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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

DEBRA STAVENJORD, Petitioner, vs. MONTANA STATE FUND Respondent/Insurer	WCC No. 2000-0207 Petitioner Stavenjord's Report Regarding the Need for a Common Fund

The Montana Supreme Court remanded *Stavenjord* to the Workers' Compensation Court to conduct:

> "... further proceedings to include the determination of an appropriate procedure by which potential *Stavenjord* beneficiaries will be identified and notified of their interests related to *Stavenjord*-type PPD benefits."

Stavenjord v. Montana State Fund, 2006 MT 257, 334 Mont. 117, 146 P.3d 724, ¶ 31 (emphasis added, and cited hereafter as "*Stavenjord II*").

In addition, *Stavenjord II* denied common fund status to the *Stavenjord* claimants, which left the claimants without an attorney to assist the Court in its duty to secure benefits for hundreds (or possibly thousands?) of claimants; therefore, Stavenjord filed a petition for rehearing seeking reinstatement of the common fund. In its order denying Stavenjord's petition for rehearing, the Supreme Court stated:

> "[S]hould the Workers' Compensation Court determine that it will be impracticable or impossible for it to comply with our remand Order without the assistance of a Common Fund counsel, then and in that event the Workers' Compensation Court may enter an order to such effect, which order would then be amenable to review on appeal."

Stavenjord v. Montana State Fund Order denying Rehearing (11/9/06).

Stavenjord respectfully submits that, without Common Fund Counsel, it will be "impossible" or "impracticable" for the Workers' Compensation Court to comply with the Supreme Court's order to identify, notify, and adjudicate the interests of all *Stavenjord* claimants.

GLOBAL APPLICATION EXTENDS BEYOND THE MONTANA STATE FUND

Stavenjord II implicates hundreds of insurance companies; furthermore, the applicable benefit entitlement period spans fourteen years. Consequently, Stavenjord submits that there is no practicable or possible way to administer the case without the assistance of Common Fund Counsel.

As this Court previously noted after the second remand, *Stavenjord II* requires "global" application. In its unanimous decision on the issue of global application, the Montana Supreme Court held that a common fund action extends to all insurers, whether or not those other insurers were parties to the action. *Ruhd v. Liberty Northwest Ins. Co.* 2004 MT 236, 322 Mont. 478, 97 P.3d 561. Therefore, the Workers' Compensation Court has been directed to oversee the payment of *Stavenjord*-type benefits from hundreds of non-party insurers.

Earlier in the storied history of this case, the Montana State Fund did not oppose Stavenjord's request for a global lien. In fact, the Montana State Fund urged "global application." The Montana State Fund appeared as Amicus Curiae before the Supreme Court in the *Ruhd* & *Rausch* cases, and the Montana State Fund argued that the common fund global lien should apply to non-party insurers.

Therefore, when this Court assesses whether it is "practical" or "possible" to oversee the payment of *Stavenjord*-type benefits to all eligible claimants, the Court should recognize that there are many more insurers, other than the Montana State Fund, that will need to be scrutinized. The Montana Supreme Court remanded the case to conduct "proceedings" to "identify" and "notify" potential *Stavenjord II* claimants of their disputed "interests." It is axiomatic that *Stavenjord*-type benefits also extend to non-party insurers that have not yet appeared in the case. Stavenjord asks the Court to consider the magnitude of the requirement to adequately "engage" non-party insurers and to force those insurers to pay *Stavenjord II* benefits without the assistance of common fund counsel.

As an example of the enormity of this undertaking, Stavenjord refers the Court to the exhausting job being done in the *Reesor* Common Fund Action. Three Hundred and One insurers appeared, and Ninety-Eight insurers were dismissed. Counsel for Reesor sent written discovery requests to twenty insurers to determine if they owed *Reesor*

benefits, and there have already been legal disputes. The Court may benefit from visiting the State Fund offices to learn a little about some of the State Fund processes, but the Fund is only one of the insurers involved. Using the number of insurers involved in *Reesor* as an indication, Stavenjord submits that it will be impossible or impractical for the Court to visit the offices of the other Two Hundred and Three companies involved. Common Fund Counsel should sift through those companies to determine liability; otherwise, the Court will not be able to complete the task assigned on remand.

