

**FILED**

APR 28 2008

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. \_\_\_\_\_

OFFICE OF  
WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

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**Debra Stavenjord,**  
Appellant,

vs.

**NOTICE OF APPEAL**

**Montana State Fund,**  
Appellee.

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NOTICE is given that Debra Stavenjord, the Appellant above named and the petitioner in that cause of action filed in the Workers' Compensation Court as WCC No. 2000-0207, hereby appeals to the Montana Supreme Court from the Orders of the Workers' Compensation Court dated January 15, 2008 (2008 MTWCC 4) and April 24, 2008 (2008 MTWCC 17).


**THE APPELLANT FURTHER CERTIFIES:**

1. This appeal is subject to the mediation process required by Rule 7, M.R.App.P., and the money judgment being sought is not less than \$5,000.
2. This is an appeal from an order certified as final under Rule 54(b) M.R.Civ.P., and a true copy of the Workers Compensation Court's certification order dated 1/15/08 is attached hereto as "Exhibit A."
3. That all available transcripts of the proceedings in this cause have been ordered from the court reporter before the filing of this notice of appeal, and the Appellant has complied with the provisions of Rule 8 (3) M.R.App.P. with the filing of this notice of appeal.

DOCKET ITEM NO. 122

4. That included herewith is the filing fee prescribed by statute.

DATED this 25<sup>th</sup> day of April 2008.

  
THOMAS J. MURPHY  
Attorney for the Appellant

### CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing NOTICE OF APPEAL with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing NOTICE OF APPEAL upon the Clerk of the Workers' Compensation Court, each attorney of record, and each party not represented by an attorney in the above-referenced Workers' Compensation Court action, as follows:

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DATED this 25<sup>th</sup> day of April 2008.

  
THOMAS J. MURPHY

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 4

WCC No. 2000-0207

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DEBRA STAVENJORD

Petitioner

vs.

MONTANA STATE FUND,

Respondent

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ORDER REGARDING IDENTIFICATION AND NOTIFICATION  
OF POTENTIAL BENEFICIARIES

**Summary:** After denying common fund status in this matter, the Montana Supreme Court remanded it to this Court 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 this Court to comply with the Supreme Court's remand order without the assistance of a common fund counsel.

**Held:** Having considered the issues presented, the Court concludes it is impossible for this Court to comply with the Supreme Court's remand order. Therefore, no further action can be taken by the Court as this matter now stands.

BACKGROUND

¶ 1 In *Stavenjord v. Montana State Fund*,<sup>1</sup> the Montana Supreme Court affirmed the Workers' Compensation Court's determination that: (1) application of § 39-72-405(2), MCA (1997), to Stavenjord's claim against Montana State Fund (State Fund) violated her constitutional equal protection rights; and (2) that she should receive benefits related to her occupational disease equal to benefits she would have received had she suffered an industrial injury. Upon remand to this Court, State Fund paid Stavenjord's additional benefits. Stavenjord then sought retroactive application of *Stavenjord I* and common fund attorney fees for Stavenjord-type benefits secured by nonparticipating claimants. This Court ordered partial retroactive application of *Stavenjord I* and common fund attorney fees

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<sup>1</sup> *Stavenjord v. Montana State Fund*, 2003 MT 67, 314 Mont. 466, 67 P.3d 229 (*Stavenjord I*).

for claims arising within the time period of retroactivity. Both parties appealed from this Order.

¶ 2 On appeal, the issues in *Stavenjord II*<sup>2</sup> were:

¶ 2a Whether *Stavenjord I* applies retroactively to claims arising on or after June 30, 1987;

¶ 2b Whether the Workers' Compensation Court erroneously applied the date of maximum medical improvement as the entitlement date for retroactivity purposes;

¶ 2c Whether the Workers' Compensation Court erroneously concluded that *Stavenjord I* created a common fund entitling *Stavenjord's* counsel to collect common fund fees from nonparticipating claimants who benefit from the decision; and

¶ 2d Whether the Workers' Compensation Court erroneously concluded that *Stavenjord's* counsel timely asserted a claim for common fund attorney fees.

