

Bradley J. Luck, Esq.
Thomas J. Harrington, Esq.
Garlington, Lohn & Robinson, PLLP
199 West Pine, PO Box 7909
Missoula, MT 59807-7909
Telephone: (406) 523-2500
Facsimile: (406) 523-2595

FILED

JUN 13 2003

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

Greg E. Overturf, Esq.
Special Assistant Attorney General
Montana State Fund
P.O. Box 4759
Helena, Montana 59604-4759
Telephone: (406) 444-6480
Facsimile: (406) 444-6555

Attorneys for Respondent

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

<p>KELLY WILD, Petitioner, vs. MONTANA STATE WORKERS' COMPENSATION FUND, Respondent.</p>	<p>WCC NO. 2001-0286 STATE FUND'S ANSWER BRIEF IN OPPOSITION TO MOTION FOR CONSOLIDATION</p>
--	--

COMES NOW the Respondent, Montana State Workers' Compensation Fund ("State Fund"), and hereby files its Answer Brief in Opposition to Motion for Consolidation. For the reasons stated herein, the State Fund requests this Court to deny the Petitioner's Motion to Consolidate.

INTRODUCTION

On April 29, 2003, the Montana Supreme Court published two decisions with similar holdings. See *Wild v. Fregein Constr.*, 2003 MT 115, 315 Mont. 425, 68 P.3d 855; *Mathews v. BJS Constr., Inc.*, 2003 MT 116, 315 Mont. 441, 68 P.3d 865. In each case, the Montana Supreme Court held that an employment relationship existed between the petitioners and their general contractors, even though each petitioner had a valid independent contractor exemption. For purposes of oral argument, the Montana Supreme Court consolidated the two cases. Counsel for Wild and Mathews have moved to consolidate the two cases for post-remand proceedings. However, each case involves a unique set of underlying facts, and the application of those unique facts to legal principles involved in post-remand proceedings requires separate analysis and treatment. Further, each case involves different parties: the State Fund is the respondent/insurer in *Wild* whereas Liberty Northwest is the respondent/insurer in *Mathews*. Implementing the decisions as applied to one insurer is complex, and implementing the decisions as applied to two separate insurers would result in a judicial inefficiency. Thus, the State Fund opposes consolidation.

ARGUMENT

No express rule of the Workers' Compensation Court addresses motions to consolidate. Lacking express direction, this Court may look to the Montana Rules of Civil Procedure for guidance. See Admin. R. Mont. 24.5.352. Montana Rules of Civil Procedure 42(a) governs consolidation and provides in full:

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Under Rule 42(a), the trial courts have broad discretion to either grant or deny a motion for consolidation. See *Tribby v. Northwestern Bank of Great Falls* (1985), 217 Mont. 196, 208, 704 P.2d 409, 417. A decision to deny consolidation will be given great deference and will seldom be overruled on appeal. *Tribby*, 704 P.2d at 417.

I. CONSOLIDATION IS IMPROPER BECAUSE THERE IS NO COMMONALITY BETWEEN THE PARTIES OR FACTS AND CONSOLIDATION WOULD NOT RESULT IN JUDICIAL EFFICIENCY.

Wild bases his motion to consolidate on two grounds: (1) the factual and legal issues between the two cases are virtually identical; and (2) consolidation would save time. *See* Pet.'s Mot. to Consolidate 1. However, in light of recent orders from this Court, neither reason cited by Wild represents a sufficient ground for allowing consolidation.

A. The Differences Between *Wild* and *Mathews* Preclude Consolidation.

As the plain language of Montana Rules of Civil Procedure 42(a) establishes, courts may consolidate cases that have common questions of fact or law. However, even when there are similar issues between two cases, courts have discretion to deny a consolidation request. *See Tribby*, 704 P.2d at 417. Here, the post-remand differences between *Wild* and *Mathews* preclude consolidation. Although the Montana Supreme Court ultimately held that Wild and Mathews were each employees rather than independent contractors, the facts underlying each holding were different. Based on the factual differences between the employment relationships of Wild and Mathews, the insurers may take different stances in post-remand proceedings that would require the Court to handle each case separately.

