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FEB 20 2008

Thomas J. Murphy
Murphy Law Firm
P.O. Box 3226
Great Falls, MT 59403-3226
(406) 452-2345
Attorneys for Petitioner

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

DEBRA STAVENJORD,)	
)	WCC No. 2000-0207
Petitioner,)	
)	Petitioner's Response to the
vs.)	State Fund's Request for
)	Reconsideration
MONTANA STATE FUND)	
)	
Respondent/Insurer)	

PROCEDURAL BACKGROUND

After finding it unconstitutional to deny equal permanent partial disability benefits to Occupational Disease Claimants, the Montana Supreme Court remanded the *Stavenjord I* case to this Court for further proceedings. *Stavenjord v. Montana State Fund* 2003 MT 67, 314 Mont. 466, 67 P.3d 229. The Workers' Compensation Court found that *Stavenjord I* created a common fund, and it ordered retroactive application of *Stavenjord I* from 1999 forward. In *Stavenjord II*, both parties challenged the retroactivity date, but the Montana Supreme Court held the case was fully retroactive from 1987 forward.

On remand of *Stavenjord II*, the Supreme Court ordered this 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*").

The crux of the present debate relates to the fact that *Stavenjord II* denied common fund status to the non-participating *Stavenjord* Claimants. That part of the *Stavenjord II* holding left non-participating Claimants without an attorney to assist them

in their effort to secure *Stavenjord* benefits from hundreds of potential Insurers. In response, *Stavenjord* filed a petition for rehearing asking the Supreme Court to reinstate 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).

THE ARGUMENTS ON REMAND

On remand, *Stavenjord* argued that, without Common Fund Counsel, it was "impossible" and "impracticable" for this Court to comply with the Supreme Court's remand order to identify, notify, and adjudicate the interests of *Stavenjord* Claimants.

Stavenjord argued that global application extended beyond the Montana State Fund, because *Stavenjord II* implicates hundreds of insurance companies. Citing the Supreme Court's unanimous decision in *Ruhd v. Liberty Northwest Ins. Co.* 2004 MT 236, 322 Mont. 478, 97 P.3d 561, *Stavenjord* argued that *Stavenjord II* extends to all insurers - whether or not those insurers were parties. Consequently, this Court was clearly asked if it could, without the assistance of common fund counsel, directly oversee the payment of *Stavenjord* benefits by hundreds of non-party insurers. Interestingly, the Montana State Fund did not oppose global application, because the Montana State Fund said that it would be unfair to require it to pay *Stavenjord* benefits without also requiring the non-participating insurers to pay *Stavenjord* benefits. In its Order of January 15, 2008, this Court agreed to apply the *Ruhd* analysis. Indeed, the Court said that it would be a violation of equal protection to find otherwise. *Stavenjord v. Montana State Fund* 2008 MTWCC 4, ¶ 10.

In its January 15, 2008 Order, this Court acknowledged *Stavenjord*'s argument that basic principles of constitutional jurisdiction require a party litigant to stand before the Workers' Compensation Court to argue on behalf of the *Stavenjord* Claimants. *Stavenjord* argued that if the Montana State Fund is allowed to have an attorney, then the *Stavenjord* Claimants should also be allowed to have an attorney.

After the remand of *Stavenjord II*, however, Counsel for Stavenjord could only participate as *Amicus Curiae*. *Stavenjord v. Montana State Fund* 2008 MTWCC 4, ¶ 6. As such, Counsel for Stavenjord had none of the powers ordinarily accorded to the attorney of a party litigant. For instance, as *Amicus Curiae*, Counsel for Stavenjord was invited to question two witnesses at a conference at the State Fund Offices, but Counsel for Stavenjord had no standing to serve written discovery requests, to depose other witnesses, or to request a formal trial of the many factual assertions made by the Montana State Fund. Currently, the State Fund seeks reconsideration, because it contends that there was a "trial on the merits" at the State Fund offices, but that is not the case. More than anything, the conference at the State Fund offices proved that the *Stavenjord* Claimants should have been entitled to a real litigant, as a real party in interest; otherwise, it would be "impossible" and "impractical" to locate and pay all *Stavenjord* Claimants. The Court correctly decided that the term "all *Stavenjord* Claimants" includes the claimants of all insurers, so there was no need for the Court to make specific findings as to the procedures of only one of those insurers.

Consequently, Stavenjord does not believe the Court should enter additional Findings of Fact and Conclusions of Law. The Court was correct in its holding, and nothing further needs to be said to allow the parties to proceed with an appeal. However, if this Court is inclined to reconsider additional findings at the State Fund's request, then Stavenjord would also ask for a few additional Findings of Fact and Conclusions of Law itemized below.