In light of the Montana Supreme Court's holding in *Ruhd*, Stavenjord asks the Court to find that it would be impractical or impossible to supervise the payment of *Stavenjord*-type PPD benefits, because the Court needs to supervise hundreds of insurers affected by *Stavenjord II*.

CONSTITUTIONAL PRINCIPLES OF JURISDICTION REQUIRE A PARTY LITIGANT

Stavenjord contends that basic principles of constitutional jurisdiction require there to be a party litigant before the Workers' Compensation Court to argue on behalf of all *Stavenjord* claimants. Contrary to the inducement of the State Fund, Stavenjord does not believe the State Fund will protect the interests of injured claimants. Why else has the State Fund fought to deny those benefits for the last eight years? Has the State Fund paid any of those people yet? Stavenjord asserts that every claimant, including a claimant with another insurer, deserves an advocate when this Court "identifies" claimants, calculates their disputed "interests," and "notifies" them of those interests.

In *Seubert v. Seubert*, the Montana Supreme Court discussed jurisdictional limitations under the "case or controversy" provision of the United States Constitution. *Seubert,* (2000) 301 Mont. 382, 13 P.3d 365, ¶ 17; see also, *Olson v. Department of Revenue,* (1986), 223 Mont. 464, 470, 726 P.2d 1162, 1166. *Seubert* confirmed that courts involve themselves with parties that have adverse legal interests:

> The United States Supreme Court has in many cases held that a "controversy," in the constitutional sense, must be "one that is appropriate for judicial determination", be definite and concrete, touching legal relations of parties having adverse legal interests, and a real and substantial controversy, admitting of specific relief through decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts, or upon an abstract proposition.

Seubert, ¶ 18 (emphasis added).

The question in the present case is whether one party (the Montana State Fund) should be allowed to have an attorney (here, multiple attorneys) while the other party (*Stavenjord* Claimants) should be asked to wait for the insurance industry to look through fourteen years of files to find them, calculate their rights, and then hopefully notify them about those rights. And note, the State Fund does not agree to pay benefits; rather, the State Fund makes a big deal about trying to "identify and notify." In so doing, the State Fund attempts to escape its duty to determine the claimants "interests related to *Stavenjord*-type PPD benefits."

By arguing that it is only required to "identify and notify," the State Fund unwittingly proves to the Court that this case remains very adversarial. The remand Order requires the claimants to be told about their "interests," but those interests will mean nothing until calculated in monetary terms. The State Fund proves this is an adversarial proceeding, because the State Fund says nothing about calculating "interests." What good is eight years of work if these claimants are not paid? More to the point, can the Court make that happen alone? Counsel asks the Court for permission to continue to act as the advocate for these claimants until they are paid.

As *Seubert* indicates, the *Stavenjord* Claimants need a real litigant, or a real party in interest, who is present in court to fight for the adverse legal interests of injured claimants. Without common fund status, there will be no litigant to represent unidentified *Stavenjord* claimants. Consequently, Stavenjord asks the Court to find that it is "impossible or impractical' to proceed without common fund counsel.

COURT AND COUNSEL AGREE TO THE NEED FOR A COMMON FUND

It is instructive that Judge McCarter previously recognized the need for a common fund in the case at bar. See, *Stavenjord* 2004 MTWCC 62 (8/27/04). In his opinion, Judge McCarter pointed out that he encountered many difficulties when, in *Murer*, he was forced to enter multiple orders regarding disputed procedural determinations, disputed identifications, disputed notifications, and disputed payments:

> 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, 2004 MTWCC 62, ¶ 32 (emphasis added).

