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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

DALE REESOR, Petitioner, v. MONTANA STATE FUND, Respondent.	WCC No. 2002-0676 **REPLY TO MOTION TO COMPEL**

COMES NOW the Montana State Fund ("State Fund") and presents this Reply to Petitioner's Motion to Compel Discovery Responses from Montana State Fund and The Liberty Companies ("Reesor Motion").

The State Fund joins in and incorporates by reference the arguments made in Liberty's Answering Brief in Opposition to Petitioner's Motion to Compel. Liberty's position is well taken across the board and applies equally to the State Fund. In addition, the State Fund states:

Reesor's motion improperly accuses the State Fund and Liberty of being "delighted to stall every phase of the litigation" and of "creating new phases of litigation that are not necessary." He goes on to claim that the carrier's motivation in dragging the matter out is with the hope that some appreciable number of claimants pass away because "[t]he Insurers know that it will be difficult for a claimant's estate to prosecute her claim." Reesor Motion 2-3. The positions are absurd and place the tactic and motion in proper context. In addition, the tone and content of such assertions have no proper place in this action or any other matter before the Court.

The memorandum goes on to state the real basis for wanting premature discovery---common fund counsel is attempting at every juncture to attempt to prove that State Fund cost estimates are illusory for use in the appeal in *Satterlee v. Lumberman's Mut. Cas. Co.,* WCC No. 2003-0840. This coincides with an effort to improperly supplement the record in regard to cost estimates in that action after the fact. (*See* the State Fund's Motion to Strike.)

As a justification for the tactic, Reesor cites to this Court's decision in *Stavenjord v. Montana State Fund,* 2004 MTWCC 62. In fact, the Court only commented in that action that the adjusting efforts and their related expenses cited by the State Fund for complete implementation of the Supreme Court decision were maximum "hard costs" and were likely not necessary in each claim and therefore constituted a "worst case scenario." Reesor takes the Court's discussion out of context especially when considering that the comments related to adjustment and not indemnity expense. The $3 million figure noted in Reesor's extra record assertions is an estimated *benefit cost* not a presentation of the "cost to the system" argued by him. *See* Aff. Dan Gengler (Aug. 8, 2005) in *Satterlee*. The *Stavenjord* comments do not provide justification for the premature discovery at issue.

In addition, Reesor totally misapprehends, or misstates, the basis of the State Fund's projections and cost estimates incident to the whole host of cost and expenses incident to retroactivity. The basis of the cost estimates are explained in some detail in the State Fund's *Satterlee* filings and require various actuarial assumptions not requiring file-by-file analysis. The discussion necessarily includes other topics in addition to benefit costs, such as administrative costs, premium increases, depletion of surplus and premium rates, among other things. In that light, not only is the discovery propounded premature and unduly burdensome it does not even consider the various areas necessary to properly discuss allegedly "overblown" exposure estimates. Therefore, even if the State Fund dropped all efforts on the various common fund projects to respond to the discovery, consuming its time and an inordinate amount of administrative dollars Reesor's counsel would not have the data necessary to mount the desired battle over cost estimates.

It should also be noted that the discovery at issue here totally ignores the scope of the logistical effort that would have to be undertaken to fully respond to the premature requests. In that regard, other comments in the noted decision are worth considering. In *Stavenjord*, the Court stated:

> The State Fund also indicates that it will incur substantial "soft costs" due to the time spent by its employees in reviewing and copying files, corresponding with physicians and vocational consultants, and calculating benefits. There is no figure put on their employees' time, but certainly it will be significant.
>
> Even though the costs and financial burden of retroactive application may be less than alleged by the State Fund, one thing is for sure: Identifying and paying *Stavenjord* benefits back to 1987 will be tedious, difficult, and time consuming. I base this conclusion on my own experience in *Murer*. In *Murer v. State Compensation Mut. Ins. Fund*, 267 Mont. 516, 885 P.2d 428 (1994) (*Murer II*), the Supreme Court held that 1987 and 1989 caps on benefits were temporary, not permanent, . . . this Court has overseen the implementation of the common fund. I have held numerous conferences with the parties, issued rulings regarding specific entitlement issues, reviewed and approved complex computer queries to identify claimants entitled to *Murer* benefits, reviewed and approved the methodology for calculating benefits, and ruled on attorney fees. Seven years later, the process is nearly complete but the case is still not closed.

Stavenjord, ¶¶ 31-32.

Given that the extent and parameter of this case is unknown, the question of what discovery may be relevant cannot be answered. Once the issues concerning whether *Reesor* is indeed a common fund, retroactivity, and the definition of "closed, final, settled or inactive" are resolved, petitioner can propound meaningful discovery. At this time, however, petitioner's shotgun approach discovery is improper, unnecessary and unduly burdensome. It is respectfully submitted that the Motion to Compel is properly denied and the Motion for a Protective Order is well taken and is properly granted

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DATED this 14th day of February 2006.

Attorneys for Respondent/Insurer

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By Bradley J. Luck
Bradley J. Luck

CERTIFICATE OF MAILING

I, the undersigned, of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for Respondent/Insurer, hereby certify that on this 14th day of February, 2006, I mailed a copy of the foregoing **REPLY TO MOTION TO COMPEL**, postage prepaid, to the following persons:

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Rhonda Dursma
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February 14, 2006

Ms. Patricia Kessner, Clerk of Court
Workers' Compensation Court
P.O. Box 537
Helena, MT 59624-0537

RE: Reesor v. Montana State Fund
WCC No. 2002-0676

Dear Pat:

Enclosed for filing is a Reply to Motion to Compel in the above-mentioned matter. Thank you for your assistance. If you have any questions, please feel free to call

Very truly yours,

GARLINGTON, LOHN & ROBINSON, PLLP

Bradley J. Luck (rad)

Bradley J. Luck

BJL:rad
Enc.
c: Mr. Thomas J. Murphy (w/copy)
Mr. Larry Jones (w/copy)
Mr. James G. Hunt (w/copy)