¶ 3 Regarding the first issue, the Supreme Court concluded that the correct date to apply to the retroactive application of occupational disease claims was June 30, 1987.<sup>3</sup> In light of the disposition of this issue, the Supreme Court determined that it need not address the second issue.<sup>4</sup> Regarding the third issue, the Supreme Court concluded that *Stavenjord I* did not create a common fund.<sup>5</sup> The fourth issue, therefore, was moot.<sup>6</sup>

¶ 4 After holding that *Stavenjord I* did not create a common fund, the Supreme Court remanded *Stavenjord II* "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."<sup>7</sup>

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<sup>2</sup> *Stavenjord v. Montana State Fund*, 2006 MT 257, 334 Mont. 117, 146 P.3d 724 (*Stavenjord II*).

<sup>3</sup> *Stavenjord II*, ¶ 16.

<sup>4</sup> *Id.* at ¶ 18.

<sup>5</sup> *Id.* at ¶ 28.

<sup>6</sup> *Id.* at ¶ 30.

<sup>7</sup> *Id.* at ¶ 31.

¶ 5 After *Stavenjord II* was issued, Stavenjord petitioned the Supreme Court for a rehearing and reversal of its decision to deny common fund status. In its order denying Stavenjord's petition, the Supreme Court held:

[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.<sup>8</sup>

¶ 6 After receiving *Stavenjord II* on remand, I conducted a conference with counsel for State Fund and Stavenjord. The purpose of the conference was to determine how this Court would proceed in this matter in light of the Supreme Court's ruling in *Stavenjord II* and its order denying rehearing. Among the issues addressed was how this Court could conduct further proceedings in this case since Stavenjord's claim was resolved and the Supreme Court denied common fund status. Therefore, no actual claimants remained in the remanded case. With Stavenjord having received all the benefits to which she was entitled and with no common fund existing in this matter, I concluded that Stavenjord no longer had any interest in this case. The result was that the only party remaining in the case on remand was State Fund. In light of counsel for Stavenjord's experience in this case and in order to allow him the opportunity to be heard in the matter, I invited him to participate as *amicus curiae*.

¶ 7 State Fund prepared a report setting forth the procedures it intended to follow in identifying potential beneficiaries. I ordered State Fund to provide copies of the report both to this Court and to Stavenjord's counsel. After receiving State Fund's report, I issued an Order advising counsel that although it appeared to me that the process State Fund proposed in its report seemed reasonable, before making a final determination, I believed it would be prudent to allow Stavenjord's counsel to submit a written *amicus* response to the report. After receipt of the *amicus* response by counsel for Stavenjord, a conference was held at the offices of State Fund so that it could demonstrate for the Court the practicalities of the procedure it had proposed. Stavenjord's counsel appeared at the conference in his *amicus* capacity.

#### DISCUSSION AND ANALYSIS

¶ 8 Pursuant to the Supreme Court's order in *Stavenjord II* and its order denying rehearing, two issues are before this Court on remand:

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<sup>8</sup> *Stavenjord v. Montana State Fund*, Order Denying Rehearing, No. 04-737, 11/09/06.

¶8a To determine an appropriate procedure by which potential *Stavenjord* beneficiaries will be identified and notified of their interests related to increased *Stavenjord*-type benefits.<sup>9</sup>

¶8b To determine whether it is impracticable or impossible for this Court to comply with the Supreme Court's remand order without the assistance of a common fund counsel.<sup>10</sup>

**Issue 1: Determining an appropriate procedure by which potential *Stavenjord* beneficiaries will be identified and notified of their interests related to increased *Stavenjord*-type benefits.**

¶ 9 Before determining an appropriate procedure by which potential *Stavenjord* beneficiaries can be identified and notified of their interests, I must first define "potential *Stavenjord* beneficiaries" within the meaning of the Supreme Court's order. In this regard, I see two options:

¶9a Claimants who satisfy the *Stavenjord* criteria whose employer was insured by State Fund.

Or

¶9b Claimants who satisfy the *Stavenjord* criteria, regardless of their employer's insurer.

¶ 10 Logically, it would seem that the Supreme Court did not intend to limit the class of "potential *Stavenjord* beneficiaries" to only those individuals whose employer was insured by State Fund. I can see no rational basis for holding that one individual would be entitled to uncapped PPD benefits, while an identically situated individual would not, for the sole reason that his employer was insured by someone other than State Fund. Indeed, such a holding would arguably constitute an equal protection violation unto itself, something the *Stavenjord I* decision sought to rectify. However, in light of the Supreme Court's decision to deny common fund status, this definition of "potential *Stavenjord* beneficiaries" goes to the heart of this Court's dilemma in trying to meaningfully enforce the Supreme Court's directives on remand.

