

Bradley J. Luck
GARLINGTON, LOHN & ROBINSON, PLLP
199 West Pine • P.O. Box 7909
Missoula, MT 59807-7909
Telephone (406) 523-2500
Telefax (406) 523-2595

Greg Overturf
Thomas E. Martello
MONTANA STATE FUND
P.O. Box 4759
Helena, MT 59604-4759
Telephone (406) 444-6500
Facsimile (406) 444-6555

Attorneys for Respondent/Insurer

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

DEBRA STAVENJORD,

Petitioner,

v.

MONTANA STATE FUND

Respondent.

WCC No. No. 2000-0207

**MONTANA STATE FUND'S RESPONSE
TO PETITIONER'S REQUEST FOR
EMERGENCY HEARING ON
ATTORNEY FEE LIEN**

The Montana State Fund ("State Fund") presents this Response regarding Petitioner's Request for Emergency Hearing on Attorney Fee Lien.

1. Overview

The Montana Supreme Court reversed this Court's previous decision and refused to allow common fund status for this action. The fundamental basis for the decision was that no identifiable monetary fund was created by the original *Stavenjard* decision. The Court noted that each claimant's individual entitlement situation will be unique, with no simple universal formula for determining entitlement. It also indicated that claimants will likely utilize existing counsel or retain counsel as needed and that there was proper financial incentive for each to do so.

On remand, the Supreme Court was solely interested in insuring that an appropriate process existed for the identification and notification of potential Stavenjord beneficiaries. If it was “impracticable or impossible” to identify and notify claimants, the Supreme Court indicated this Court could enter an Order to that effect. The Supreme Court never indicated that it would abandon its clear substantive factual and legal foundation for refusing common fund status solely on the basis of a procedural identification and notification concern.

Following appropriate proceedings, this Court has determined that the State Fund had a “well thought out and reasonable” approach to identification and notification. The State Fund has asked the Court, on Reconsideration, to provide additional detail in that regard.

The decision of the Supreme Court stands. There is no common fund. The Court’s sole remand direction related to identification and notification. Nothing in the identification or notification process relates in any way to the implementation issues which formed the basis for the Court’s denial of the common fund in the first place. Therefore, even if the Supreme Court reviews the matter again it will be on the limited “identification and notification” basis. Any objections Petitioner’s counsel has to identification and notification issues will not bear on the previous decision or the law of the case, i.e., that this action is not proper for common fund treatment.

Because there is no common fund there can be no common fund attorney fee lien. Because Petitioner has admittedly been paid all of her benefits, her counsel has no standing to exert a lien or participate in the implementation process.

2. Standing

It is first noted that the filing in question is captioned as being presented by Petitioner. This would appear to mean that Debra Stavenjord filed the request. However, the record of this cause indicates that Ms. Stavenjord has been paid all benefits due her and has no continuing interest in the litigation. Issues raised in her Petition are moot.

The filing, in fact, was made on behalf of her attorney seeking fees against non-party claimants; many insured by other carriers also not a party to this proceeding. Counsel has previously admitted his lack of standing in this action. The State Fund agreed to the participation of Stavenjord’s counsel in the hearing at the State Fund regarding the identification and implementation issue only so long as such participation related to the specific remand instruction. See State Fund’s Resp. Stavenjord’s Report Regarding Need Common Fund, Apr. 20, 2007, Docket No. 106.

The present request for hearing and apparent motion to exert a common fund attorney lien on behalf of a non-party lawyer in a case where the Supreme Court has ruled that a common fund does not exist requires the State Fund to object to the proceeding on the basis that the movant lacks standing to appear and participate.

3. Present Status of the Record

The Montana Supreme Court unanimously rendered its decision in relation to common fund issues on October 6, 2006. *Stavenjord v. Mont. State Fund*, 2006 MT 257, 334 Mont. 117, 146 P.3d 724 (“*Stavenjord II*”). The Supreme Court reversed this Court’s previous approval of common fund status. (“We therefore conclude that the WCC erred in determining that *Stavenjord I* created a common fund.” *Stavenjord II*, ¶ 28.) The Supreme Court denied common fund status on several grounds, noting the present claim circumstances failed to meet the requirements set out in *Ruhd v. Liberty Northwest Insurance Corp.*, 2004 MT 236, ¶ 16, 322 Mont. 478, ¶ 16, 97 P.3d 561, ¶ 16 (citing *Mountain W. Farm Bureau Mut. Ins. Co. v. Hall*, 2001 MT 314, ¶¶ 15-18, 308 Mont. 29, ¶¶ 15-18, 38 P.3d 825, ¶¶ 15-18).

Stavenjord sought rehearing and reinstatement of the common fund. The Supreme Court refused. In so doing, the Court took its original general remand instruction:

We remand this case to the WCC for 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 increased *Stavenjord*-type PPD benefits.

Stavenjord II, ¶ 31, and focused it:

[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.

