

Lon J. Dale, Esq.  
MILODRAGOVICH, DALE  
STEINBRENNER & BINNEY, P.C.  
Attorneys at Law  
P.O. Box 4947  
Missoula, Montana 59806-4947  
Telephone: (406) 728-1455  
Fax No: (406) 549-7077  
Attorneys for Petition Rausch

**FILED**

JAN - 9 2006

OFFICE OF  
WORKER'S COMPENSATION JUDGE  
HELENA, MONTANA

Monte Beck, Esq.  
BECK, AMSDEN & RUGGIERO, PLLC  
1946 Stadium Drive, Suite 1  
Bozeman, MT 59715  
Telephone: (406) 586-8700  
Fax No.: (406) 586-8960  
Attorneys for Petitioner Fisch

Stephen D. Roberts, Esq.  
ATTORNEY AT LAW  
1700 W. Koch St. Ste. 5  
Bozeman, MT 59715  
Telephone: (406) 586-3100  
Fax No.: (406) 585-0087  
Attorney for Petitioner Frost

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

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

WCC No. 9907-8274R1

**PETITIONERS' BRIEF IN  
SUPPORT OF INTERIM  
ATTORNEYS' FEES**

COME NOW the Petitioners and, pursuant to the Court's Order of December 6,

DOCKET ITEM NO. 303

2005, submit the following brief in support of the assessment of interim attorneys' fees.

### **FACTUAL BACKGROUND**

The Petitioners' attorneys established entitlement to common fund attorneys' fees as a result of a Montana Supreme Court decision. *Rausch, et al. v. State Compensation Insurance Fund*, 311 Mont. 210, 224, 54 P.3d 25, 35, 202 MT 203 ¶ 48. The Montana Supreme Court concluded that the claimants', Fisch, Frost and Rausch, [Petitioners herein] attorneys were entitled to "reasonable attorneys' fees for the creation or preservation of a common fund, and that those fees should be divided among the three firms involved in the case." *Id.* The case was then remanded to the Workers' Compensation Court for a determination of reasonable fees.

The Petitioners have, with the assistance of this Court, concluded a settlement with the State Workers' Compensation Insurance Fund. Procedures were established for the establishment of the fee to be charged, and notice was provided to all of the affected Workers' Compensation Claimants. Therefore, all matters involving the State Fund as to common fund attorneys' fees have been resolved, and pending matters are being supervised by this Court.

Issues remain concerning the determination of common fund attorneys' fees for Plan I and Plan II insurers. This Court has issued summonses to the various insurers, and the Petitioners' attorneys have been involved in a process of determining the common fund as it relates to Plan I and Plan II carriers. The Court has the responsibility to determine attorneys' fees for the Petitioners' attorneys.

### **FACTUAL AND PROCEDURAL BACKGROUND**

The Montana Supreme Court determined that the Petitioners' attorneys were entitled to common fund attorneys' fees from all Claimants regardless of who the insurer was. Further, this Court was ordered to supervise the enforcement of the common fund from all insurers involved. *Ruhd v. Liberty Northwest Insurance Corp., et al.*, 322 Mont. 478, 484, 97 P.3d 561, 566, 2004 MT 236 ¶ 25.

This Court has sent out a number of subpoenas pertaining to common fund issues related to Plan I and Plan II for the determination of fees due to the Petitioners' attorneys. A question has been presented for judicial determination as to how attorneys' fees ought to be administered. It is the position of the attorneys for the Petitioners that interim attorneys' fees ought to be allowed. This Brief is submitted in support of the Court determining interim attorney's fees and advocates for a process for determination of interim attorneys' fees before all common fund fees are resolved.

## LAW AND ARGUMENT IN SUPPORT OF ASSESSMENT OF INTERIM ATTORNEYS' FEES

### A. Case Law and Treatises Support Assessment of Interim Attorneys' Fees

Normally, court awarded fees are disbursed at the final disposition of the litigation; however, the common fund doctrine allows for interim fee awards when the final common fund pool is unknown. 3 Herbert Newberg, *Newberg on Class Actions* § 6975, at 1265-66 (1977). By definition, "interim common-fund fee awards" must await the creation of a common fund by judgment or settlement. The most common use of an interim fee award occurs when there has been a partial case settlement resulting in a common fund for the benefit of the class. 1 Alba Conte, *Attorney Fee Awards*, § 2:18 at 188 (3rd ed.2004). The allowance of interim attorneys' fees supports the conclusion that once the fund is created, the attorney has more than an expectation to a fee award, he or she has a vested right in that award. Justification for interim fee awards lies in the often long lapse of time between the filing of a complaint and the final disposition of the case. *Kuhn v. State of Colorado*, 924 P.2d 1053, 1059 (Colo. 1996). Indeed, courts often look at the complexity and length of the litigation, as well as at whether a final determination of the litigation is in sight.

