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FILED

MAY - 9 2003

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA
IN AND FOR THE AREA OF BOZEMAN
BEFORE THE WORKERS' COMPENSATION JUDGE**

**KELLY WILD and
MARK MATHEWS,
individually and on behalf of all
others similarly situated,**

Petitioners,

vs.

**MONTANA STATE
COMPENSATION INSURANCE
FUND, LIBERTY NORTHWEST
INSURANCE COMPANY,
and all other similarly situated,**

Respondents.

WCC Number: 2001-0286

**MOTION FOR APPLICATION OF
COMMON FUND DOCTRINE**

COMES NOW, Lucas J. Foust, attorney for Claimant/Petitioner Kelly Wild and moves the Court to apply the Common Fund Doctrine in the case at bar, so that additional benefits will be provided to Mr. Wild, additional benefits will be provided to other individuals classified as independent contractors pursuant to providing an Independent Contractor Exemption Form and who are directly effected by the Montana Supreme Court's recent decision of the above-entitled matter. Counsel further requests that appropriate attorney's fees will be spread among those

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individuals benefitting from the holding in this litigation. Simultaneous to this motion, Counsel for Claimant in this matter is joining in a request with Counsel for Claimant in *Matthews v. Liberty Northwest Insurance, Co.* for class certification. The below request is being made as an alternative to the request for class certification and provided as an option for this Court.

ARGUMENT

As a result of the decision of the Montana Supreme Court in *Wild vs. Montana State Fund* Cause No. 02-198 2003 MT 115 (decided on 4-29-03), and *Matthews v. Liberty Northwest Insurance, Co.* Cause No. 02-244 2003 MT 116 (decided on 4-29-03). Mr. Wild and Mr. Matthews submit that a common benefit has been created, increased, and/or preserved for Workers' Compensation benefits for independent contractors in possession of an independent contractor exemption form. Since the establishment of this form in 1987, this common benefit will provide workers' compensation benefits to individuals who were treated as employees but possessed an independent contractor exemption form. Therefore, in accord with *Murer vs. State Compensation Mutual Insurance Fund*, 283 Mont. 210, 942 P2d 69 (1997), Mr. Wild and Mr. Matthews ask this Court to apply the Common Fund Doctrine in this action. Mr. Wild and Mr. Matthews submit that the application of the Common Fund Doctrine is the most expeditious method to deliver workers compensation benefits to him and to other uninvolved claimants.

In *Murer*, several claimants initiated litigation as representatives of a class of injured claimants seeking a higher workers' compensation benefit rate. Instead of allowing a class action proceeding, the Court held that a common fund theory was more appropriate. Therefore, this Court denied class certification and applied a common fund theory. The Court's application of the common fund theory was affirmed on appeal *Murer* 942 P2d at 72.

After remand, the ruling in *Murer* forced the insurer to increase benefits to a number of claimants who were not parties to the earlier litigation. *Murer* 942 P2d at 72. The *Murer* claimants again moved for class certification, but this was unnecessary because the Court already had the power to supervise the plan to contact and pay the absent claimants. The Court's power to supervise these additional payments was inherent in the common fund action. In addition, as a part of the common fund action, the attorneys for *Murer* asserted a common fund attorney fee lien against these additional payments to the absent claimants.

Generally, the common fund doctrine "authorizes the spread of fees among those individuals benefitting from the litigation which created the common fund." *Mountain West Farm Bureau vs. Hall. Mut. Ins. Co. vs. Hall* 2001 Mt. 314 308 Mont. 29 38 P3d. 825. The common fund doctrine provides:

When a party has an interest in a fund in common with others and incurs legal fees in order to establish, preserve, increase, or collect that fund, then that party is entitled to reimbursement to his or her reasonable attorney fees from the proceeds

of the fund itself.

