

Thomas J. Murphy
Murphy Law Firm
P.O. Box 3226
Great Falls, MT 59403-3226
Phone: 406-452-2345
Fax: 406-452-2999
Attorneys for Petitioner

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OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

DEBRA STAVENJORD,)	
)	
Petitioner,)	
)	
vs.)	WCC No. 2000-0207
)	
MONTANA STATE FUND)	
)	
Respondent/Insurer for)	MOTION FOR THE APPLICATION
)	OF THE COMMON FUND DOCTRINE
)	
PRAIRIE NEST RANCH,)	
)	
Employer.)	

Comes now the claimant/petitioner Debra Stavenjord, and moves the Court to apply the common fund doctrine in the case at bar, so that additional benefits will be provided to her, additional benefits will be provided to other occupational disease claimants who were not parties to this action, and appropriate attorney fees will be spread among those individuals benefiting from the holding in this litigation.

ARGUMENT:

As a result of the recent decision of the Montana Supreme Court in Stavenjord v. Montana State Fund, 2003 MT 67 (decided 4/1/03), Ms. Stavenjord submits that a common benefit has been created, increased, and/or preserved for partially disabled occupational disease claimants with dates of disease onset between July 1, 1987 and the present. This common benefit will provide additional permanent partial disability (PPD) benefits to Ms. Stavenjord and other occupational disease claimants who were not parties to this action. Therefore, in accord with Murer v. State Compensation Mutual Ins. Fund, 238 Mont. 210, 942 P.2d 69 (1997), Ms. Stavenjord asks this Court to apply the common fund doctrine in this action. Ms. Stavenjord submits that the application of the common fund doctrine is the most expeditious method available to deliver the additional PPD benefits to her and to other uninvolved occupational disease claimants.

In Murer, several claimants initiated litigation as representatives of a class of injured claimants seeking a higher workers' compensation benefit rate. Instead of allowing a class action proceeding, the Court held that a common fund theory was more appropriate. Therefore, this Court denied class certification and applied a common fund theory. The Court's application of the common fund theory was affirmed on appeal. Murer, 942 P.2d at 72.

After remand, the ruling in Murer forced the insurer to increase benefit payments to a number of claimants who were not parties to the earlier litigation. Murer, 942 P.2d at 72. The Murer claimants again moved for class certification, but this was unnecessary because the Court already had the power to supervise the plan to contact and to pay the absent claimants. The Court's power to supervise these additional payments was inherent in the common fund action. In addition, and as a part of the common fund action, the attorneys for Murer asserted a common fund attorney fee lien against these additional payments to the absent claimants.

Generally, the common fund doctrine "authorizes the spread of fees among those individuals benefiting from the litigation which created the common fund." Mountain West Farm Bureau Mut. Ins. Co. v. Hall, 2001 MT 314, 308 Mont. 29, 38 P.3d 825. The common fund doctrine provides:

When a party has an interest in a fund in common with others and incurs legal fees in order to establish, preserve, increase, or collect that fund, then that party is entitled to reimbursement of his or her reasonable attorney fees from the proceeds of the fund itself.

Murer, 283 Mont. at 222, 942 P.2d at 76.

To receive attorney fees under the common fund doctrine, a party must satisfy three elements: "First, a party (or multiple parties in the case of a consolidated case) must create, reserve, increase, or preserve a common fund. This party is typically referred to as the active beneficiary. Second, the active beneficiary must incur legal fees in establishing the common fund. Third, the common fund must benefit ascertainable, non-participating beneficiaries." Mountain West Farm Bureau Mut. Ins. Co. v. Hall, 2001 MT 314, 308 Mont. 29, 38 P.3d 825.

Ms. Stavenjord easily meets the three elements of the common fund doctrine test. First, Ms. Stavenjord "created, increased, and/or preserved" a common benefit for other partially disabled occupational disease claimants. Ms. Stavenjord is therefore the active beneficiary. Second, Ms. Stavenjord incurred legal fees in establishing this common fund. Third, this common fund will benefit other ascertainable non-participating claimants. Therefore, the workers' compensation insurers in the state of Montana can offer no substantive argument that the Murer common fund doctrine should not be applied in the case at bar.