### B. The Court has a Duty to Determine Reasonable Fees

It is the duty of the trial judge to determine the amount of fees and costs to be allowed out of the common fund. *Bogosian v. Gulf Oil Corp.*, 621 F. Supp. 27, 28 (E.D. Penn. 1985). Although some circuits mandate that a certain method for computing fees be used, the Ninth Circuit has consistently held that the court has broad discretion to make interim common fund fee awards by either the lodestar or percentage recovery methods. *In Re FPI/Agretechy Securities Lit v. Haushalter*, 105 F.3d 469 (9th Cir. 1997). Under the lodestar method, the court first multiplies the number of hours an attorney reasonably spent on the case by a reasonably hourly rate. This figure is then adjusted according to the circumstances of the case to reach a reasonable fee. Under the percentage recovery method, the court awards the attorneys a percentage of the funds recovered by the successful litigation sufficient to give them a reasonable fee. *Id.* The Ninth Circuit has stated that, regardless of whether a court applies the lodestar or the percentage method, "we require only that fee awards in common fund cases be reasonable under the circumstances." *In Re Washington Public Power Supply System Sec. Litigation*, 19 F.3d 1291, 1296 (9th Cir. 1994).

### C. Common Fund Fees Instant Case

Pursuant to the Department of Labor's regulation, the attorney's fees in a matter that has been appealed to the Montana Supreme Court cannot exceed twenty-five percent (25%). 24.29.3802 Admin. R. Mont. Since the attorneys' fees issue has been

before the Montana Supreme Court on two occasions, the maximum attorneys' fees that can be assessed is twenty-five percent (25%) of the impairment benefit received by a claimant. Based upon the maximum fees assessable, this Court has sent lien notices to the Plan I and Plan II carriers concerning the judicially determined common fund fee entitlement of the Petitioners' attorneys. The question remaining for court determination is reasonable attorneys' fees.

**D. Proposal for Determination of Interim Fees**

The attorneys for the Petitioners propose that interim attorneys' fee be determined by the Court on a per insurer basis. As noted, this has already occurred in regard to the State Fund. It is proposed that this process continue with each of the insurers providing the necessary information to determine a fair common fund fee as to the claimants covered by the particular insurer.

It is proposed that the common fund attorneys communicate with each insurer and determine the applicable common fund claimants. The common fund attorneys will then make an assessment as to what is a reasonable fee concerning the work related to the common fund issues on a per insurer basis. Once an attorney's fee request has been determined by the common fund attorneys, the specific insurer and the common fund attorneys will petition the Court for a judicial determination of reasonable attorneys' fees. In this process, unrepresented claimants will be given the opportunity to object to the attorney fee assessment. The Court would then enter an order after notice to the unrepresented claimants concerning attorneys' fees as to the common fund established for the specific insurer. It is contended that this process allows for all of the due process rights of the claimants and streamlines the process of common fund determination.

**E. Court Intervention Unnecessary For Represented Claimants**

Since the Court has provided lien notices to Plan I and Plan II carriers, there have been several instances where common fund fees have been withheld by insurers as to specific claimants represented by attorneys. In these circumstances, since the claimant is represented, resolution has occurred on an *ad hoc* basis with no fees being charged in excess of twenty-five percent (25%). In some occasions, fees have been divided between common fund attorneys and the claimants' individual attorneys pursuant to agreement. Such division of fees has occurred mostly in circumstances where liability issues existed in the initial claim.

The common fund attorneys hereby request that the Court ratify this procedure and enter an order as to how fees may be assessed for represented claimants. The Petitioners request a decision of this Court stating that, when a claimant is represented by an attorney, the common fund attorneys and the claimant's attorney may agree on an appropriate fee without court intervention or administration, so long as the fee charged does not exceed the twenty-five percent (25%) allowable by law.