Murer at 222, 942 P2d. at 76

To receive attorneys fees under the common doctrine, a party must satisfy three elements: “First, a party (or multiple parties in the case of a consolidating case) must create, reserve, increase or preserve a common fund. This party is typically referred to as the active beneficiary. 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 Insurance Company vs. Hall* 2001 Mt. 314 308, Mont. 29 38 P3d. 825. Mr. Wild easily meets the three elements of the common fund doctrine test. First, Mr. Wild “created, increased and/or preserved” a common benefit for other independent contractors who obtained an independent contractor exemption form and were subsequently denied benefits. Mr. Wild is therefore the active beneficiary. Second, Mr. Wild incurred legal fees in establishing this common fund. Finally, this common fund will benefit other ascertainable non-participating claimants. Therefore, the workers’ compensation insurers in the state of Montana can offer no substantive argument that the *Murer* common fund doctrine cannot be applied in the case at bar.

In *Murer*, during the discussing about attorneys fees, the Supreme Court noted that as a result of its decision, the insurer became obligated to increase benefits to a substantial number of otherwise uninvolved claimants. *Murer* 942 P2d. at 75. The Court noted that these benefits would not have been created, increased, and/or preserved after the Court’s decision in *Murer*; or put another way, no such obligation by the insurer would have existed without the *Murer* decision. Therefore the Montana Supreme Court recognized that attorney’s fees were properly awarded based upon the common fund doctrine. This result was not that innovative as the Court found that the Common Fund Doctrine is “deeply rooted in America Juris Prudence.” *Murer* 942 P2d. at 76.

After discussing the common fund doctrine, the Court recognized:

application of the common fund doctrine is especially appropriate in a case like this where the individual damage from an institutional wrong may not be sufficient from an economic viewpoint to justify the legal expense necessary to challenge that wrong. The alternative to the doctrine’s application is simply for the wrong to go uncorrected.

Murer, 942 P2d. at 76.

The Court continued:

Based on these legal principles and authorities, we conclude that when a party, through active litigation, creates a common fund which directly benefits an ascertainable class of non-participating beneficiaries, those non-participating beneficiaries can be required to bury portion of the litigation costs, including

reasonable attorney's fees. Accordingly, the party who creates the common fund is entitled, pursuant to the common fund doctrine to reimbursement of his or her reasonable attorney's fees.

Murer 942 P2d. at 76.

The Montana Supreme Court held that absent claimants were required to contribute in proportion to the benefits they actually received to the costs of litigation, including reasonable attorney's fees. *Murer* 942 P2d. at 77. Furthermore, the Montana Supreme Court has subsequently followed the *Muirer* rationale in two other cases involving common fund attorneys fees. See *Rouche Fisch and Frost vs. State Fund* 311 Mont. 210 54 P3d. 25 (2002); and *Flynn vs. State Fund* 2002 WL 31740520 312 Mont. 410, decided 12/5/02-opinion not yet released for publication. As in *Muirer*, *Rouche et al*, and *Flynn*, Mr. Wild engaged in complex and lengthy litigation that resulted in a legal precedent, which directly benefits a substantial number of independent contractors who were neither parties to nor directly involved in the *Wild* litigation. See *Muirer* 283 Mont at 223, 942 P2d at 76. In addition, Mr. Wild "established a vested right on behalf of the absent claimants to directly receive immediate monetary claimants of past due benefit under-payments." se *Murer* 283 Mont. at 223, 942 P2d. at 76-77. Since Mr. Wild's active litigation created a common fund that directly benefits an ascertainable class of non-participating beneficiaries, those non-participating beneficiaries should be required to bear a portion of the litigation cost, including reimbursement of his reasonable attorney fees from that fund. See *Wild*, Cause No. 02-198 2003 MT 115 (decided on 4-29-03).

Pursuant to *Murer*, *Rouche*, and *Flynn*, Mr. Wild and Mr. Matthews should be entitled to common fund attorneys fees. The attorneys in this case have incurred legal costs and fees in the preservation of a common fund that will benefit an ascertainable class of workers who will receive the benefit "even though they were not required to intervene, file suit, risk expense, or hire an attorney." *Murer* 283 Mont. at 223, 942 P2d. at 77. Accordingly, this Court should apply the common fund doctrine to the case at bar, this Court should supervise the payment of these additional benefits to absent claimants, and this Court should find that Mr. Wild's and Mr. Matthew's attorney are entitled to reasonable attorneys' fees for the creating, increase and/or preservation of the common fund involved in the case at bar.

Dated this 8th day of May, 2003.



Lucas J. Foust
Attorney for Petitioner