

IN THE WORKERS' COMPENSATION COURT  
STATE OF MONTANA

**FILED**

JAN 13 2005

ALEXIS RAUSCH, et al., )  
 )  
 Petitioner, )  
 -vs- )  
 MONTANA STATE FUND, )  
 )  
 Respondent/Insurer, )  
 and )  
 JEREMY RUHD, )  
 )  
 Petitioner, )  
 -vs- )  
 LIBERTY NORTHWEST )  
 INSURANCE CORPORATION, )  
 )  
 Respondent/Insurer. )

OFFICE OF  
WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

WCC No.  
9907-8274R1

**COPY**

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**TRANSCRIPT OF PROCEEDINGS**

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Heard at the Workers' Compensation Court  
1625 11<sup>th</sup> Avenue, Helena, Montana  
December 16, 2004  
11:20 a.m.

BEFORE THE HONORABLE MIKE McCARTER

LISA R. LESOFSKI, RPR  
Lesofski & Walstad Court Reporting  
21 North Last Chance Gulch, Suite 201, Placer Center  
Helena, Montana 59601 (406) 443-2010

IN THE WORKERS' COMPENSATION COURT  
OF THE STATE OF MONTANA

ALEXIS RAUSCH, et al.,

Petitioner,

-vs-

MONTANA STATE FUND,

Respondent/Insurer,

and

JEREMY RUHD,

Petitioner,

-vs-

LIBERTY NORTHWEST  
INSURANCE CORPORATION,

Respondent/Insurer,

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(406) 443-2010

Page 2

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25                  NANCY BUTLER  
                  Legal Counsel  
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                  5 South Last Chance Gulch  
                  Helena, Montana 59601

                  ALSO PRESENT: Carol Glead, Cris McCoy,  
  Diana Ferriter

20  
21  
22  
23  
24  
25

1 The following proceedings were had:  
2 \*\*\*\*\*

3  
4 THE COURT: I'm going to tell you who's  
5 here. We just had a conference in Hiatt and  
6 I've got a headache and I understand I can take  
7 Ibuprofen for it but I can't go to the  
8 chiropractor. That's an inside joke.  
9 I've got Greg Overturf, Brad Luck, Tom  
10 Harrington, Larry Jones, Nancy Butler, Cris  
11 McCoy is here from the State Fund. I don't  
12 know whether you guys know Cris or not. And  
13 I've got Diana Ferriter from the Department as  
14 well as Carol Glead from the Department. We do  
15 have a court reporter. I decided to keep her  
16 since she was here for our conference in Hiatt  
17 so we can get a transcripts of this if anybody  
18 wants it. And then Jackie Bockman, my clerk,  
19 is here.

20 MR. MARTELLO: And Tom Martello incognito.

21 THE COURT: I've got Tom on my lift.  
22 Yeah, he's here too.

23 We started out I think with you, Lon, we  
24 started talking about the letter that Monte had  
25 sent to us regarding the proposed summons that

1 of supervisory control was drafted and filed by  
2 Brad. We do have an order back from the  
3 Supreme Court which is carefully phrased and  
4 what it requests is it requests that Rex Palmer  
5 file a response stating whether or not he  
6 agrees or disagrees with my order, and Larry  
7 too. Larry, I assume your response is going to  
8 be that you agree with my order?

9 MR. JONES: I agree with everything you  
10 say, Judge.

11 THE COURT: Okay. And I think since Rex  
12 participated in the drafting of the order and  
13 we had the order before we ever sent it out, he  
14 is going to reply that he agrees with my order.  
15 But the phrasing of that order from the Supreme  
16 Court indicates to me that they are going to  
17 basically reject the writ of supervisory  
18 control and leave my order intact, although we  
19 could all be surprised. But I expect that  
20 that's going to come about and if that comes  
21 about, I would expect in all of these cases to  
22 basically proceed in the fashion that I  
23 directed in the Flynn case, which is to open up  
24 the information in these common fund cases to  
25 the claimant's attorneys with the protection of

