the insurers simply to accept the Petitioner's attorneys' assertion of an across-the-board 25% lien, and immediately pay the same, they would potentially expose themselves to significant

claims by any non-participating beneficiary who the insurers shortchange by deducting an excessive amount for attorneys fees.

Clearly, under the common fund doctrine as adopted in Montana, the non-participating beneficiaries of the *Flynn* decision are liable to contribute only their proportional share to Mr. Flynn, \$326.00 attorneys fees. As shown above, the 25% across-board-assessment disregards the proportionality of the non-participating beneficiaries liability and results in an exorbitant overpayment of the attorneys fees due Mr. Flynn. Therefore, the 25% attorneys fee lien, asserted by Mr. Palmer, is not permitted under the common fund doctrine.

V. WHILE MONTANA'S COMMON FUND DOCTRINE DIFFERS FROM MOST OTHER JURISDICTIONS, ITS PECULIAR ADAPTATION OF THE COMMON FUND DOCTRINE DOES NOT ALTER THE REQUIREMENTS THAT THE ATTORNEYS FEES RECOVERED MAY ONLY BE THOSE ACTUALLY INCURRED OR THAT THE NON-PARTICIPATING BENEFICIARIES ARE ONLY LIABLE FOR SUCH FEES IN PROPORTION TO THE BENEFIT RECEIVED

At the February 16 hearing on this matter, the State Fund's attorney, Tom Martello, in reliance on the *Murer* decisions, argued that Montana's peculiar version of the common fund doctrine permitted the 25% across-the-board assessment advocated by Mr. Palmer. However, Mr. Martello misreads the *Murer* decisions.

The *Murer* decisions consisted of three separate appeals to the Montana Supreme Court all proceeding from the same Workers' Compensation Court action.⁴ *Murer I* and *Murer II* are irrelevant to common fund analysis because the issues addressed therein were limited to the Workers' Compensation Court's denial of class action certification and its determination that a statutory cap on workers' compensation benefits permanent.

Murer III, however, is relevant to common fund analysis. As a result of *Murer II* the State Fund agreed that it was liable to numerous non-participating claimants for additional benefits. The State Fund agreed to locate those claimants and pay them the additional benefits. In response to this agreement, the petitioners asserted a 20% attorneys fee lien against those additional payments under the common fund doctrine. However, the Workers' Compensation Court refused to award such fees under the common fund doctrine. The petitioners appealed that decision. Thus, the question decided by the *Murer III* Court was whether the Workers' Compensation Court erred in denying attorneys fees under the common fund doctrine.

⁴ *Murer v. State Fund* (1993), 257 Mont. 434, 849 P.2d 1036 (*Murer I*); *Murer v. State Fund* (1994), 267 Mont. 516, 885 P.2d 428 (*Murer II*); and *Murer v. State Fund* (1997), 283 Mont. 210, 942 P.2d 69 (*Murer III*).

In analyzing whether a common fund existed, the *Murer III* Court accepted State Fund's aggregate liability for increased benefits to non-participating beneficiaries as the identifiable monetary fund required to find a common fund. Therefore, the *Murer III* Court held that the petitioners were entitled to attorney's fees because they had created a common fund. This analysis is a departure from the traditional common fund doctrine in that a defendant's liability to numerous claimants is not normally sufficient to find the identifiable monetary fund contemplated by the common fund doctrine.

Murer III also departed from the traditional common fund doctrine in that it permitted the substitution of the common fund for a class action. Thus, while Mr. Martello is correct in that Montana has departed from the traditional common fund doctrine, it has not done so with respect to the requirement that attorneys fees awarded thereunder are limited to those actually incurred or the requirement that non-participating beneficiaries are liable for attorney's fees only in proportion to the benefit received. Indeed, in both *Murer III* and *Flynn*, the Montana Supreme Court has repeatedly adhered to these requirements.

...absent claimants should be required to contribute, in proportion to the benefits they actually received, to the costs of the litigation, including reasonable attorney fees.

Murer III, 942 P.2d at 77.

Accordingly, pursuant to the common fund doctrine, the State Fund should contribute, in proportion to the benefits it actually received, to the costs of the litigation, including reasonable attorney fees.

Flynn at ¶ 18.

Clearly, while Montana has its own unique version of the common fund doctrine, that version expressly requires that the attorney's fees which are to be reimbursed are only those fees actually incurred and that the liability of the non-participating beneficiaries to contribute to those fees must be based upon their proportional benefit.

VI. CONCLUSION

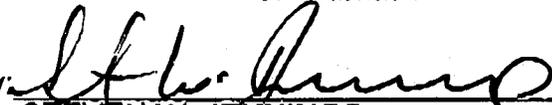
As shown above, Petitioner's attempt to assert a 25% attorneys fee lien on the benefits due non-participating beneficiaries is a violation of the common fund doctrine because it reimburses attorneys fees in excess of those required to be reimbursed. It also does without regard to the proportionality of the benefits received by non-participating beneficiaries. Moreover, under the common fund doctrine, the only means of computing the attorneys fees to be reimbursed is to determine the actual amount of such fees incurred by Mr. Flynn, divide that number by the total number of non-participating beneficiaries, and then weight each such beneficiaries contribution by a

factor above or below the average liability to arrive at each beneficiary's proportional liability for Mr. Flynn's attorneys fees.

WHEREFORE, Respondents respectfully request this Court to enter an order establishing that, with respect to those non-participating beneficiaries insured by Respondents, each such beneficiaries liability under the attorneys fee lien asserted in this case, shall be computed as described in paragraph VI above.

Dated this 27th day of February, 2006.

CROWLEY, HAUGHEY, HANSON,
TOOLE & DIETRICH P.L.L.P.

By: 
STEVEN W. JENNINGS
Attorneys for Respondents

CERTIFICATE OF SERVICE

I, STEVEN W. JENNINGS, one of the attorneys for the law firm of Crowley, Haughey, Hanson, Toole & Dietrich P.L.L.P., hereby certify that on the 27th day of February, 2006, I mailed a true and correct copy of the foregoing document, postage prepaid, to the following:

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February 27, 2006

Workers' Compensation Court
PO Box 537
Helena, MT 59624-0537

RE: *Robert Flynn and Carl Miller vs. Montana State Fund, et al.*
WCC No. 2000-0222

Dear Clerk:

On behalf of our clients, please file the enclosed Respondents' Brief on Issue of 25% Attorney Fee Lien, date stamp the extra copy of the cover page and return in the envelope provided.

Thank you in advance for your assistance with this matter.

Sincerely yours,

CROWLEY, HAUGHEY, HANSON,
TOOLE & DIETRICH P.L.L.P.

Myrna Henschel, PLS

Myrna Henschel, Certified PLS
Legal Secretary to Steven W. Jennings

mlh
Enclosures
c (w/encl.): Mr. Rex Palmer