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<sup>9</sup> *Stavenjord II* at ¶ 31.

<sup>10</sup> *Stavenjord v. Montana State Fund*, Order Denying Rehearing, No. 04-737, 11/09/06.

¶ 11 For purposes of this analysis, I define “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,<sup>11</sup> inclusive, and whose PPD benefits were capped at \$10,000 pursuant to § 39-72-405, MCA.

¶ 12 As noted above, in endeavoring to comply with the Supreme Court’s remand order, I attended State Fund’s presentation of its proposed procedures. 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. However, under the definition of *Stavenjord* beneficiaries I have set forth above, irrespective of whether State Fund’s procedure is appropriate for State Fund’s claimants, I cannot conclude that this procedure is appropriate for the several hundred other workers’ compensation insurers in Montana who may have claimants entitled to *Stavenjord*-type benefits.

¶ 13 Moreover, I note that State Fund has willingly submitted itself to this Court to oversee the identification and notification process. However, I question whether, as the matter presently stands, this Court has the jurisdiction to order State Fund to undertake an identification and notification procedure since, with no adversarial party remaining, there is no case or controversy before me. Furthermore, assuming for the sake of argument that this Court has jurisdiction over State Fund in this matter, there can be no question that the Court does not have jurisdiction over the several hundred other insurers who are not a party to the action.

¶ 14 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.

**Issue 2: Determining whether it is impracticable or impossible for this Court to comply with the Supreme Court’s remand order without the assistance of a common fund counsel.**

¶ 15 Having determined that it is impossible to comply with the Supreme Court’s remand order, irrespective of the assistance of a common fund counsel, the resolution of issue two is moot. However, it bears noting parenthetically that, even assuming this Court could

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<sup>11</sup> May 22, 2001, was stipulated to by the parties as the date after which a claim would not be covered by a potential common fund, see *Stavenjord v. Montana State Fund*, WCC No. 2000-0207, Stipulation Regarding Prospective Claims, Docket Item No. 47.

benefit from the assistance of a common fund counsel, I am unable to find any authority by which this Court would be empowered to appoint common fund counsel to a case in which common fund status has been denied.

CONCLUSION

¶ 16 Having considered the issues presented, I have determined that this Court cannot comply with the Supreme Court's remand order. This is a determination I have not reached lightly. In attempting to comply with the Supreme Court's directives on remand, I have enlisted the assistance of counsel for both Stavenjord and State Fund, as well as the individuals at State Fund who are specifically designated to handle common fund cases. All of these individuals have been extremely helpful and forthcoming. Nevertheless, having considered all possible options, I conclude that no further action can be taken by this Court as this matter now stands.

¶ 17 Consistent with the Supreme Court's order denying Stavenjord's petition for rehearing, this Order is amenable to review on appeal.

¶ 18 Any party to this dispute may have twenty days in which to request reconsideration from this Order.

DATED in Helena, Montana, this 15<sup>th</sup> day of January, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: Parties of Record Via Website



IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 17

WCC No. 2000-0207

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DEBRA STAVENJORD

Petitioner

vs.

MONTANA STATE FUND

Respondent

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ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION

**Summary:** Respondent moved for reconsideration of this Court's Order Regarding Identification and Notification of Potential Beneficiaries, arguing that since the Court found its process to be "well thought-out and reasonable," it was not impracticable or impossible for the identification and notification procedure to commence without common fund counsel and therefore this Court should reconsider its determination that it could not comply with the Montana Supreme Court's remand order to that effect.

**Held:** The Court determined as a threshold issue that it was impossible to determine an acceptable identification and notification procedure for potential *Stavenjord* beneficiaries since, without common fund status, the Court has no jurisdiction to order non-party insurers to comply with the procedure. Therefore, irrespective of the fact that Respondent's proposed procedure appears to the Court to be "well thought-out and reasonable," the Court is unable to comply with the Supreme Court's directive on remand until such time as the Supreme Court clarifies whether the term "potential Stavenjord beneficiaries" is limited to **only** those claimants whose employer was insured by Respondent. Motion for reconsideration is therefore denied.

