

Rex Palmer
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ATTORNEYS FOR PETITIONER

FILED

FEB 27 2001

OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

ROBERT FLYNN,)	WCC No. 2000-0222
Petitioner,)	
)	
v.)	
)	PETITIONER'S REPLY BRIEF
MONTANA STATE FUND,)	
Respondent/Insurer for)	
)	
SALISH KOOTENAI COLLEGE)	
Employer.)	

* * * * *

- 1. The common fund doctrine compels the State Fund to bear a pro rata share of attorneys fees incurred by Flynn to establish his Social Security claim.**

State Fund contends that the common fund doctrine enunciated in Murer¹ does not apply here because "[n]o common fund has been established in the case at hand, [and] there is no class of beneficiaries." This ignores the genesis of this dispute. Specifically, State Fund claims it is entitled to receive over \$14,000 due to the retroactive lump sum Social Security award which Flynn established through active litigation. The lump sum social Security award is the common fund of which Flynn and State Fund are beneficiaries.

State Fund is quick to claim half of the fruits of Flynn's efforts to create

¹ Murer v. State Comp. Mutual Ins. Fund, 283 Mont. 210, 942 P.2d 69 (1997).

this fund but is unwilling to pay its fair share of the expense to establish the fund. This argument not only violates the common fund doctrine, it is bad public policy and violates basic fairness.

In support of its position, State Fund cites 20 C.F.R. §404.408(2000) pg 142(c). While it does not directly explain the purpose of this citation, it seems to be implying that offsets allowed by the federal rules do not permit credits for attorney fees. In fact, the opposite is true. See 20 C.F.R. §404.408(2000) pg 143(d):

Items not counted for reduction. Amounts paid or incurred, or to be incurred, by the individual for medical, legal, or related expenses in connection with the claims for public disability payments or the injury or occupational disease on which the public disability award or settlement agreement is based, are excluded in computing the reduction...

Under the federal rules, the passive beneficiary absorbs the entire cost of establishing entitlement to other disability benefits and thereby pays its pro-rata share of fees.

Murer supersedes and effectively overrules Stahl.² The common fund doctrine is consistent with good public policy and requires that State Fund pay its fair share of attorney fees incurred by Flynn to establish his Social Security claim.

2. Mackney requires State Fund to pay the total disability benefits it terminated and refused to pay on and after September 26, 2000.

State Fund contends that Mackney was decided based upon equitable estoppel resulting from alleged representations by State Fund that no offset would be taken. It contends that Mackney does not apply to this case because Flynn does not claim estoppel.

²

Stahl v. Ramsey Constr. Co., 248 Mont. 271, 811 P.2d 546 (1991).

State Fund completely misconstrues Mackney. The Mackney decision is not based upon a finding of estoppel. The court concluded as a matter of fact that Mackney had not proven the alleged representation and as a matter of law that estoppel did not apply. Notwithstanding these findings, the court required State Fund to pay a 20% penalty for withholding Mackney's impairment award to offset the overpayment created by receipt of certain Social Security benefits. The court pointed out the obvious fact that, "There is no authority in the Workers' Compensation Act" to allow recoupment of overpayments absent a court order or agreement with claimant.

State Fund offers no authority contrary to Mackney and does not argue that Mackney should be overruled. State Fund should be required to pay the total disability benefits it unilaterally terminated and refused to pay on and after September 26, 2000.

3. State Fund should be required to pay a penalty, attorney fees and costs for terminating and refusing to pay various total disability benefits.

Again, State Fund relies upon its erroneous reading of Mackney to argue that Flynn is not entitled to an award of attorney fees, costs and a penalty. This conclusion is not supported by Mackney. On the contrary, this court must overrule Mackney in order to decline the relief requested by Flynn.


In Mackney, this court gave direct instruction to State Fund on what *not* to do when seeking recoupment of overpayments created by a Social Security award. Flynn repeatedly directed State Fund's attention to this authority. State Fund nevertheless disregarded the court's prior instruction including the penalty award. State Fund's conduct is not only unreasonable, it demonstrates intransigence which must be met with an award of fees and a penalty if precedent means anything.

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DATED this 26 day of February 2001.




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CERTIFICATE OF SERVICE

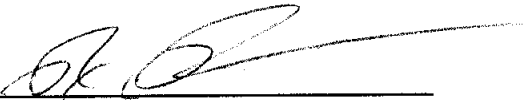
I hereby certify that on the 26th day of February 2001 a true and correct copy of the foregoing was served upon the following by U.S. mail, hand-delivery, Federal Express, or facsimile:

Ann E. Clark, Legal Counsel
Special Assistant Attorney General
Montana State Fund
PO Box 4759
Helena, MT 59604-4759
(406) 444-6480
ATTORNEY FOR RESPONDENT

<input checked="" type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Hand Delivered
<input type="checkbox"/>	Federal Express
<input type="checkbox"/>	Facsimile



DATED this 26 day of February 2001.



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Ann E. Clark, Legal Counsel
Special Assistant Attorney General
Montana State Fund
PO Box 4759
Helena, MT 59604-4759
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ATTORNEY FOR RESPONDENT

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**REX PALMER
ROBERT STUTZ**

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February 26, 2001

Patricia J. Kessner, Clerk of Court
Workers' Compensation Court
PO Box 537
Helena, MT 59624-0537

Re: Robert Flynn

Dear Ms. Kessner:

Enclosed please find the original PETITIONER'S REPLY BRIEF dated February 26, 2001.

If you have any questions or concerns, feel free to contact me.

Sincerely,
ATTORNEYS INC., P.C.


Rex Palmer

RP:mm

Enclosure

cc: Ann Clark

ATTORNEYS INC., P.C.

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February 27, 2001

Patricia J. Kessner, Clerk of Court
Workers' Compensation Court
PO Box 537
Helena, MT 59624-0537

Re: Robert Flynn

Dear Ms. Kessner:

Pursuant to your conversation with Miva this afternoon, enclosed please find the completely executed page 4 of PETITIONER'S REPLY BRIEF dated February 26, 2001.

If you have any questions or concerns, feel free to contact me.

Sincerely,
ATTORNEYS INC., P.C.


Rex Palmer

RP:mm

Enclosure

cc: Ann Clark