In Murer, during the discussion about attorney fees, the Supreme Court noted that as a result of its decision the insurer became obligated to increase benefits to a substantial number of otherwise uninvolved claimants. Murer, 942 P.2d at 75. The Court noted that these benefits would not have been created, increased, and/or preserved absent the Court's decision in Murer; or put another way, no such obligation by the insurer would have existed without the Murer decision. Therefore, the Montana Supreme Court recognized that attorney's fees were properly awarded based upon the common fund doctrine. This result was not that innovative, as the Court found that the common fund doctrine is "deeply rooted in American jurisprudence." Murer, 942 P.2d at 76.

After discussing the common fund doctrine, the Court recognized:

Application of the common fund doctrine is especially appropriate in a case like this where the individual damage from an institutional wrong may not be sufficient from an economic viewpoint to justify the legal expense necessary to challenge that wrong. The alternative to the doctrine's application is simply for the wrong to go uncorrected.

Murer, 942 P.2d at 76.

The Court continued:

Based on these legal principles and authorities, we conclude that when a party, through active litigation, creates a common fund which directly benefits an ascertainable class of non-participating beneficiaries, those non-participating beneficiaries can be required to bear a portion of the litigation costs, including reasonable attorney's fees. Accordingly, the party who creates the common fund is entitled, pursuant to the common fund doctrine, to reimbursement of his or her reasonable attorney's fees from that fund.

Murer, 942 P.2d at 76.

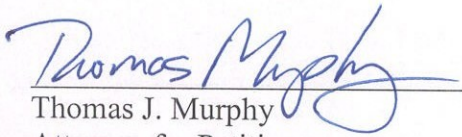
The Montana Supreme Court held that absent claimants were required to contribute, in proportion to the benefits they actually received, to the costs of litigation, including reasonable attorney's fees. Murer, 942 P.2d at 77. Furthermore, the Montana Supreme Court has subsequently followed the Murer rationale in two other cases involving common fund attorney fees. See, Rausch, Fisch & Frost v. State Fund, 311 Mont. 210, 54 P.3d 25 (2002); and, Flynn v. State Fund, 2002 WL 31740520, 312 Mont. 410, ___ P.3d ___ (Decided 12/5/02 - Opinion not yet released for publication).

As in Murer, Rausch et al., and Flynn, Ms. Stavenjord engaged in complex and lengthy litigation that resulted in a legal precedent, which directly benefits a substantial number of occupational disease claimants who were neither parties to nor directly involved in the Stavenjord litigation. See, Murer, 283 Mont. at 223, 942 P.2d at 76. In addition, Ms. Stavenjord "established a vested right on behalf of the absent claimants to directly receive immediate monetary payments of past due benefit underpayments." See,

Murer, 283 Mont. at 223, 942 P.2d at 76-77. Since Ms. Stavenjord's active litigation created a common fund that directly benefits an ascertainable class of non-participating beneficiaries, those non-participating beneficiaries should be required to bear a portion of the litigation costs, including reimbursement of her reasonable attorney fees from that fund. See, Murer, 283 Mont. at 223, 942 P.2d at 76.

Pursuant to Murer, Rausch, and Flynn, Ms. Stavenjord should be entitled to common fund attorney fees. Her attorneys incurred legal costs and fees in the preservation of a common fund that will benefit an ascertainable class of workers who were denied benefits that they were legally entitled to receive. These absent claimants will receive the benefit "even though they were not required to intervene, file suit, risk expense, or hire an attorney." Murer, 283 Mont. at 223, 942 P.2d at 77. Accordingly, this Court should apply the common fund doctrine to the case at bar, this Court should supervise the payment of these additional Stavenjord benefits to absent claimants, and this Court should find that Ms. Stavenjord's attorneys are entitled to reasonable attorney fees for the creation, increase, and/or preservation of the common fund involved in the case at bar.

DATED this 21st day of April, 2003.

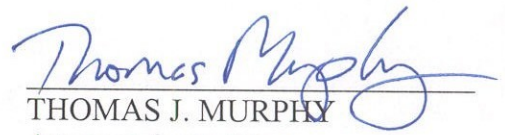

Thomas J. Murphy
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of April, 2003, a copy of the foregoing MOTION FOR THE APPLICATION OF THE COMMON FUND DOCTRINE was served upon Attorneys for the Respondent by mailing a true and correct copy of said document via first class mail to the addresses listed below:

Dave Hawkins
P.O. Box 4759
Helena, MT 59604-4759
Attorney for the Respondent/Insurer

Bradley J. Luck
PO Box 7909
Missoula, MT 59807
Attorney for the Respondent/Insurer


THOMAS J. MURPHY
Attorney for Petitioner