1 I had drafted and also Larry had some concerns.  
2 And I think we didn't have Larry on the phone,  
3 I think we didn't have him and we didn't have  
4 Monte or Steve so we decided to go ahead and  
5 postpone the call, although we had a little bit  
6 of discussion. I'd indicated to Lon that the  
7 purpose of the summons was to get this thing  
8 going and that my intent is ultimately to turn  
9 over any information that we gleaned from the  
10 summons to the three of you, but I don't want  
11 to do that until we have a reply from the  
12 Supreme Court with respect to the order that I  
13 issued in Flynn, because we've got the  
14 confidentiality issues which may be raised on  
15 behalf of the claimants. And I requested, if  
16 not directed, the State Fund to take a writ of  
17 supervisory control from my order in Flynn in  
18 order to see if the Supreme Court had a  
19 different view of it with the potential that  
20 they could say, "I can't open this up, we have  
21 to follow an opt-in procedure like was followed  
22 in St. James versus an opt-out procedure," or  
23 something along those lines, and I avoided both  
24 of those procedures in my Flynn issue.

25 I can tell you that the petition for writ

1 the confidentiality order and the  
2 confidentiality agreement.

3 So that's sort of where I'm at in these  
4 cases, but I wanted to talk to you some more to  
5 make sure that we're on-line as far as the  
6 procedure that I'm proposing to follow and also  
7 with respect to the draft summons that I sent  
8 to everybody. And I can tell you I asked for a  
9 lot of information in that summons but I would  
10 expect that with respect to a lot of these  
11 insurers I'm going to get a number nine  
12 response, which is that at the present time  
13 they can't provide us anything more than what  
14 they've got.

15 Anyway, with that, I guess I'm going to  
16 throw it back -- The two primary movers in this  
17 case who drafted letters to me were Larry and  
18 also Monte. So maybe I'll throw it back to  
19 you, Monte, and you let me know what you think  
20 of the summons and the procedure we're  
21 following and what you would like me to do.

22 MR. BECK: Sure, Judge. This is Monte  
23 Beck, and I did read Flynn and I read Miller,  
24 of course, and the issue that I am most  
25 concerned about is the idea that we would be

1 delayed for some length of time waiting for the  
 2 Supreme Court. Now it sounds like that may be  
 3 mooted. But my analysis still is, as I said in  
 4 the letter, I think that we need to have the  
 5 common fund counsel have access to medical  
 6 information that is contained in the files of  
 7 the various insurers merely for the purpose of  
 8 verifying the information that I requested or  
 9 that I pointed out in the letter that I sent to  
 10 the Court.

11 I think that there has been waivers but,  
 12 most importantly, Judge, the point that I would  
 13 make is that the common fund counsel and this  
 14 whole process is under the guise of the Court.  
 15 It is your job in effect to do this and we are  
 16 your agents. I feel that as common fund  
 17 counsel and your approval of all things,  
 18 including attorney's fees and how and what we  
 19 do is under your guidance and under your  
 20 auspices and under your court. So if we are in  
 21 effect officers of the Court and agents of the  
 22 Court, it seems to me to be no different if you  
 23 receive the information as well as whether or  
 24 not we as common fund counsel receive the  
 25 information.

1 speaks for itself. I think that we will submit  
 2 ourselves to the Court's jurisdiction. We will  
 3 be willing to sign a confidentiality order  
 4 ensuring the privacy of this information and  
 5 would only release information with a court  
 6 order and with the agreement of all parties if  
 7 we needed to, for instance, have an independent  
 8 doctor or something like that review  
 9 information for purposes of obtaining an  
 10 impairment rate.

11 So I would rather see us go forward,  
 12 however, it sounds like the Court wants to wait  
 13 for the Supreme Court to give its ultimate  
 14 guidance, so as far as the summons is  
 15 concerned, I'm in agreement with that. I guess  
 16 I had a couple of questions about it. I wanted  
 17 to, I guess, ask about the OD aspect of it and  
 18 so maybe the Court can give us information  
 19 there. I realize that if we do this with  
 20 injury we may just turn right around and have  
 21 to do it with OD and the other case. So I  
 22 assume that that's what the Court had in mind  
 23 when you included all of the OD information.

