

Bradley J. Luck, Esq.
Thomas J. Harrington, Esq.
GARLINGTON, LOHN & ROBINSON, PLLP
199 W. Pine, P.O. Box 7909
Missoula, MT 59807-7909
Telephone: (406) 523-2500
Facsimile: (406) 523-2595

Greg Overturf, Esq.
Montana State Fund
P. O. Box 4759
Helena, MT 59604-4759
Telephone: (406) 444-6500
Facsimile: (406) 444-6555

Attorneys for Respondent/Insurer

FILED

APR 28 2003

OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

THE WORKERS' COMPENSATION COURT IN THE STATE OF MONTANA

DEBRA STAVENJORD,

Petitioner,

v.

MONTANA STATE FUND,

Respondent/Insurer.

WCC No. 2000-0207

**MOTION FOR STAY, REQUEST
FOR DIRECTION ON
IMPLEMENTATION, AND REQUEST
FOR STATUS CONFERENCE**

COMES NOW the Montana State Fund, ("State Fund"), through counsel, and respectfully requests that the Court enter an Order staying the retroactive implementation of the Montana Supreme Court's decision in this matter. The State Fund also requests direction from the Court concerning the entitlement or other date to be used for purposes of prospective implementation of the decision. Lastly, the State Fund requests the Court to hold a status conference to identify the significant legal issues in this matter which require

briefing and to establish a briefing schedule to allow the parties to brief those issues. In support of the motion and request, the State Fund states as follows:

1. STAY

Claimant has already filed her Notice of Common Fund Attorney Fee Lien and Motion for the Application of the Common Fund Doctrine. According to her lien, the Claimant is seeking common fund fees for all partially disabled occupational disease claimants with an onset date between July 1, 1987 and April 8, 2003, who will receive additional partial disability benefits as a result of the Montana Supreme Court's decision in *Stavenjord v. Montana State Fund*, 2003 MT 67, ___ Mont. ___, ___ P.2d ___ (Apr. 1, 2003). The State Fund intends to brief the issue of retroactive application of the decision of the Montana Supreme Court and argue that the decision should not be applied retroactively. The State Fund also contends that common fund fees should not be awarded in this action and will brief that issue.

Determinations of retroactive application and entitlement to common fund fees are significant. Claimant appears to contend that the decision applies to partially disabled occupational disease claimants whose onset of occupational disease claims occurred on or after July 1, 1987. The State Fund is beginning to field inquiries from other claimants and their counsel seeking payment on pending claims and/or seeking increased partial disability payments on prior claims. The State Fund anticipates increased inquiries and absent a stay, it is expected that litigation will be commenced in this Court on numerous claims. It is also anticipated that claims of unfair claims practices may be made against the State Fund if it delays payments pending a determination on retroactivity unless the Court approves such handling with a stay.

The retroactivity issue is a significant one. The identification and retrieval of files, as well as the adjustment and payment of such claims, would create a significant administrative and financial burden upon the State Fund that will not be necessary unless a judicial determination is made that the decision applies retroactively. With the Court's permission, the State Fund would like to brief the issue, hold an evidentiary hearing and engage in oral argument before the matter is finally submitted. Following decision, an appeal from one side or the other is likely. As such, the process of determination may be lengthy and a stay is necessary to maintain the status quo while the rights and obligations of the parties are determined.

2. DIRECTION ON IMPLEMENTATION

The State Fund desires to begin applying the decision in this matter prospectively. However, a determination of the exact claims subject to prospective application is difficult, requiring direction from the Court.

Claimant's counsel is not claiming a common fund fee for partially disabled occupational disease claimants who had an onset date occurring after April 8, 2003, which was the date the lien was filed. *See* Petr.'s Notice of Common Fund Atty. Fee Lien 1 (Apr. 8, 2003). However, the date of the lien claim is not necessarily dispositive of the proper entitlement date for prospective application. More importantly, the date of the lien claim may have no bearing for purposes of prospective application.

The Occupational Disease Act in Montana determines benefits based upon the law in effect at the time-of-injury or on the basis of an entitlement date. It appears that a proper date for prospective application of occupational disease claims might be the entitlement date, which may be determined by reference to Montana Code Annotated § 39-72-403 (2001) ("the date the claimant knew or should have known that the claimant's condition resulted from an occupational disease."). Accordingly, the entitlement date may be the date the parties agree as the date of knowledge of the employment relatedness of the condition or perhaps the date the condition was first treated or first diagnosed as work-related.

The State Fund believes that the noted entitlement date method is logical and consistent with Montana law. However, other dates, such as the date of the decision or the date the claimant reached medical stability, may serve as the date for prospective application. The State Fund wants to be sure that its prospective implementation is consistent with an approach approved by this Court and therefore seeks such direction at the outset. Based on the above, the State Fund seeks the entry of an Order staying the implementation of the decision of the Montana Supreme Court retroactively and also seeks direction from the Court concerning the method for implementing the decision prospectively.

3. REQUEST FOR STATUS CONFERENCE

Mirroring the procedural approach taken by the Court in the other common fund cases currently pending before it, the State Fund requests the Court to hold a status conference to identify the significant legal issues in this matter which require briefing and to establish a

briefing schedule to allow the parties to brief those issues. The State Fund requests the Court to postpone the need for any party to respond to any pleadings filed by the other party until a briefing schedule is established that fixes each party's briefing deadlines (the parties have informally made such agreement between themselves).

RESPECTFULLY SUBMITTED this 25th day of April, 2003.

Greg Overturf, Esq.
Montana State Fund
P. O. Box 4759
Helena, MT 59604-4759
Telephone: (406) 444-6500
Telefax: (406) 444-6555

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199 West Pine • P.O. Box 7909
Missoula, MT 59807-7909
Telephone: (406) 523-2500
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Attorneys for the Respondent/Insurer

By Jh A.A.
for Bradley J. Luck

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