In this regard, Stavenjord consulted several attorneys who have handled large common fund disputes. Attorneys Allan M. McGarvey, Lawrence A. Anderson, and Monte D. Beck all signed affidavits (attached hereto as Exhibits 1(a), 1(b), and 1(c)), which confirm that the case at bar needs a common fund attorney. The affidavits factually establish a point that should be a matter of common knowledge – insurers do not take care of the interests of injured claimants. These three Montana workers' compensation experts prove that it would be impractical or impossible to attempt to resolve this case without the assistance of Common Fund Counsel. As confirmed by Judge McCarter, these attorneys encountered multiple disputes during the "identification and notification" period, and they encountered additional disputes during the "calculation of interest" period. Based on their experiences, each lawyer predicts similar problems for the *Stavenjord*-type claimants. Consequently, these respected attorneys testify that they are concerned that the workers' compensation insurers will not adequately identify, notify, calculate, and pay past due benefits to deserving *Stavenjord* claimants. The affidavits conclude that it is imperative for the Court to uphold the common fund.

In the four common fund cases handled by Attorneys McGarvey, Anderson, and Beck, they argued multiple issues relating to peculiar identifications and entitlements. This should not surprise the Court. People are different and cases are different, so there is a legitimate need to address those peculiarities in the context of a hearing between adversaries. Without a common fund that will be impossible.

In their cases, Attorneys McGarvey, Anderson, and Beck were forced to argue about the methodology of identifying claimants, the methodology of notifying them, the methodology of calculating the benefits, and the methodology of paying the benefits. Therefore, the attached affidavits cast tremendous doubt on whether, without Common Fund Counsel, the insurers will pay *Stavenjord*-type benefits to unrepresented (and previously represented) claimants. Each attorney indicates that the Court should reinstate common fund status, because it would be impracticable or impossible for the Court to oversee the payment of *Stavenjord*-type benefits without the assistance of Common Fund Counsel.

If this Court denies common fund status, Stavenjord asks who will attend the numerous conferences? What litigant will file briefs to aid the Court when it is asked to rule on a specific legal issue? What litigant will develop and review complex computer queries to identify additional *Stavenjord* claimants? In spite of everything, it is not the 3,543 claimants that the State Fund first identified (Stip. Fact #29), or the various numbers that the State Fund now proposes (4,797; or 3,099; or 3,017), see (Brief pp 6-7); rather, it is the missed claimants that need help now. How many claims did the State Fund miss in its queries?

In *Broeker*, Attorney Anderson hired his own computer programmer to identify additional claimants. Without a common fund, what litigant will suggest, review, and argue about the methodology for identifying claimants or calculating benefits? Stavenjord asks the Court to follow the knowledgeable and experienced lead of Judge McCarter to find that the common fund doctrine offers the only practical solution.

In its present form, *Stavenjord II* puts the burden of finding potential *Stavenjord*-type claimants on already burdened Montana Workers Compensation Attorneys. If this Court does not find the need for a common fund, then each attorney in the state may be required to search every workers compensation file she or he ever had to determine if *Stavenjord*-type benefits should be paid. Effectively, the current Supreme Court order shifts the burden of finding *Stavenjord* Claimants to attorneys that were counsel of record. Unfortunately, many of those attorneys will be unable to protect the rights of their past clients.

The State Fund says that it has adequate records to find past *Stavenjord* Claimants, but the same cannot be said of past attorneys of record. Some of the past attorneys of record are no longer alive, as they do not live in perpetuity like insurance corporations. Some of the attorneys of record discarded their files, and some moved out of state. By disallowing the *Stavenjord* Common Fund, the Court will deny some claimants their last best chance of being located and paid.

MOST *STAVENJORD* CLAIMANTS DO NOT HAVE ATTORNEYS

The Workers' Compensation Court was undoubtedly aware of the need for the common fund when it issued its original decision. As indicated above, there was no other legal vehicle available by which to alert and pay benefits to potential *Stavenjord* Claimants. Although a few claimants may be fortunate to have attorneys, the vast majority do not have attorneys. In fact, the lack of attorney involvement should not surprise the Court, because the longstanding public policy of the Montana Workers' Compensation Act states:

> Montana's workers' compensation and occupational disease insurance systems are intended to be primarily self-administering.
> ...
> To meet these objectives, the system must be designed to minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities.

Section 39-71-105 (4) MCA (2005) (emphasis added).

The Employment Relations Division has developed some interesting data that describes how few claimants have attorneys. See, ERD 2005 Annual Report at: http://erd.dli.mt.gov/annualrpt/ar05/ar05content.asp.