More importantly, the differences in the day-to-day operations of Liberty and the State Fund preclude consolidation. Although both cases will address retroactivity and entitlement to common fund fees, the factual application of those legal principles to Liberty and to the State Fund requires separate treatment and analysis. For example, each insurer will set forth distinct *Chevron Oil* arguments that will require separate consideration. Further, both Wild and Mathews are claiming entitlement to common fund fees. However, this Court recently held that a claimant's attorney is only entitled to common fund fees from the group of claimants insured by the respondent/insurer named in the original action. *See Ruhd v. Liberty Northwest Ins. Corp.*, WCC No. 2002-0500, 2003 MTWCC 38. Thus, if Mathews' attorney is entitled to common fund fees, his fees are limited to the group of claimants insured by Liberty. Similarly, if Wild's attorneys are entitled to common fund fees, their fees are limited to the group of claimants insured by the State Fund.

When coupled with *Ruhd*, prior decisions from the Montana Supreme Court also underscore the inappropriateness of consolidation. See *Ferron v. Intermountain Transp. Co.* (1943), 115 Mont. 388, 143 P.2d 893, *overruled on other grounds*, *Leary v. Kelly Pipe Co.* (1976), 169 Mont. 511, 549 P.2d 813. Although *Ferron* was decided prior to the enactment of the current version of Rule 42(a), its analysis is particularly applicable in light of *Ruhd*. In *Ferron*, the Montana Supreme Court held that consolidation is improper when the actions do not involve the same parties, even when the actions arise out of the same accident. See *Ferron*, 143 P.2d at 894-95, 898. Like in *Ferron*, the involvement of different insurers renders consolidation useless because it prevents an overlapping award of attorney fees. Based on the different post-remand factual and legal issues between *Wild* and *Mathews*, and based on the different insurers involved in each case, Wild's motion for consolidation should be denied.

B. Consolidation Would Not Save Time or Result in Judicial Efficiency.

The State Fund acknowledges that under Montana Rules of Civil Procedure 42(a), consolidation may be appropriate in cases where common issues of fact exist and consolidation will result in judicial efficiency by avoiding unnecessary costs or delay. See, e.g. *Means v. Montana Power Co.* (1981), 191 Mont. 395, 625 P.2d 32, 36 (citation omitted). As explained above, the differences in the issues on remand as applied to each insurer make consolidation inappropriate. Further, the Court's recent approach to handling the pending common fund cases accomplishes the exact result sought by Wild and Mathews. See *Flynn v. Montana State Fund*, WCC No. 2002-0222, Order Permitting Amicus Briefs (dec. June 10, 2003). In effect, the Court's invitation to file amicus briefs regarding retroactivity and common fund entitlement serves as a "quasi-consolidation" of the legal issues raised in each of the pending common fund cases. In addition, the difficulties associated with the implementation process – including file reviews, system issues and payments – is complex even when it only involves one insurer. See, e.g. *Murer v. State Compensation Mut. Ins. Fund* (1997), 283 Mont. 210, 942 P.2d 69. Implementing the decisions as applied to two separate insurers would result in judicial inefficiency. Lacking justification for consolidating *Wild* and *Mathews*, Wild's motion should be denied.

CONCLUSION

The lack of commonality between the factual issues and the parties precludes consolidation under Montana Rules of Civil Procedure 42(a). Further, different insurers

are involved in *Wild* and *Mathews*, making consolidation improper in light of this Court's recent decision in *Ruhd*. Lastly, this Court's invitation for amicus briefs in *Flynn* regarding retroactivity and entitlement to common fund fees is a quasi-consolidation of the intertwined legal principles and it effectively disposes of any potential justification for consolidation. Therefore, this Court should deny Wild's motion for consolidation.

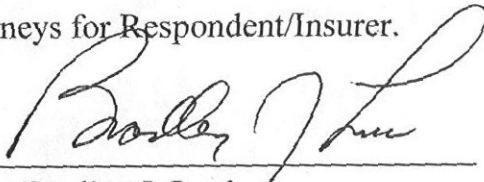
DATED this 13 day of June, 2003.

Greg E. Overturf, Esq.
Montana State Fund
P. O. Box 4759
Helena, MT 59604-4759
Telephone: (406) 444-6500
Telefax: (406) 444-6555

GARLINGTON, LOHN & ROBINSON, PLLP
199 W. Pine, P.O. Box 7909
Missoula, MT 59807-7909
Telephone: (406) 523-2500
Telefax: (406) 523-2595

Attorneys for Respondent/Insurer.

By



Bradley J. Luck