

SUPREME COURT OF MONTANA

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OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

ED SMITH
Clerk

REMITTITUR

Date: September 16, 2004

Supreme Court Case No. 03-504
Workers Compensation Court Case No. 2000-0500

JEREMY RUHD,
Petitioner and Respondent,
vs.
LIBERTY NORTHWEST INSURANCE CORP. and
RICHARD BARBER d/b/a BARBER HOMES,
Respondents and Respondents,
vs.
FISCH, FROST RAUSCH,
Intervenors and Appellants.

This case was a review of the order/judgment of the Workers' Compensation Court.

IT IS ORDERED by the Supreme Court in an opinion, that the decision of the Workers' Compensation Court is reversed and remanded.

The appeal record is hereby returned to the Clerk of the Workers Compensation Court.

I certify that the attached is a true and correct copy of the opinion filed by the Supreme Court on August 31, 2004.



ED SMITH
Clerk of the Supreme Court

IN THE SUPREME COURT OF THE STATE OF MONTANA

2004 MT 236

JEREMY RUHD,

Petitioner and Respondent,

v.

LIBERTY NORTHWEST INSURANCE CORPORATION,
and RICHARD BARBER d/b/a BARBER HOMES,

Respondents and Respondents,

v.

FISCH, FROST, RAUSCH,

Intervenors and Appellants.

FILED
AUG 31 2004
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

APPEAL FROM: Workers' Compensation Court, State of Montana,
The Honorable Mike McCarter, Judge presiding.

COUNSEL OF RECORD:

For Appellants:

Monte D. Beck (argued), Beck, Richardson & Amsden, PLLC, Bozeman,
Montana (Fisch)

Stephen D. Roberts, Attorney at Law, Bozeman, Montana (Frost)

Lon J. Dale (argued), Milodragovich, Dale, Steinbrenner & Binney, P.C.,
Missoula, Montana (Rausch)

For Respondent Ruhd:

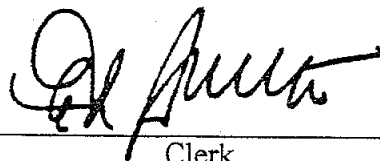
Geoffrey C. Angel (argued), Angel Law Firm, Bozeman, Montana

For Amicus Curiae Montana State Fund:

Bradley J. Luck, Thomas J. Harrington, Garlington, Lohn & Robinson, PLLP,
Missoula, Montana

Argued: March 24, 2004
Submitted: April 27, 2004
Decided: August 31, 2004

Filed:


Clerk

Fisch, and Frost filed petitions in the WCC on behalf of themselves and all similarly situated workers, to determine whether permanently totally disabled workers were entitled to impairment awards upon establishment of their impairment ratings or if they had to wait until retirement age. In late 2000 and early 2001, the WCC determined that permanently totally disabled workers' compensation claimants were not entitled to impairment awards at all. The plaintiffs appealed.

¶7 In January 2002, while the *Rausch* appeal was pending in this Court, Ruhd filed a petition in the WCC seeking essentially the same relief as that sought in *Rausch* with the exception that Liberty Northwest Insurance Corporation was the defendant insurer. In June 2002, Ruhd amended his petition to join similarly situated claimants and for common fund attorneys' fees. In August 2002, the WCC entered judgment against Ruhd relying on its prior decision in *Rausch*. Ruhd appealed.

¶8 On September 5, 2002, this Court decided *Rausch v. State Compensation Insurance Fund*, 2002 MT 203, 311 Mont. 210, 54 P.3d 25. The decision reversed the WCC and held that permanently totally disabled workers are entitled to impairment awards immediately upon receipt of their impairment ratings. The decision also held that the *Rausch* attorneys were entitled to common fund fees from the State Fund. The decision, however, did not specifically reach the question of whether the common fund included only claimants ensured by the State Fund or whether the common fund included all permanently totally disabled claimants irrespective of their insurer.

¶9 Immediately following the *Rausch* decision, Liberty acknowledged that the decision was binding upon it and agreed to pay Ruhd an impairment award under the same terms and

¶13 We hold the decision by the WCC was a conclusion of law. The issue is not whether the WCC abused its discretion in awarding fees, but rather what would be the source of the fees once awarded. This Court undertakes plenary review of the WCC's conclusions of law to determine whether the WCC was correct. *Murer v. State Compensation Mutual Insurance Fund* (1997), 283 Mont. 210, 217, 942 P.2d 69, 73.

DISCUSSION

Issue One

¶14 Did the Workers' Compensation Court err in determining that Intervenor's counsel are not entitled to common fund attorneys' fees with respect to impairment awards payable by insurers other than the State Fund.

¶15 When a party, through active litigation, creates, reserves, preserves, or increases a fund which directly benefits an ascertainable class of non-participating beneficiaries, the common fund doctrine provides that non-participating beneficiaries sharing in the proceeds of the fund must bear a portion of the litigation costs including reasonable attorneys' fees. *Rausch*, ¶ 46-47.

¶16 There are three elements necessary to establish a common fund. First, a party, styled the active beneficiary, must create, reserve, preserve, or increase an identifiable monetary fund or benefit in which all active and non-participating beneficiaries have an interest. Second, the active beneficiary must incur legal fees in establishing the common fund. Third, the common fund must benefit ascertainable, non-participating beneficiaries. *Mountain West Farm Bureau Mutual Ins. Co. v. Hall*, 2001 MT 314, ¶¶ 15-18, 308 Mont. 29, ¶¶ 15-18, 38 P.3d 825, ¶¶ 15-18.

the Intervenor. There is no question that elements two and three are satisfied. Intervenor have incurred fees pursuing litigation, and all permanently totally disabled claimants constitute an ascertainable class.