Order, Nov. 9, 2006. Further filings and proceedings culminated in a hearing at the State Fund in which it was demonstrated that it had properly identified potential *Stavenjord* beneficiaries and had a sound plan for notifying them of their potential entitlement. The remand review was therefore satisfied.

The Court issued its Order following the hearing raising the concern that the remand order was construed to include potential Stavenjord beneficiaries due benefits from carriers other than the State Fund. As a result, the Court concluded it was not capable of complying with the remand order because the “several hundred other workers’ compensation insurers in Montana who may have claimants entitled to *Stavenjord*-type benefits” were not before the Court and therefore an analysis of their implementation procedures was not possible. Docket No. 113 at ¶ 12.

In arriving at its conclusions, however, the Court observed:

It was obvious to me that State Fund expended considerable effort in arriving at a procedure to identify potential *Stavenjord* beneficiaries. **If my duty was to determine an appropriate procedure by which potential *Stavenjord* beneficiaries insured by State Fund were to be identified and notified, then State Fund has set forth a procedure which appeared to be well thought-out and reasonable.**

Docket No. 113 at ¶ 12 (emphasis added). The Court went on to note that the State Fund had fully cooperated in the remand process and willingly submitted itself to the jurisdiction of the Court. The Court was concerned, however, that no other insurer was before the Court and jurisdiction of non-parties was absent. For that reason, in the Court’s mind, the entire process was stalled and unable to be completed.

The State Fund sought rehearing and the issuance of a supplemental Order specifically noting what the Court had already found, i.e., that, as to the State Fund, it was not impossible or impracticable to properly identify and notify potential Stavenjord beneficiaries and the assistance of common fund counsel was not necessary in that regard. State Fund’s Pet. Recons., Feb. 4, 2008, Docket No. 115. The State Fund continues to believe that such an Order would be appropriate since it **is** a party to this case, the Court **does** have jurisdiction over it and it **has** been determined to have a proper identification and notification process.

It is noted that counsel for Stavenjord actually appears to be seeking another review by the Supreme Court, not on the very specific remand issue of identification and notification, but on reinstating a common fund so that he can participate substantively in the implementation process and secure a fee from all claimants. This would be his third attempt at a common fund with the Court, totally contrary to the law of the case and well beyond the subject matter of the remand orders, the only open item on the agenda.

Ironically, in specifically reversing this Court and negating the common fund finding, the Supreme Court rejected each of the positions Petitioner's counsel continues to present to grant him common fund status and, now to continue to exert a lien:

- a. The decision did not create, reserve, preserve, or increase an identifiable monetary fund or benefit in which all active and non-participating beneficiaries have an interest. ("Here, by contrast, benefits due to non-participating *Stavenjord* beneficiaries will not be readily identifiable on superficial review of case files, nor can benefits due be calculated with certainty by way of a mathematical formula [B]ecause each claimant's situation will be unique, there will be no simple universal formula that can be applied to all non-participating claimants to determine to what additional money they are entitled.") *Stavenjord II*, ¶ 27.
- b. Allowing common fund attorney fees when entitlement issues are numerous, and many claimants are or will be represented by counsel, creates a disincentive for necessary non-participating counsel. ("It also bears noting that many of these claimants are represented by counsel, and will require further assistance from their attorneys. A common fund reduction in fees to benefit *Stavenjord*'s counsel would create a disincentive for non-participating claimants' counsel, and could thereby threaten a claimant's prospects for an aggressively negotiated benefit recovery.") *Stavenjord II*, ¶ 27.
- c. Common fund treatment is not necessary in this case, where claimant and her counsel were appropriately compensated and other beneficiaries of the decision have appropriate financial incentive to pursue additional benefits. ("[T]he fact is that eligible claimants *do* have the financial incentive to pursue *Stavenjord* benefits, provided they and their counsel expend the time and effort required to reap the benefit of our decision.") *Stavenjord II*, ¶ 28.

Nothing that can be said by Petitioner's counsel on the issue of identification and notification, whether aimed at the State Fund's process or those of unknown non-parties, can change these findings or the law of this case.

4. State Fund Notice

Attached is a copy of the letter/notice prepared to be sent by the State Fund this week to potential *Stavenjord* beneficiaries. A copy had been provided to the Court on April 18, 2008, for informational purposes. Contrary to the assertion in the Petition for

Emergency Hearing, the letter is a fair statement of the status of the matter. Data questionnaires are also to be provided to potential claimants depending upon date of injury.

The Court is advised that some Stavenjord benefits have been paid to claimants on settled claims which reserved such rights.¹ Also, the Court should know the State Fund is receiving increased numbers of inquiries/demands for payment of Stavenjord entitlements. With the Court's recent comments regarding the sufficiency of the State Fund identification and notification procedure, it was determined that the implementation process should now begin. That is why the letter was finalized and prepared for mailing this week.