According to the ERD, there were 32,164 claims in the year 2005. ERD 2005 Annual Report Ex. 2.2, pg. 13 (attached hereto as Exhibit 2). Moreover, the claims experience in 2005 was a typical number if compared to the three preceding years: In 2004, there were 32,443 claims; In 2003, there were 33,321 claims; and in 2002, there were 33,442 claims. ERD 2005 Annual Report, Ex. 2.2, pg. 13. Nonetheless, the ERD data soon after proves that only a few hundred of those claimants ever retained attorneys.

The ERD counts the number of cases with claimant attorney involvement in the section of the Annual Report discussing attorney fees. See, ERD 2005 Annual Report, *Attorney Fees from Claimant Settlements*, Exhibit 3.24 (attached hereto as Exhibit 2). Specifically, the ERD verifies that in the last five years the number of claims settled with attorney involvement varied between a low of 645 cases in 2003 to a high of 787 cases in 2004. Therefore, the ERD data establishes that there are a huge number of unrepresented claimants when the Court compares a typical year like 2005, which had 32,164 claimants versus 779 attorney-negotiated settlements. Based on the large number of unrepresented claimants, the Court should welcome a common fund litigant to occupy one side of the adversarial system of justice in order to facilitate the fair resolution of these claims.

The common fund is the most expeditious method available to deliver additional PPD benefits to unrepresented ODA claimants. In addition, the common fund doctrine allows this Court to coordinate all *Stavenjord*-type cases simultaneously. With several hundred workers' compensation insurance companies and 14 years of claims, the common fund doctrine promises a level application of legal principles, and the equal payment of *Stavenjord*-type PPD benefits. Finally, the common fund gives the Court the power to address attorney fee issues that may arise between common fund counsel and other counsel of record. Under the common fund doctrine, this Court may reduce or take away common fund attorney fees. Thus, the common fund maximizes benefits, reduces aberrant adjuster practices, and allows the Court to administer all *Stavenjord*-type cases in one concise framework.

THE DAMAGE MAY NOT JUSTIFY THE EXPENSE TO CHALLENGE THE WRONG

In part, the Supreme Court denied common fund status, because the Court mistakenly thought that the individual damage of these cases was sufficient from an economic viewpoint to justify the legal expense necessary to challenge the wrong.

Stavenjord, 2006 MT 257, ¶ 28. Stavenjord disagrees. In fact, Judge McCarter previously found that many *Stavenjord* claims would range from small to nonexistent:

> As to the second criteria for common fund status, the claimant in this case incurred substantial attorney fees in establishing her entitlement to benefits and the entitlement of other beneficiaries. The State Fund has attempted to refute this factor by pointing out that the benefits the claimant obtained in this case – approximately $30,000 – resulted in a significant attorney fee. The fee is approximately $7,500 based on the regulations governing attorney fees. ARM 24.29.3802(3)(b). That fee is a paltry one given the claimant's attorney's time and efforts in not only this Court but in the Supreme Court. Moreover, the Court must consider the return in other potential cases. <u>While this case involved $30,000, other cases will involve far less, thus providing a disincentive to litigate the issues joined in this case</u>.

Stavenjord, 2004 MTWCC 62, ¶42 (emphasis added)

In addition to the insignificant size of many claims, Stavenjord asks the Court to review other equitable reasons to apply the common fund doctrine. As a matter of equity, the common fund doctrine accomplishes maximum benefits, reduces aberrant applications, and provides one case within which the Court can administer the case. Therefore, the common fund approach is the only "practical" way to proceed.

The State Fund cannot offer a substantive argument why the common fund doctrine should not be applied. The only plausible reason for the State Fund to oppose the common fund is so that it can escape the payment of lawful PPD benefits. To prove that, Stavenjord points out that the Court's present order requires the State Fund to find claimants and pay benefits. Why then, Stavenjord asks, should the State Fund care if it pays those benefits in the context of a common fund? The only plausible explanation is the profit motive – the State Fund knows that it will be required to pay all of the *Stavenjord*-type benefits if there is a common fund.

