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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, v. *Montana State Fund*, Respondent/Insurer, and *Liberty Northwest Insurance Company*, Intervenor.	WCC No. 2000-0222 ***PETITIONERS' RESPONSE BRIEF OBJECTING TO REQUEST FOR DISMISSAL***

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Thirty-nine insurers have moved for dismissal from this common fund proceeding. The Request For Dismissal, Doc. 677, claims the insurers each filed affidavits on or before March 8, 2012, demonstrating that they have no liability in this action. It also claims the affidavits each used the form "prepared and promulgated by the Court."

These claims are not accurate. Five of the insurers have filed no affidavit. Another two insurers filed affidavits after the claimed date of March 8, 2012. None of the affidavits request dismissal. Four of the insurers submitted affidavits which are

not in the form prescribed by the Court. Further, the insurers seek dismissal without providing the discovery necessary to determine whether dismissal would be appropriate. And five of the insurers purportedly seeking dismissal here are no longer parties, due to a prior dismissal.[1]

The insurers claim that Petitioners' discovery requests were served one day late and that Petitioners have not objected to dismissal. Neither claim is accurate.

Petitioners timely served their discovery requests and they object to dismissal of these insurers, at least until the assertions in their affidavits can be verified by discovery. The Request for Dismissal should be denied.

I. Chronology.

This chronology concerns the electronic service and filing process established for common fund actions. The insurers served affidavits to establish that they have no liability in this case. Petitioners' served discovery designed to investigate the affidavit statements.

This Court has often reminded the parties about the "90-day window to conduct discovery with the parties filing Affidavits." Accordingly, the affidavits acknowledge that Petitioners have "90 days from the date of filing this affidavit within which counsel for Petitioner[s] may conduct discovery and investigation for the limited purpose of proving or disproving the foregoing statement(s)."

Various of the insurers' affidavits were served by email to the Court on March 7 and 8, 2012. They were filed and posted on the Court's website on the respective days they were served. The Petitioners on June 6 served their discovery requests by email to the Court, for filing on the Court's website. Doc. 674. On June 7, Petitioners served the insurers by conventional mail with his discovery requests. On that same day, the Court notified Petitioners by email that it would not post to its website the discovery requests received on the evening before.

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[1] Petitioners already agreed recently to dismiss five of these insurers, Doc. 675, and the dismissal occurred. Doc. 676. One other insurer, Evanston Ins. Co., was dismissed without objection over three years ago. Doc. 584. The request that they be dismissed again is likely nothing more than an administrative oversight, but it is indicative of the other problems with the Request for Dismissal here.

The insurers now submit a Request for Dismissal. Doc. 677. They argue that Petitioners' discovery requests were served one day late, on June 7.

The insurers have also served their objections to Petitioners' discovery requests. These so-called "responses" provide no responsive information. This leaves several questions unanswered. For example:

- Did any of these insurers ever take a Social Security offset in Montana before August 5, 2003?
- Are the affidavit statements based on a computer search or a manual search?
- What was the nature and extent of the review undertaken to complete the affidavit?

Because of these unanswered questions, Petitioners object to dismissal of these insurers, at least until the Affidavit statements can be further investigated by discovery.

II. Petitioners timely served their Discovery Requests.

When the insurers filed their Affidavits, they triggered Petitioners' right to investigate the affidavit statements. As the insurers properly note, this Court has often reminded the parties by email about the "90-day window to conduct discovery with the parties filing Affidavits." Accordingly, the affidavits acknowledge that Petitioners have "90 days from the date of filing this affidavit within which counsel for Petitioner[s] may conduct discovery and investigation for the limited purpose of proving or disproving the foregoing statement(s)." The parties dispute the computation of that 90-day period.

As discussed below, not all the insurers at issue here have filed proper affidavits. Setting those insurers aside, various proper affidavits were served by email to the Court on March 7 and 8, 2012. They were filed and posted on the Court's website on the respective days they were served. This is the Court-prescribed method

for service in common fund actions.[2] It is undisputed that the Petitioners were deemed served on those filing dates for purposes of calculating the response time.

The insurers argue that Petitioners served their discovery requests by conventional mail on June 7, and this was one day late. The insurers count 90 days from March 8, and thus conclude that Petitioners' deadline was June 6. Proper computation, however, shows that Petitioners served their discovery requests before the deadline.