First, Stavenjord reminds the Court that Judge McCarter previously recognized the need for a common fund in the case at bar. *Stavenjord* 2004 MTWCC 62 ¶ 32 (8/27/04). In fact, Judge McCarter related many difficulties he encountered in previous common fund cases, which confirmed for him that a common fund would be necessary in *Stavenjord*. Consequently, it would be helpful for the parties to hear from this Court about whether the Court believes a common fund is the most appropriate method to identify and pay benefits.

In addition, Stavenjord submitted several affidavits from other attorneys who have handled large common fund disputes. Attorneys McGarvey, Anderson, and Beck confirmed the need for a common fund in the case at bar. Their affidavits factually establish that insurers do not protect the interests of injured claimants. These attorneys also testified that it would be impractical or impossible to resolve this case without the assistance of common fund counsel. In their cases, these attorneys 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. Their affidavits cast tremendous doubt on whether, without common fund counsel, the insurers will pay *Stavenjord* benefits to unknowing claimants.

Consequently, it would be instructive for the parties to hear from this Court about whether, based on those affidavits, the Court believes a common fund would be the most appropriate method to identify and pay benefits.

In addition, Stavenjord proved to the Court that most of the potential *Stavenjord* Claimants do not have attorneys. Citing data from the Employment Relations Division, Stavenjord proved that only a small number of claimants have attorneys (Ranging from 2% to 2.5% over the last three years reported). Estimates from the State Fund were that 70% of the potential claimants are unrepresented (Hearing Trans. pg. 117, line 9).

Stavenjord proved to the Court that most of the potential *Stavenjord* Claimants do not have large cases. In part, the Supreme Court denied common fund status, because the Supreme Court mistakenly thought that the individual damages in each of these cases was sufficient from an economic viewpoint to justify the legal expense necessary to challenge the wrong. *Stavenjord*, 2006 MT 257, ¶ 28. On the contrary, Stavenjord referenced contrary findings that many *Stavenjord* claims would range from small to nonexistent: "While this case involved \$30,000, other cases will involve far less, thus providing a disincentive to litigate the issues joined in this case." *Stavenjord*, 2004 MTWCC 62, ¶42. Therefore, it would be helpful to hear from the Court on that issue.

In addition to the insignificant size of many claims, Stavenjord asked the Court to review other equitable reasons to apply the common fund doctrine. Stavenjord argued that a common fund would pay equal benefits, reduce aberrant applications, and it would provide one case within which the Court could administer the case. Therefore, it would be helpful to hear from the Court on that issue.

Finally, Stavenjord pointed out that the State Fund could not offer a substantive argument against applying the common fund doctrine. The only plausible reason for the State Fund to oppose the common fund was so that it could escape the payment of lawful PPD benefits. The State Fund has paraded an ever-changing number of claims in its numerous arguments against this case over the past ten years. For instance, the State Fund formally stipulated that it might need to manually review 3,543 files, as that is "the only reliable means of identifying affected claims." (Stip. Fact #29). However, in its report to this Court, the State Fund indicated that it would only manually review 348 cases (Brief pg. 7). Thereafter, at the hearing at the State Fund offices, the State Fund did not set forth a firm number of cases that involved Stavenjord benefits that needed to be resolved. Stavenjord asked what happened to the other cases. Was the State Fund wrong before or is it wrong now? More importantly, should the State Fund be allowed to unilaterally decide without oversight? Having lost the entitlement and retroactivity issues, the State Fund's new goal is to proceed without oversight. Therefore, it would be helpful to hear from the Court on that issue.

The State Fund glossed over serious legal questions that may require substantive rulings by the Court. For instance, the State Fund fought about the legal definition of what is a "settled claim." Furthermore, in its Report to Court, the State Fund admitted that it did not know what to do with deceased *Stavenjord* Claimants (Brief pg. 7). Without alerting the Court to the complexity of the issue, the State Fund nonchalantly asked the Court for an advisory opinion. *Stavenjord* challenged the State Fund's "nonchalant request" (involving 104 claimants), Brief pg. 7, and *Stavenjord* thereby demonstrated that it was impossible or impractical to oversee this case without hearing from both sides of the adversarial system of justice. Naturally, the estates of the deceased *Stavenjord* Claimants have a cogent legal argument that entitles them to receive benefits. See, *Breen v. Industrial Accident Board*, (1968) 150 Mont. 463, 436 P.2d 701. Nevertheless, the State Fund did not want to hear from an opposing attorney on that issue. Win, lose, or draw, the *Stavenjord* Claimants argued that they should be allowed to have an attorney to argue their case. Therefore, it would be helpful to hear from the Court on that issue.

THIS COURT'S ORDER FINDING IT IMPOSSIBLE TO COMPLY

As argued by *Stavenjord*, this Court correctly found that it was impossible to comply with the *Stavenjord II* remand order. *Stavenjord v. Montana State Fund* 2008 MTWCC 4 ¶ 14. After receiving *Stavenjord II*, this Court acknowledged that *Stavenjord*'s claim was resolved and the Supreme Court denied common fund status. Consequently, there was no actual claimant in the remanded case, and the Montana State Fund was the only party remaining. The Court acknowledged that the *Stavenjord* Claimants were continuing their effort to secure common fund status, so the Court allowed Counsel for *Stavenjord* to participate as *amicus curiae*.