Stavenjord respectfully submits that the common fund doctrine is the only legal vehicle that can be utilized to identify, notify, and pay *Stavenjord*-type benefits. Stavenjord urges the Court to recognize that the common fund doctrine is a vehicle of equity, and equity desires each deserving claimant to recover.

THE STATE FUND'S PRIOR INCONSISTANT STATEMENTS

Initially, the State Fund estimated that there may be 3,543 *Stavenjord* claimants (Stip. Facts #29). These claims, whether large or small, should be examined. However, the State Fund then admits, "Locating files on various media types is a labor-intensive process, and several different procedures are employed to retrieve the stored media." (Stip. Fact #7). Stavenjord asks who will verify that the State Fund and other insurers did the job properly.

To date, Court and Counsel only have assurances from the State Fund's attorney. The State Fund has not provided the Court with affidavits stating that every file was examined, and that the proper person examined it. The State Fund previously said that some of its file searches may take three hours for one file (Stip. Fact #11), is the Court to trust that each search was done to perfection, each time, and without oversight. For claims arising before 1990, the State Fund admits that some files may be "several volumes and thousands of pages" (Stip. Fact #12). Clearly, the Court does not have time to review those documents to make identification, notification, and entitlement determinations.

The State Fund let slip that there are other problems that will require the individual attention of counsel. For instance, there are claims that were erroneously coded (Stip. Fact #21), and this makes "a computerized 'sort and search' function a useful, but not comprehensive, mechanism for identifying affected claims." (Stip. Fact #24). What are the other processes that the State Fund will use? Why those, and are there any others? These questions, and more, may not be asked if the claimants do not have an attorney. Obviously, the Court could ask those questions, but good questions depend on good discovery and outside experts. The Court is not set up to tackle such an endeavor.

Without Common Fund Counsel, there will be no comparative studies. The State Fund and other insurers ask the Court to rely solely on their data and methods. However, Counsel for Stavenjord has amassed a list of claimants that should appear on State Fund and other Insurer lists. I represented some of the claimants, but others I did not represent. I always intended to compare my list with the Insurers' lists of potential claimants. In my capacity as Co-Chairman of the MTLA Workers' Compensation Section, I also planned to solicit information from other claimants' attorneys to see if there were other claims that should be actionable. These are few examples of kinds of comparative studies that might turn up additional claimants or whole groups of claimants not found by the Insurers. Without common fund designation, however, such comparative studies will be impossible. Without Common Fund Counsel, the Court will be relegated to a position where the Court must accept its facts from only one side of the dispute – the insurers.

The ever-changing numbers of claims identified by the State Fund should cause the Court concern. For instance, because of improper coding errors, the State Fund formally stipulated that it may need to manually review 3,543 files, as that is "the only reliable means of identifying affected claims." (Stip. Fact #29). However, in its most recent Report to Court, the State Fund indicates that it will only manually review 348 cases (Brief pg. 7). Stavenjord asks what happened to the need to manually review the other 3,195 cases? Was the State Fund wrong before or is it wrong now? More importantly, should the State Fund be allowed to unilaterally make the decision to neglect the manual review of those files. Having lost the entitlement and retroactivity issues, the new goal of the Insurers is to proceed without oversight. The Insurers want to evade payment, and that is the only plausible purpose for them to dodge oversight. Stavenjord asks the Court to find that it would be impractical or impossible for the Court to provide the necessary oversight without the assistance of Common Fund Counsel.

ADVISORY OPINIONS WILL NOT SUFFICE FOR SERIOUS LEGAL QUESTIONS

The State Fund admits to having serious legal questions that require substantive rulings by the Court. For instance, the State Fund fought about the legal definition of "settled claim." More immediately, in its Report to Court, the State Fund admits that it does not know what to do with deceased *Stavenjord* claimants (Brief pg. 7). Without alerting the Court to complexity of the issue, the State Fund nonchalantly asks the Court to issue an advisory opinion about the rights of deceased *Stavenjord* claimants.