In common fund actions, service is accomplished through the Court's website. WCC rules for computation of time, however, do not address the special circumstance of service through the Court's website. In such circumstance, this Court looks to the Montana Rules of Civil Procedure for guidance. Rule 24.5.352(1). Those rules provide guidance here. They provide 3 days to be added after electronic service.

Rule 5(b)(2)(E), M.R.Civ.P., permits electronic service and instructs that service is deemed complete upon transmission. Rule 6(d), M.R.Civ.P., provides that three days are added for purposes of calculating a response time. It states:

> (d) Additional Time after Certain Kinds of Service. When a party may or must act within a specified time after service and service is made under Rule 5(b)(2) . . . (E), or (F), 3 days are added after the period would otherwise expire . . . .

Applying this rule, Petitioners' Discovery Requests had to be served within 93 days after March 7 and 8, meaning June 8 and 9. Thus, because it is undisputed that Petitioners served the insurers by conventional mail on June 7, the discovery requests were timely.

The rule adding 3 days for electronic filing is supported by sound policy. The rule is even more justified in a common fund action, such as this, wherein the served party is not affirmatively notified of the filing, but instead is required to vigilantly check the Court's website to obtain notice of filings.

This appears to be an issue of first impression. If the Court declines to apply the rule adding 3 days, Petitioners' discovery requests should be deemed timely under

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[2] This court's periodic notice states: "This is a reminder, that service in the Common Fund matters is not effected by mail, but via the website."

an alternative theory. That is, the requests were timely because they were emailed to the Court for filing on website within the time that the insurers claim service was required.

Service in common fund matters is subject to special practice. The Court has ruled that "service in the common fund matters is not effected by mail, but via the website." This rule does not make any exception for discovery requests. This is practical considering that in multi-party litigation discovery "must be served on every party." See Rule 5(a)(I)(c) M.R.Civ.P.

A common fund matter such as this, by its nature, involves numerous Respondents. Service through the Court's website is an efficient means of service, given the number of parties involved. With this process in place, it would not be practical to require parties to serve discovery requests and responses on every party individually by mail.

Here, Petitioners served their discovery requests by email to the Court for filing on the website. This service was accomplished June 6, which is the date insurers urge as the deadline. See doc. 674, Notice of Service of Discovery, dated June 6, 2012, stating that:

> "Discovery Requests have been served upon the following insurers and their counsel by submitting the Discovery to the Court for posting on the Flynn/Miller Common Fund website."

Although the Court declined to formally post the discovery requests to the website, the Petitioners' service by email should be deemed sufficient for purposes of calculating the response time here. Further, the Court should rule that service of discovery through the website is appropriate in any event. The insurers' affidavits were deemed served when emailed to the Court for posting on the website. For the same reasons that this mode of service is deemed proper, the Petitioners' identical use of electronic filing should also be deemed proper.

III. Non-conforming affidavits do not trigger the 90 day deadline to commence Discovery.

Not all of the affidavits filed by these insurers are in the form prescribed by the Court. The form prescribed by the Court requires that the affiant swear that he/she

is "authorized . . . to bind [the insurer] by these statements." Some of the affidavits omit the words "by these statements." For example, see Doc. 640, 645.

The language required by the Court is not optional. These and other affidavits which do not conform to the express language of the form required by the Court do not satisfy the criteria to trigger the 90 day deadline to commence discovery. It is one thing to swear in the abstract that the affiant is authorized to bind the insurer. It is another thing to swear that the affiant is authorized to bind the insurer by specific statements. Only the second satisfies the procedure established by the Court. Likewise, non-conforming affidavits do not trigger dismissal. This would be true even in the absence of discovery.

Likewise, the five insurers who claimed to have filed affidavits, but did not, should not be deemed to have triggered the Petitioners' 90-day discovery period.

IV. Objection to Dismissal.

Petitioners' discovery requests ask each insurer the same seven interrogatories. On June 28, 2012, these insurers submitted joint responses to Petitioners' discovery requests. They objected to each and every interrogatory and provided no responsive information. Absent some responsive information, Petitioners will file a motion to compel.