24 THE COURT: I think you're correct in  
 25 that. I think when I was looking at this, it's

1 I have another point and that is that when  
 2 we did this process with the State Fund with  
 3 the cooperation of Greg and Tom and Nancy and  
 4 Brad, we didn't have a problem. We were given  
 5 what would be considered to be private,  
 6 confidential information. I don't think anyone  
 7 in the room would say that we abused our  
 8 position, we tried to verify certain things, we  
 9 had the assistance of the State Fund's people  
 10 actually reviewing files for us, making  
 11 determinations, in particular determinations  
 12 that temporary total disability of claimants  
 13 should really be perm total claimants, and had  
 14 a procedure by which they were then sent to  
 15 doctors, if it wasn't their own, doctors that  
 16 we could agree with the State Fund that would  
 17 render impairment ratings and the processing to  
 18 work. And I think that they would verify that  
 19 we honored all of the confidentiality  
 20 provisions that we agreed to among the  
 21 attorneys and I think -- I can't recall if the  
 22 Court signed off on a confidentiality order or  
 23 not.

24 THE COURT: I did.

25 MR. BECK: But I think our track record

1 going to apply to the OD cases so why not just  
 2 do it all at one time.

3 MR. BECK: Yeah. And then the last  
 4 question I had about this one is we had a time  
 5 period that we were looking at, and I think  
 6 this might be something that Cris McCoy or  
 7 someone from the State Fund can look to. You  
 8 have in your order if someone has received TTD  
 9 benefits for 18 months or longer then they  
 10 should be provided the names and addresses.  
 11 And one of the things that we agreed to in our  
 12 last meeting was to have Cris or someone from  
 13 the State Fund give you or give us a little bit  
 14 of information about what seemed to be a  
 15 reasonable cutoff date.

16 Because I noticed that when Diane Ferriter  
 17 gave us claimants at least for the Liberty  
 18 group of claimants that were there longer than  
 19 a year, we show, you know, some 400. That's  
 20 actually a discrepancy from what I was reported  
 21 to verbally from Mark Cadwallader on October  
 22 4th when he said there were 553. But, you  
 23 know, I don't know how that exact figure worked  
 24 out, but I think that I would like to know from  
 25 at least the State Fund what seemed to be a

1 reasonable time period there. So that was my  
2 only question, did we want to use it one year?  
3 Eighteen months seemed like a good compromise  
4 so I'm just throwing that out, but maybe the  
5 State Fund can give us some feedback on that as  
6 to how, when they looked through all of that  
7 files and they determined that there were  
8 people that needed to be converted, what would  
9 be the best and reasonable time period to go  
10 back.

11 THE COURT: Cris?

12 MS. MCCOY: Personally, we use two years.

13 THE COURT: Cris says they use two years.

14 MR. BECK: Okay.

15 MR. OVERTURF: To go look at.

16 THE COURT: To go look at, right. And I  
17 backed it up to 18 months. I guess the  
18 question you're raising is whether we should  
19 back it up to more than 18 months, and I would  
20 question doing that just based on my own  
21 experience and the fact that especially with  
22 back surgeries and stuff like that we often  
23 have temporary total benefits being paid out  
24 for a year or more.

25 MR. BECK: That's true. So I think that's

1 were talking about in the first place. I agree  
2 with you that you're acting as officers of the  
3 Court. I trust you implicitly. Counsel who  
4 have worked on all of these cases have done a  
5 good job, they've honored the confidentiality  
6 provisions and I don't have any problem turning  
7 it over to you.

8 The problem I have is the Supreme Court  
9 might not see it the same way as I see it, you  
10 see it, Brad sees it. Everybody else I think  
11 that's talked about this issue in this court  
12 agrees that it ought to be turned over to  
13 common fund counsel subject to the  
14 confidentiality agreement, and it's my intent  
15 to do so if I we get through with Flynn and the  
16 Supreme Court basically validates what I'm  
17 doing in Flynn.