Below, Stavenjord contends that the State Fund's "nonchalant request" (involving 104 claimants – Brief pg. 7) demonstrates that it is impossible or impractical to oversee these matters without hearing from both sides of the adversarial system of justice. Certainly, the State Fund has the right to ask the legal question: should it pay *Stavenjord* benefits to deceased claimants? In a normal case, adverse counsel would debate the issue with one another, and if they did not agree, the matter would be briefed and decided by the Court. However, that time-tried procedure is not acceptable to the State Fund in the present case, because the State Fund does not want an opposing attorney in this case. If the State Fund raises the issue in the normal manner, then the Court will see that it needs to hear from Common Fund Counsel. Instead, the State Fund asks for an advisory opinion:

> "MSF seeks direction of the Court in relation to whether notice should be sent to/on behalf of such deceased claimants..."

State Fund Report to Court -- pg. 7.

Naturally, the deceased claimants have a cogent legal argument that may entitle them to receive benefits, but the State Fund does not want to hear from the other side. Because the State Fund brought the issue up, Stavenjord addresses it below; however, this may be the last time an attorney makes an argument for *Stavenjord* Claimants if the claimants are denied Common Fund Counsel. Stavenjord submits that there will be other unforeseen issues in the future. Win, lose, or draw, the Claimants should be allowed to have an attorney present to argue their case.

AN EXAMPLE OF ONGOING LEGAL ISSUES – PPD FOR DECEASED CLAIMANTS

As with PPD benefits under the Workers' Compensation Act, *Stavenjord* claimants have a vested right that accrued at maximum medical improvement, despite subsequent injury or death. Stavenjord submits that this "accrued entitlement" is assured by *Breen v. Industrial Accident Board*, (1968) 150 Mont. 463, 436 P.2d 701. In *Breen*, the Montana Supreme Court held:

> "If an employee is receiving compensation as a result of an industrial injury and subsequently dies from causes other than this injury, liability for further compensation by way of death benefits or continuing disability benefits is cut off . . . but we do not construe this statute as terminating liability for compensation accrued prior to death but unpaid at the time of death."

Breen, 150 Mont. at 475, 463, 436 P.2d at 707. The *Breen* Court further stated:

> "Compensation is payable even after death because the benefits have accrued prior to death but were unpaid."

Breen, 150 Mont. at 475, 463, 436 P.2d at 707.

Stavenjord submits that *Breen* is still controlling law, which is evidenced by the fact that *Breen* was referenced favorably in *Monroy v. Cenex*, (1990) 246 Mont. 365, 805 P.2d 1343. In *Monroy*, benefits were terminated for a claimant who died of excessive alcohol consumption, but the Court nevertheless confirmed the *Breen* exception for "compensation accrued prior to the death, but unpaid at the time of the death." *Monroy*, 246 Mont. at 371, 805 P.2d at 1346.

In its Report to Court, the State Fund implies that it has mastered identification and notification (Brief pg. 4). The State Fund confidently states that there is no need for "the intervention of outside counsel" (Brief pg. 1), but Stavenjord believes the Insurers should be watched. No party ought to be allowed unfettered control of all of the facts

and all the issues in a case. More pointedly, no judge, no matter how smart, should be assigned the task of protecting all the rights and all the issues of every potential claimant. The Court requires the assistance of counsel (from both sides). Stavenjord contends that identification, notification, and valuation must be subject to even-handed scrutiny.

One of the greatest inventions of the Founding Fathers was the checks & balances system, but the State Fund wants no one to check its power. It is good that "MSF converted to its current system, adding more data fields which enhanced MSF's ability to search the database" (Brief pg. 4), but that does not mean the State Fund is perfect. Judge McCarter and several experienced claimant attorneys confirm that the process of securing payment of these benefits will be anything but simple.

The State Fund did not previously tell the Court about its improved locating system, because of advocacy. The State Fund did not previously disclose the system, because, up until recently, the State Fund was doing everything it could to persuade the Court that it would be impossible (or at least impractical) to find and pay all of the *Stavenjord* claimants. Now the tables have turned, but the advocacy continues. The *Stavenjord* claimants ask this Court to allow them to have an advocate, also.