In that lop-sided equation (Party Insurer versus *Amicus Curiae*), the State Fund prepared a report setting forth proposed procedures to identify potential *Stavenjord* Claimants. Afterwards, the Court allowed *Stavenjord*'s Counsel to submit a written *amicus* response to the State Fund report. Next, the State Fund presented a "conference" at its offices to discuss the procedures proposed. *Stavenjord*'s Counsel was allowed to appear at the conference in his *amicus* capacity, but he was not allowed to conduct pre-conference discovery.

In its Order of January 15, 2008, the Court defined the issues before it as follows:

To determine an appropriate procedure by which potential *Stavenjord* beneficiaries will be identified and notified of their interests related to increased *Stavenjord*-type benefits; and,

To determine whether it is impracticable or impossible for the Court to comply with the Supreme Court's remand order without the assistance of common fund counsel

However, before determining an appropriate procedure by which potential *Stavenjord* beneficiaries could be identified and notified, this Court was first compelled to define the term "potential *Stavenjord* beneficiaries." The Court acknowledged two options: (1) State Fund Insureds, or (2) All Relevant Claimants regardless of Insurer. The Court correctly found that it was unfair to limit the class of "potential *Stavenjord* beneficiaries" to only State Fund Insureds. Indeed, the Court found no rational basis for holding one insurer liable for uncapped PPD benefits, while an identically situated insurer would not be held liable. The Court said, "such a holding would constitute an equal protection violation unto itself, something the *Stavenjord I* decision sought to rectify." *Stavenjord v. Montana State Fund* 2008 MTWCC 4 ¶ 10. This Court accurately acknowledged that the definition of "potential *Stavenjord* beneficiaries" went to the heart of the case.

Using clear logic, the Court defined "potential *Stavenjord* beneficiaries" as follows: "Claimants who, irrespective of their employer's insurer, made occupational disease claims between the dates of June 30, 1987, and May 22, 2001, inclusive, and whose PPD benefits were capped at \$10,000 pursuant to § 39-72-405, MCA." *Stavenjord v. Montana State Fund* 2008 MTWCC 4, ¶ 12.

The Court recognized the State Fund efforts to identify potential claimants, but there was no need to analyze the issue further. Under its definition of *Stavenjord* beneficiaries, this Court had no need to continue the factual analysis, because such an analysis would then necessarily require the Court to examine the procedures of several hundred other workers' compensation insurers. Moreover, the Court correctly questioned whether it presently had jurisdiction over those non-participating insurers. Therefore, this Court found:

Unless it was the Supreme Court's intention to limit the definition of "potential *Stavenjord* beneficiaries" to only those claimants insured by State Fund, I find it is impossible to determine an appropriate procedure by which potential *Stavenjord* beneficiaries will be identified and notified of their interests related to increased *Stavenjord* type benefits.

Stavenjord v. Montana State Fund 2008 MTWCC 4, ¶ 14.

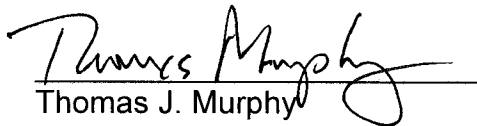
THE MONTANA STATE FUND'S REQUEST FOR RECONSIDERATION

The Montana State Fund requests reconsideration to add Findings of Fact that relate to a moot issue. This Court found that it is impossible to adjudicate the matter as it is presently set on remand; therefore, it is axiomatic that the Supreme Court should address the common fund issue before this Court should be forced to make additional Findings of Fact or Conclusions of Law as to any one or all of the other insurers. Therefore, the State Fund requests reconsideration of facts that are no longer relevant.

CONCLUSION

The Montana State Fund now requests reconsideration to add Findings of Fact that relate to a moot issue. This Court found that it will be "impractical or impossible" to supervise the payment of *Stavenjord*-type benefits without jurisdiction over multiple non-party insurers. The common fund approach is the only reliable method that will allow this Court to deliver *Stavenjord*-type benefits to all relevant Claimants, and principles of jurisdiction require opposing advocates to complete that judicial examination. Otherwise, it will be "impractical or impossible" to provide *Stavenjord* benefits to all deserving claimants from all concerned insurance companies.

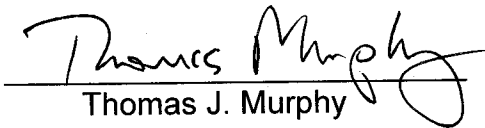
DATED this 19th day of February 2008.


Thomas J. Murphy

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of February 2008, 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:

Bradley J. Luck
Garlington, Lohn & Robinson
P.O. Box 7909
Missoula, MT 59807
Attorneys for Respondent/Insurer
Montana State Fund


Thomas J. Murphy