BACKGROUND

¶1 Respondent moves this Court for reconsideration of its Order Regarding Identification and Notification of Potential Beneficiaries.<sup>1</sup> Respondent's motion is denied for the reasons set forth below.

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<sup>1</sup> 2008 MTWCC 4 (Order).

¶ 2 Briefly stated, in *Stavenjord II*,<sup>2</sup> the Montana Supreme Court concluded that previous litigation in this case<sup>3</sup> did not create a common fund. The Supreme Court then remanded the matter back to this Court to determine an appropriate procedure by which "potential *Stavenjord* beneficiaries" would be identified and notified of their interests related to increased *Stavenjord*-type benefits. Upon rehearing of the matter, the Supreme Court further directed this Court to determine whether it would be impracticable or impossible to comply with its remand order in *Stavenjord II* without the assistance of a common fund counsel.<sup>4</sup> In this Court's Order, while considering Respondent's proposed identification and notification process and commending Respondent for its thorough and well-thought-out proposal, I ultimately concluded that since potential *Stavenjord* beneficiaries included claimants not insured by Respondent, and since this Court would have no jurisdiction over any procedure for identifying and notifying those potential beneficiaries, it would be impossible for this Court to determine an appropriate procedure by which potential *Stavenjord* beneficiaries would be identified and notified of their interests related to increased *Stavenjord*-type benefits.<sup>5</sup> In reaching my decision, I further noted, "I question whether, as the matter presently stands, this Court has the jurisdiction to order State Fund to undertake an identification and notification procedure since, with no adversarial party remaining, there is no case or controversy before me."<sup>6</sup>

¶ 3 In requesting reconsideration of this Court's Order,<sup>7</sup> Respondent argues that while it agrees the Court has no jurisdiction to order other insurers to comply with any identification and notification procedures for potential *Stavenjord* beneficiaries, Respondent has proposed a process which met with the approval of the Court and it should be allowed to move forward with the notification and identification. In support of its position, Respondent quotes from this Court's Order:

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.<sup>8</sup>

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<sup>2</sup> *Stavenjord v. Montana State Fund*, 2006 MT 257, 334 Mont. 117, 146 P.3d 724 (*Stavenjord II*).

<sup>3</sup> See *Stavenjord v. Montana State Fund*, 2003 MT 67, 314 Mont. 466, 67 P.3d 229 (*Stavenjord I*).

<sup>4</sup> *Stavenjord v. Montana State Fund*, Order Denying Rehearing, No. 04-737, 11/09/06.

<sup>5</sup> Order, ¶ 14.

<sup>6</sup> Order, ¶ 13.

<sup>7</sup> State Fund's Petition for Reconsideration, Docket Item No. 115.

<sup>8</sup> Order, ¶ 12 (emphasis in original).

¶ 4 Respondent argues that since I found it had determined an appropriate procedure, I should reconsider my Order in this case and approve Respondent's identification and notification procedure. However, the language Respondent relies upon above was not a holding that Respondent's proposed procedure was being approved. Rather, it was an acknowledgment that, based on the information before the Court, I could not find a flaw in the procedure Respondent set forth.

¶ 5 Regardless of my assessment of the procedure set forth by Respondent, ultimately I could not – and still cannot – approve Respondent's proposed procedure because to do so presupposes that the Supreme Court intended "potential *Stavenjord* beneficiaries" to constitute only those claimants for whom Respondent was liable. As I noted in my previous Order on this matter, I doubt this was the Supreme Court's intention.<sup>9</sup> Therefore, unless and until the Supreme Court advises this Court that "potential *Stavenjord* beneficiaries" is to include only Montana State Fund claimants, and that notwithstanding the Supreme Court's holding that *Stavenjord* is not a common fund, this Court nevertheless has jurisdiction to oversee the process, the fact that I found Respondent's process to appear to be "well thought-out and reasonable" is dicta.

#### CONCLUSION

¶ 6 Respondent's motion for reconsideration is **DENIED**.

¶ 7 Consistent with the Supreme Court's order denying *Stavenjord*'s petition for rehearing, this Order is amenable to review on appeal.

DATED in Helena, Montana, this 24<sup>th</sup> day of April, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: Parties of Record Via Website

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<sup>9</sup> Order, ¶ 10.