CONCLUSION

It will be "impractical or impossible" to supervise the payment of *Stavenjord*-type benefits without common fund counsel. Multiple non-party insurers must be joined and evaluated by counsel. Principles of jurisdiction require two advocates to compete in the judicial checks & balances system, and the common fund approach is the only reliable method that will allow the Court to deliver *Stavenjord*-type benefits. Stavenjord asks the Court to reinstate the earlier determination that there should be a Stavenjord Common Fund, because it would otherwise be "impractical or impossible" to provide *Stavenjord* benefits to all deserving claimants from all concerned insurance companies.

DATED this 30th day of March, 2007.

Thomas J. Murphy

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of March, 2007, a copy of the foregoing Response was served by mailing a true and correct copy of said document via first class mail to the attorneys at the addresses listed below:

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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

DEBRA STAVENJORD Petitioner, vs. MONTANA STATE FUND Respondent/Insurer.	WCC No. 2000-0207 AFFIDAVIT OF ATTORNEY LAWRENCE A. ANDERSON

STATE OF MONTANA)
:ss.
County of Cascade)

LAWRENCE A. ANDERSON, first sworn, deposes and says:

1. I am an attorney from Great Falls, and I have extensive experience representing workers' compensation claimants.

2. I have been the attorney for two common fund cases before this Court. Those cases are: *Broeker v. Great Falls Coca Cola Bottling Company*, WCC No. 9211-6631R1, and *Buckley v. University of Montana*, WCC No. 2003-752. In *Broeker*, the State Fund was including all social security disability cost of living increases in its social security offset calculation, in violation of the Supreme Court's decision in *McClanathan v. Smith* (1980), 186 Mont. 56, 606 P2d 507 and the Supreme Court's decision in *Broeker* (1996), 275 Mont. 502, 914 P2d 967.

3. In *Buckley*, the State Fund was systematically including in the social security offset calculation the claimant's family auxiliaries even though family members have reached the age of majority and were no longer receiving family auxiliary benefits.

4. The descriptions of the *Broeker* and the *Buckley* cases demonstrate the need for common funds in workers' compensation matters. Both *Buckley* and *Broeker* involved discreet and subtle mathematical approaches taken by insurers to deprive workers'

EXHIBIT 1-A-1

compensation claimants of the full benefits to which they are entitled. *Broeker* took twelve years to resolve; and even after the Supreme Court's decision in 1996, it took six additional years to resolve. Part of the delay after the Supreme Court's decision involved the State Fund's continued efforts to evade both the *McClanathan* and *Broeker* holdings.

5. Common fund cases involve complex analysis of the computer fields used to develop the class of claimants who are entitled to the benefits at issue. Certainly, the State Fund should not be trusted to develop and identify the claimants who are entitled to the benefits at issue. Both the *Broeker* and the *Buckley* cases demonstrate they have a fundamental interest in conflict with the full development and identification of class members and the proper analysis of complex benefit issues in these type cases. The review of the minute entries in the *Broeker* case shows how important common fund counsel and the Court were in the successful identification and payment of the common fund claimants in *Broeker.* This identification process could not have been done without this active participation by common fund counsel in Broeker and the Court's involvement in the matter.

6. In *Buckley*, the State Fund quickly recognized the problem and would have been willing to resolve *Buckley's* case before the Court became involved. However, if *Buckley* had been resolved in that manner, hundreds of claimants would have had to hire separate counsel to secure their benefits; and because of the cost benefit analysis in such a claim, few people would have been able to secure competent counsel to represent them in the *Buckley* type claim. As a result, the State Fund would have continued to miscalculate the social security offset after claimant's auxiliaries reached the age of adulthood.

7. Without common fund counsel in Stavenjord, I am very concerned that insurers will neglect the rights of many unrepresented (and previously represented) claimants. Therefore, I believe that Stavenjord should have common fund status, because it would be impractical and impossible for the Workers' Compensation Court to oversee the payment of Stavenjord type benefits without the assistance of common fund counsel. There are hundreds of insurance companies affected by the Stavenjord ruling, and the benefit entitlement period spans some fourteen years; and consequently, there is simply no practicable or possible way for the Workers' Compensation Court to administrate this case alone.

8. The statements contained in this affidavit are true and correct to the best of my knowledge and belief.

DATED this 16 day of March, 2007.

Lawrence A. Anderson

EXHIBIT 1-A-2