5. Petitioner's Filing

Counsel for Petitioner seeks an emergency hearing to discuss the Notice but, primarily, to exert a common fund attorneys lien "until the Montana Supreme Court conclusively rules on the issue of common fund." The filing goes on to allege "this Court essentially found that it was impossible to administer the *Stavenjord* case on remand without counsel." The first statement ignores the status of the case and the second is not accurate.

The Supreme Court reversed this Court's establishment of a common fund on multiple grounds, noted above, indicating the facts do not allow the matter to meet accepted standards for such status. It refused to modify the findings on rehearing. All it did was issue a directive on identification and notification. Even if problems exist in such procedural areas, and they certainly do not with the only party Respondent in this case, that would not change the law of the case on the substantive common fund status.

The Court did not find that it is impossible to administer this case without counsel. It did raise concerns about non-parties.

¹ It appears eight such matters were resolved since the information necessary to pay Stavenjord benefits was readily available in the file. The letters written to the claimants in the noted matters were the ones referenced by Petitioner in the present filing. The attached letter advising the broader population of claimants of potential entitlement is much different.

The State Fund is the sole Respondent in this case. It spent considerable time identifying potential Stavenjord beneficiaries and has a sound notification process ready to proceed. This “well thought out and reasonable” process was never found in need of assistance by any non-retained counsel. There is no basis to exert any claim for common fund counsel or any type of lien against the State Fund.

6. Lien

Petitioner’s counsel’s common fund attorney fee lien was filed April 9, 2003, in this Court, pertaining to benefits secured in the original Supreme Court decision in this cause. It is indicated that the “common benefit was created, increased, and/or preserved by the” initial decision. Since that time, however, *Stavenjord II* determined that no common fund exists. As a result, by the terms of the lien itself, there is no common benefit upon which a lien may be claimed.

Petitioner’s counsel can argue that he intends to appeal and secure common fund status. Again, this position ignores both the scope of the remand and the basis of the denial of the common fund in the first place, which will not change regardless of any identification or notification finding.

7. Status/Reconsideration

The State Fund is the only carrier in this action. It has diligently worked with the Court in the process since remand. It has properly identified and is set to properly notify prospective Stavenjord claimants. Remand considerations, the only open issue in the action, have been resolved. It is time that the State Fund be allowed to move forward under the law of the case, which does not include a common fund.

The Court is legitimately concerned with non-party issues. As a party, however, this does not affect the State Fund. The State Fund respectfully requests that, for record clarity purposes, the Court issue the requested Order on Reconsideration and allow the notification process to proceed without an unnecessary lien. Even without such an Order, the Court can properly allow the State Fund to proceed as requested on the basis that it has a “well thought out and reasonable” identification and notification process and the law of the case is that no common fund exists upon which a lien would attach.

DATED this 21st day of April, 2008.

Attorneys for Respondent/Insurer:

MONTANA STATE FUND
P.O. Box 4759
Helena, MT 59604-4759
Telephone (406) 444-6500
Facsimile (406) 444-6555

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

By



Bradley J. Luck

CERTIFICATE OF MAILING

I, the undersigned, of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for Respondent/Insurer, hereby certify that on this 21 day of April, 2008, I emailed and mailed a copy of the foregoing MONTANA STATE FUND'S RESPONSE TO PETITIONER'S REQUEST FOR EMERGENCY HEARING ON ATTORNEY FEE LIEN, postage prepaid, to the following:

Thomas J. Murphy
Murphy Law Firm
P.O. Box 3226
Great Falls, MT 59403-3226

Email: tommurphy@qwest.net



**MONTANA STATE FUND'S RESPONSE TO PETITIONER'S REQUEST
FOR EMERGENCY HEARING ON ATTORNEY FEE LIEN**

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Date

Addressee
Address
City State Zip

RE: WORKER:
CLAIM NUMBER:

Dear Sir or Madam:

A Montana Supreme Court decision, *Stavenjord v. Montana State Fund*, has determined that injured workers suffering from an occupational disease are entitled to the same permanent partial disability benefits as workers suffering from an injury.

Montana State Fund (MSF) is reviewing its workers' compensation claims to determine eligibility for additional permanent partial disability benefits which may be due under *Stavenjord*.

The above noted claim has been identified as potentially entitled to additional permanent partial disability benefits under *Stavenjord*.

In order to determine potential eligibility for additional permanent partial disability benefits, further information is necessary. To expedite our review, we have enclosed a questionnaire to be completed and returned in the enclosed return envelope. Your prompt attention to this matter will expedite our review of this file.

PLEASE DO NOT CALL. Completion and return of the enclosed questionnaire will assist us in reviewing the claim for entitlement. If further information is needed, we will contact you.

PLEASE NOTE: This letter is not notification of entitlement to Stavenjord permanent partial disability benefits. Rather, we have identified this claim as potentially being due additional permanent partial disability benefits. Further review of the claim is necessary and we will notify you in writing of our determination upon assessment of the necessary information.

MONTANA STATE FUND