18 So my thought is and still is to issue  
19 this summons, require them to produce this  
20 information and let Flynn come down and if it  
21 comes down as I anticipate at this point, given  
22 the way they phrased the order to counsel, to  
23 the respondent's counsel, then I would expect  
24 that the information that we gleaned from this  
25 would be turned over and we would proceed in

1 a reasonable time period but I just wanted to  
2 get the feedback. And then that was really my  
3 only question, I think. On paragraph 4 you  
4 want to put in the word state, "Please state  
5 whether an impairment rating has been  
6 rendered," and the rating given followed after  
7 the word on the second line of paragraph 4.

8 THE COURT: Right.

9 MR. BECK: And the only other little  
10 change, not little change, but the idea of the  
11 very last paragraph of the summons, I hope we  
12 could prevail on you that as the common fund  
13 counsel could see these responses as we did in  
14 the State Fund and assure the Court on behalf  
15 of Steve and Lon and I that we'll treat all of  
16 that information confidential and, you know,  
17 even if the Court gets it and could redact the  
18 names and we just are dealing with claim  
19 numbers, that would be fine. But I think Brad  
20 can assure you that we're very careful about  
21 these things and always went through them and  
22 didn't distribute any names to anybody except  
23 for our own purposes here.

24 THE COURT: Okay. Well, let me sort of  
25 answer that, and that goes back to what you

1 the same fashion as we proceeded in Rausch, and  
2 I don't have any problem doing that. I just  
3 think I can't authorize that until we've got an  
4 answer from Flynn, until the Supreme Court has  
5 been given an opportunity to review it and say,  
6 "We're way off base," or to say, "You know,  
7 we're not going to interfere and you can go  
8 forward with this." So that's my anticipation.

9 The one other thing is I think I need to  
10 put in here some notice to them that if they  
11 object to the production that they have an  
12 opportunity to do that, because we may get some  
13 objections and I think I ought to let them do  
14 that since they aren't parties and they ought  
15 to be able to raise objections. I don't  
16 anticipate that's going to be a big deal but I  
17 think I probably am obligated to put something  
18 like that in there. And so what I'll try to do  
19 is I'll try to draft a little bit of language  
20 along that line and recirculate this so that  
21 you can see it.

22 I take it, Monte, that you didn't have any  
23 other problems with what I was asking for,  
24 asking them to produce?

25 MR. BECK: No, I think we're all in

1 agreement with the intent of the summons. It  
2 sounds real good.

3 THE COURT: But my idea is to get them in  
4 here, get them represented, get some sort of  
5 response and then we can go from there, but at  
6 least we've got the procedure started.

7 MR. BECK: Yeah.

8 THE COURT: There was a question about the  
9 numbers identified on this second run by the  
10 Department and the discrepancy between what  
11 Mark had represented?

12 MR. BECK: Yes.

13 MS. FERRITER: Monte, this is Diana  
14 Ferriter. I didn't plan to be at this  
15 conference so I didn't bring all of the  
16 information I have but I can find out what that  
17 discrepancy was. Did Mark give that to you in  
18 writing or is that something he told you?

19 MR. BECK: That is what he reported to me  
20 on October 4th, that the Liberty companies had  
21 553 TTD claimants who have been on benefits  
22 greater than one year and it was confined to  
23 four companies in the Liberty group. And he  
24 gave me some other pretty specific information  
25 about perm total claimants throughout, you

1 THE COURT: Larry also sent me a letter  
2 and I think what Larry proposes is basically  
3 turning you guys loose in his files to examine  
4 them yourself, and it's a procedure that he  
5 followed in Cheetham where Liberty initially  
6 identified the potentially benefitted  
7 claimants, and then we let Dave Lauridsen,  
8 again, with the confidentiality order, look at  
9 those files and satisfy himself as to whether  
10 they were due benefits or not. I guess the  
11 only thing I'm going to say is, again, I don't  
12 object to that procedure and I think we can do  
13 it in line with my logic in Flynn. And I think  
14 what I'll do is Larry can just put that's what  
15 he wants to do in his reply and if for some  
16 reason we can't do it then I'm going to have to  
17 probably order him to give us more information  
18 in some other more defined format and leave it  
19 up to the two sides to work out exactly the  
20 specifics of how you're going to do it.