The genesis of this action is a decision by the Montana Supreme Court that an insurer's Social Security offset must be reduced by one-half of the attorney fees and costs expended by claimants in obtaining Social Security benefits. In this way the insurer is required to pay its proportionate share of the benefit it received as a silent beneficiary of the claimant's efforts and expense to obtain Social Security benefits.

There remains a question as to the veracity of these affidavits. They claim that the insurers: (1) have conducted "a review of our records"; and (2) they have "no claimants meeting the Court's criteria in this matter **as set forth in the summons**." (Emphasis added.) Yet, the insurers' objections to the discovery requests indicate that they did not conduct a review of their records. That is, Petitioners' Interrogatory No. 3 asks if the insurer has even taken a Social Security offset on any workers' compensation claim in Montana on or before August 5, 2003. This information is required by the Court's Summons. Doc. 132. A review of the records at issue, which the insurers claim they conducted, would presumably turn up this information. Yet,

the insurers object that Interrogatory No.3 is "overly broad and unduly burdensome." This suggests the insurers did not do what they swore to by affidavit. If they had, they could simply have answered yes or no. It would not be burdensome because the work was already done in advance of taking the oath and signing the affidavit.

Interrogatory No. 4 asks "Did you do a computer search to determine your statements in the affidavit?" This calls for a simple yes or no answer. The insurers objected contending that the question was untimely.

Interrogatory No. 5 asks "Did you do a manual search to determine your statements in the affidavit?" Again, this calls for a simple yes or no answer. The insurers objected, contenting that the question was both untimely and ambiguous.

Interrogatory No. 6 asks "Please provide a brief explanation of the nature and extent of the review undertaken to complete the affidavit and to respond to this discovery request (include the names of each of the individuals involved in the review)." The insurers provided no explanation whatever, and objected that the interrogatory was untimely.

Interrogatory No. 7 asks "Please describe your record keeping process and the record storage system in which you performed your search to determine whether or not you have had any claims within the criteria set forth in the summons referred to in the affidavit." The insurers provided no description whatever, and objected that the interrogatory was untimely.

These insurers ask Petitioners and the Court to simply trust the claims in their affidavits. If this was the Court's intention, it would not have made any provision for discovery. But the Court did make provision for discovery, and the basic information which Petitioners request is a reasonable start. The insurers should be required to explain why they claim to have searched their records while simultaneously claiming it would be "unduly burdensome" to disclose what that search revealed. They should also explain why some of the affidavits omitted the language stating that the affiant is authorized to bind the insurer "by these statements."

Depending upon the answers, some or all of these insurers may be dismissed. Others may require follow-up discovery to reasonably assure that all claimants receive what the law requires. For these reasons, Petitioners object to the dismissal of these insurers.

V. Conclusion.

The insurers also argue that the affidavits themselves requested dismissal. It is not clear what the insurers seek to accomplish by this argument. First, such a request for relief is not proper material for an affidavit, which attest to facts known by the affiant. Second, the affidavits do not request dismissal. This argument should be disregarded.

Petitioners' discovery requests were timely served, and the objection herein to dismissal was made after receipt of the insurers' discovery objections which disclosed their refusal to provide answers. The insurers interpret the 90-day rule to mean that Respondents should have lodged a formal objection to dismissal within this period, separate from the discovery requests. As the insurers admit, however, this Court's periodic reminder expressly states it is a "90-day window to conduct discovery." Likewise, the affidavits acknowledge that Petitioners have "90 days from the date of filing this affidavit within which counsel for Petitioner[s] may conduct discovery and investigation for the limited purpose of proving or disproving the foregoing statement(s)." Accordingly, Petitioners met their obligation by filing the discovery requests within 90 days.

The Court should rule that Petitioners' discovery requests were timely served, and that the objection herein to dismissal, made after receipt of the insurers' discovery responses roughly two weeks ago, warrants delay of dismissal pending further proceedings. The Court should further rule that:

- non-conforming affidavits are insufficient to trigger the 90 day deadline to commence discovery;
- Unfiled/absent affidavits do not trigger any deadline; and
- Affidavits filed after March 8, 2012, are outside the scope of the insurers motion and will not be considered within the scope of this motion.

Finally, if the Court concludes that Petitioners' discovery requests were untimely by one or two days, despite the attempt to file electronically, the Court should in the interests of justice waive this irregularity or non-compliance pursuant to Rule 24.5.349.

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Dated this 16th day of November, 2012.

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