**F. Award of Interim Fees Benefits Claimants**

The award of interim fees benefits the worker's compensation Claimants subject to common fund attorneys' fees. If the Claimants are entitled to a refund of any fees, because less than twenty-five percent (25%) is awarded or agreed upon as common fund fees, the Claimants will received those fees promptly upon a determination of interim fees, rather than having to wait a protracted period of time until there is a final determination of all fees for all carriers. If an interim fee awarded is the full 25 percent, by contrast, the Claimants' interests have not been affected or harmed in any way.

**CONCLUSION**

It is the position of the common fund attorneys that interim fees ought to be assessed by this Court, and that the best process for administering interim fees is to do so on a per carrier basis after the common fund claimants for a specific carrier have been determined. The Court is requested to authorize this process. Further, the Court is requested to specifically authorize resolution of common fund fees without court intervention or administration when a claimant is represented by an attorney, and no fees assessed exceed the statutory twenty-five percent (25%).

DATED this 6<sup>th</sup> day of January, 2006.

Monte Beck, Esq.  
BECK, AMSDEN & RUGGIERO, PLLC  
1946 Stadium Drive, Suite 1  
Bozeman, MT 59715  
Telephone: (406) 586-8700  
Fax No.: (406) 586-8960  
Attorneys for Petitioner Fisch

MILODRAGOVICH, DALE,  
STEINBRENNER & BINNEY, P.C.  
P.O. Box 4947  
Missoula, MT 59806-4947  
Telephone: (406) 728-1455  
Fax: (406) 549-7077  
Attorneys for

Stephen D. Roberts, Esq.  
ATTORNEY AT LAW  
1700 W. Koch St. Ste. 5  
Bozeman, MT 59715  
Telephone: (406) 586-3100  
Fax No.: (406) 585-0087  
Attorney for Petitioner Frost

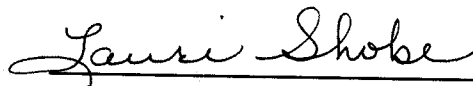
By:   
Lon J. Dale

**CERTIFICATE OF SERVICE**

The undersigned does hereby certify, under penalty of perjury, that on the 6 day of January, 2006, a true copy of the foregoing document was served by mail to the following individual(s) by depositing a copy of the same in the U.S. Mail, postage prepaid thereon, addressed as follows, unless otherwise indicated below:

Monte D. Beck, Esq.  
Beck, Amsden & Ruggiero, PLLC  
1946 Stadium Drive, Ste 1  
Bozeman, MT 59715

Stephen D. Roberts, Esq.  
Attorney at Law  
1700 W. Koch St., Ste. 5  
Bozeman, MT 59715

  
\_\_\_\_\_

6654/5(ljs)

I:\WORLD\DOCS\CLIENTFL\06654\005\brf\00060430.WPD

MILODRAGOVICH, DALE, STEINBRENNER & BINNEY, P.C.

ATTORNEYS AT LAW  
620 HIGH PARK WAY, P.O. BOX 4947, MISSOULA, MONTANA 59806-4947

TELEPHONE: (406) 728-1455  
FAX: (406) 549-7077

General E-Mail Address: bigskylaw@montana.com

M. J. MILODRAGOVICH  
LON J. DALE  
\*JON R. BINNEY  
GERALD W. STEINBRENNER  
CHRISTIAN T. NYGREN  
G. PATRICK HAGESTAD  
ELIZABETH A. O'HALLORAN  
\*\*PERRY J. SCHNEIDER  
CORY R. GANGLE  
W. ADAM DUERK  
PHILIP B. CONDR

**TRANSMITTAL MEMORANDUM**

January 6, 2006

\*ALSO ADMITTED - COLORADO STATE BAR  
\*\*ALSO ADMITTED - STATE BARS OF CONNECTICUT  
AND DISTRICT OF COLUMBIA

Worker's Compensation Court  
1625 11<sup>th</sup> Avenue  
P.O. Box 537  
Helena, MT 59624-0539

Our File No: 6654/5

RE: Rausch, et al. v. Montana State Fund, et al.  
WCC No. 9907-8274R1

Documents and/or papers listed below are enclosed:

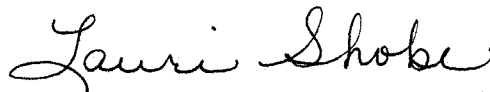
Petitioners' Brief in Support of Interim Attorneys' Fees (3 copies)

Please note:

Please file. Thank you.

Sincerely,

MILODRAGOVICH, DALE,  
STEINBRENNER & BINNEY, P.C.



Lauri Shobe  
Legal Secretary

ljs  
Enclosure