21 MR. DALE: Judge, I can speak to that. We  
22 hadn't reviewed the proposed protective order  
23 that was utilized in Cheetham until yesterday  
24 is the first time we saw it and the language  
25 there is not something we could agree to

1 know, throughout the entire system but he did  
2 give me that very specific figure, and then  
3 when I looked at your report for those greater  
4 than one year it was 424 and that was only done  
5 20 days later. So I just wasn't sure about  
6 that.

7 The correction to the perm total claimants  
8 being 47 and then the revision to 44 was  
9 explained in your note to Larry Jones and they  
10 were just those three, there were three  
11 duplicates. But I didn't get a -- I didn't see  
12 and I was waiting to see maybe, because that  
13 did match what Mark told me but I didn't see  
14 any information on the discrepancy of over  
15 120-some people.

16 MS. FERRITER: Monte, I'll have to check  
17 that out and then I can get back to everyone or  
18 to Monte. What do you prefer, Judge?

19 MR. BECK: Thank you, Diana.

20 THE COURT: Why don't you get back to  
21 Monte and then if a problem arises that needs  
22 my intervention they'll let me know or you can  
23 let me know and then we can talk about it.

24 MS. FERRITER: Okay. And I'll share the  
25 information with you too, Larry.

1 because it restricts access to any medical  
2 records.

3 THE COURT: Because we didn't need that in  
4 Cheetham so we would have to change that.

5 MR. DALE: Is that a problem, Larry?

6 MR. JONES: No, not at all, it's just that  
7 was the basic format into which we could drop  
8 any exclusions. For example, in Cheetham we  
9 excluded medical records from disclosure. In  
10 our case I anticipate you would get medical  
11 records and exclude everything else.

12 MR. BECK: Well, we'd need wage  
13 information, Larry, we're going to need more  
14 than just that because we need to check rates,  
15 and so in order to properly check an impairment  
16 award we need to have information concerning  
17 rates, which does involve other information, so  
18 we would object to that. I hope we can work  
19 that out, but that's a fundamental aspect of  
20 determining an impairment award.

21 MR. JONES: Monte, rate information is not  
22 a problem.

23 THE COURT: We'll make sure we get the job  
24 done. We can redraft the confidentiality  
25 agreement and the scope of it so that we

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1 satisfy everybody.

2 Brad indicated that you may have pretty

3 much wrapped up the State Fund's participation

4 in this case.

5 MR. LUCK: We think so. The last person

6 to pay was Rose Fleming and we paid her. We

7 have one issue, one of the fellows that came to

8 the hearing and you guys excluded and he wanted

9 just to wait and get his money at retirement

10 has now decided he wants his money. So, if

11 that's the case, do you guys want a fee out of

12 it if it calculates in? He's pretty close to

13 retirement, there may not be a lot of fee.

14 But I think that's the only string that's

15 left and we'd like to resolve that and then

16 report to the Court that we're completed as

17 long as you guys think we're completed and then

18 maybe we can take our name off the summons.

19 MR. ROBERTS: Brad, is that the guy from

20 Philipsburg?

21 MR. LUCK: Mr. Berg.

22 The question is, we need to resolve that,

23 which we can do, but at that point do you guys

24 have any sense that there is anything else that

25 we need to do or can we by agreement report to

Page 20

1 the Court that the process with the State Fund

2 has been completed?

3 MR. BECK: I would be willing to -- if

4 this person is close to retirement anyway,

5 Brad, is to waive, and I'm not speaking for

6 Steve and Lon, but I would be willing to waive

7 them and also have this completed, this process

8 completed.

9 MR. DALE: We don't have any problem with

10 that, Brad.

11 MR. ROBERTS: I don't have any problem

12 either.

13 MR. LUCK: Tom reminded me that we sent

14 down a few weeks ago a proposed closing report,

15 I guess.

16 MR. HARRINGTON: I think we circulated it

17 before the October meeting, I believe, but I'm

18 not entirely certain if you guys have it in

19 your file or not.

20 MR. LUCK: Why don't we look at it and

21 we'll make sure it's updated and then we'll

22 send you something as a proposed closing report

23 and make sure you are okay with it.

24 MR. ROBERTS: Brad, when you say he's

25 close to retirement, do you have a sense of

Page 21

1 what age he is now?