¶21 Primarily disputed is element one; whether Intervenor created a benefit for all beneficiaries or merely State Fund beneficiaries. Prior to our decision in *Rausch*, the State Fund, Liberty, and perhaps other workers' compensation insurers, contested either the availability of impairment awards to permanently totally disabled claimants, or contested the timing of those payments. Intervenor efforts in the *Rausch* litigation resolved both questions in favor of claimants.

¶22 In spite of this, Ruhd argues that the WCC correctly awarded Mr. Angel common fund fees with respect to Liberty claimants because Mr. Angel pressed forward with the claim against Liberty and established Liberty's liability in spite of his awareness of an adverse holding in the WCC on similar issues presented in *Rausch*. As soon as we decided *Rausch*, however, liability for immediate payment of impairment awards was established against all insurers. Acknowledging this, Liberty capitulated and agreed to pay Ruhd as required by *Rausch*. In disposing of Ruhd's appeal, we stated,

Ruhd and Liberty agree that Ruhd's claim to an impairment award under the 1999 version of the Act has been resolved by the Court's decision in *Rausch* Liberty indicates that it will pay Ruhd the benefits to which he is entitled Ruhd does not contest this assertion.

Ruhd, ¶ 12. The *Rausch* decision disposed of the questions presented by Ruhd. There was nothing further for Mr. Angel to do, and his efforts did not assist the Intervenor in any way in establishing new legal authority or in creating a common fund.

Issue Two

¶26 Did the Workers' Compensation Court err in determining that Ruhd's attorney is entitled to common fund attorneys' fees with respect to all relevant impairment awards payable by Liberty Northwest Insurance Corporation.

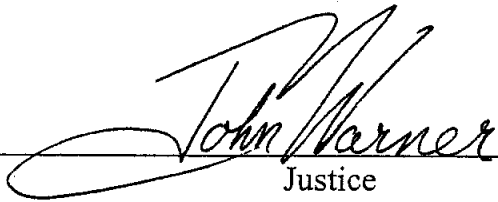
¶27 Resolution of issue one forecloses Ruhd's counsel's claim for common fund attorney's fees with respect to all Liberty claimants. However, this does not foreclose counsel's claim to fees for work done in Ruhd's case.

¶28 The common fund doctrine was created to prevent unjust enrichment of claimants who receive the benefit of a successful lawsuit but who did not participate in the suit. Subsumed within this broad purpose is a narrower purpose which is designed to prevent unjust enrichment of fee-seeking attorneys who join a suit on behalf of a beneficiary, but who add no value to the suit. This problem has been denominated "free-riding" and "coattailing" by various courts. *See duPont v. Shackelford* (Va. 1988), 369 S.E. 2d 673, 677; *Hobson v. First State Bank* (Tenn.App.1990), 801 S.W.2d 807, 810.

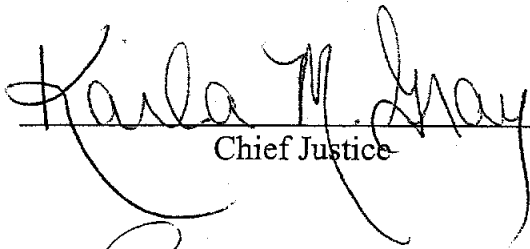
¶29 We addressed this problem to some extent in *Means v. The Montana Power Company* (1981), 191 Mont. 395, 404, 625 P.2d 32, 37, stating that non-participating beneficiaries should bear litigation costs under the common fund doctrine, and that a non-participating beneficiary is one who fails to retain counsel or whose counsel "fails, in any degree, to participate in any labors leading to the creation of the fund." Based on this definition, *Means* further held that where more than one active beneficiary retained counsel, but counsel for one did the bulk of the work while the other did relatively little, counsel who did the lion's share of the work would still be entitled to common fund fees from the less active party. *Means*,

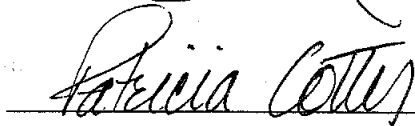
¶32 Determination of the appropriate fee award due Mr. Angel is remanded to the WCC.

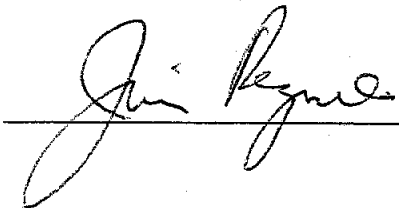
¶33 Reversed and remanded to the Workers' Compensation Court for proceedings in conformity with this Opinion.

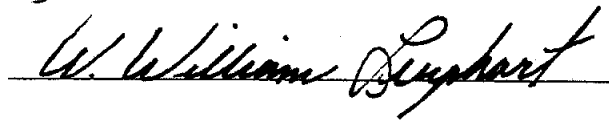

Justice


We Concur:

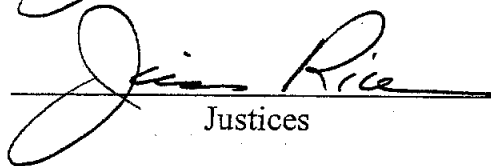

Chief Justice










Justices