2 MS. MCCOY: I don't specifically but I

3 think it was 64.

4 MR. LUCK: Cris isn't sure but he's about

5 there. We'll get the details on it and let you

6 know right away.

7 MR. ROBERTS: Yeah. The only reason I ask

8 is because I remember this fellow from

9 Philipsburg and I think he was about eight or

10 ten years away and if that was the case, I'd

11 want to know if he was the one.

12 MR. LUCK: We'll figure it out.

13 THE COURT: And then you'll be able to

14 compute what fee you would be entitled to and

15 we'll let you rehash that. I'll let you guys

16 figure that one out.

17 MR. LUCK: And just to confirm though, as

18 far as you all are concerned, there are no

19 other issues with us?

20 MR. ROBERTS: No.

21 THE COURT: I have to throw in one little

22 glitch here as far as taking the State Fund's

23 name off of the case. I think we have to leave

24 it on the caption for continuity sake. Once on

25 the caption --

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1 MR. OVERTURF: Always on the caption.

2 THE COURT: -- always on the caption.

3 Well, that may not always be true. But I think

4 for purposes of this case we need to leave you

5 on the caption, but I can indicate that all

6 issues as far as you are concerned are resolved

7 and you need not further participate.

8 MR. LUCK: Or just not issue it to us.

9 THE COURT: Well, you're already in this

10 anyway, I don't need to reissue you a summons.

11 We'd confuse somebody in the mail room, I'm

12 sure.

13 Let's proceed along that. I'll do some

14 minor redrafting on the summons, I'll send it

15 to all of you by e-mail and, if it's okay,

16 we'll do the mailing.

17 One question I don't remember whether we

18 raised it before or not, do you want this sent

19 certified or other should we just send it

20 regular mail and then if we get people that

21 don't, or insurers that don't reply we can

22 follow up and figure out what we do with them

23 later?

24 MR. ROBERTS: I think regular mail would

25 be fine with following up.



1 MR. DALE: Could the Clerk of Court, and I  
 2 know Pat will probably call me later, but could  
 3 the Clerk of Court just keep track of those  
 4 that have responded and those who haven't and  
 5 put it in a time line in the sense that if it's  
 6 over 30 days and no response they can notify us  
 7 and then we will agree that we will pay the  
 8 Court to send out certified letters?

9 THE COURT: Yes, we can do that. We  
 10 probably do that as a matter of standard  
 11 procedure anyway. We usually docket these  
 12 ahead for responses and Pat has a procedure  
 13 where if they don't respond she sends them a  
 14 letter saying, "Shame on you, you better  
 15 respond."

16 Yeah, I'll make a note of that and we'll  
 17 make sure. And we probably could just send  
 18 these out ourselves. On some of these other  
 19 cases we're just turning them over to the  
 20 attorneys and I think we did that in Flynn.  
 21 There is only 54 in here so we'll just send  
 22 them out. Mechanically, that's not a big deal.  
 23 Okay. Anything else from anybody?

24 MR. ROBERTS: No, Judge.

25 THE COURT: All right, that will be it.

1 We'll get going on this and we'll wait for the  
 2 Supreme Court decision as to what we're going  
 3 to do with the petition for writ of supervisory  
 4 control in Flynn and proceed from there.

5 (The proceedings were concluded  
 6 at 12:13 p.m.)  
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1 CERTIFICATE  
 2 STATE OF MONTANA )  
 : ss.  
 3 COUNTY OF LEWIS AND CLARK )  
 4

5 I, LISA R. LESOFSKI, Registered  
 6 Professional Reporter, Notary Public in and for the  
 7 County of Lewis and Clark, State of Montana, do  
 8 hereby certify:

9 That the proceedings were taken before me  
 10 at the time and place herein named, that the  
 11 proceedings were reported by me and that the  
 12 foregoing -24- pages contain a true record of the  
 13 proceedings to the best of my ability.

14 I have hereunto set my hand and affixed my  
 15 notarial seal this day of ,  
 16 2005.

17  
 18  
 19 LISA R. LESOFSKI  
 Registered Professional Reporter  
 Notary Public  
 Commission Expires 3/31/08.  
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