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OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

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|---------------------------|---|---------------------------|
| DEBRA STAVENJORD, |) | |
| |) | WCC No. 2000-0207 |
| Petitioner, |) | |
| |) | STAVENJORD'S |
| vs. |) | RESPONSE BRIEF - |
| |) | POST-REMAND ISSUES |
| MONTANA STATE FUND |) | |
| |) | |
| Respondent/Insurer |) | |

Comes now counsel for Stavenjord with this response brief on post remand issues raised by the Montana State Fund ("State Fund") and Liberty Northwest Insurance Corporation ("Liberty Northwest") in their opening briefs filed with the Court respectively on March 5, 2004 and March 30, 2004.

I. BACKGROUND

Over one year ago, on April 1, 2003, the Montana Supreme Court affirmed Stavenjord v. Montana State Fund, 2003 MT 67, 314 Mont. 466, 67 P.3d 229. On April 8, 2003, Stavenjord asserted a common fund for benefits created for partially disabled occupational disease claimants with dates of disease onset from July 1, 1987 to May 22, 2001. On April 24, 2003, this Court entered an order notifying all "non-party" Plan I & II workers' compensation insurers to withhold attorney fees claimed by counsel for the Stavenjord Common Fund. See, Stavenjord 2003 MTWCC 30. In accord with Murer and other controlling Montana precedent, Stavenjord asked the Court to apply the common fund doctrine pursuant to its inherent power to supervise additional Stavenjord Common Fund benefit payments. The State Fund objected, and this action ensued. On March 5, 2004, the parties filed opening briefs to address multiple post-remand issues. Liberty Northwest filed its opening brief on March 30, 2004. This is Stavenjord's response to the opening briefs of the State Fund and Liberty Northwest.

II. PROCEDURAL HISTORY

In its Order, dated February 24, 2004, the Court asked the parties to brief four post-remand issues. Stavenjord briefed these issues in the following order:

- 1) Does the appellate decision in Stavenjord apply retroactively?
- 2) Did the appellate decision in Stavenjord create a common fund? If so, what claimants are encompassed by the common fund?
- 3) If the appellate decision in Stavenjord created a common fund, is the common fund limited solely to claimants insured by named respondent - State Fund, or does the common fund encompass all claimants irrespective of their insurers?
- 4) Does the failure to request common fund fees or class certification in the pre-remand proceedings bar Stavenjord from now requesting common fund fees or class certification?

In addition to the four issues listed above, the State Fund also briefed two extra issues in its opening brief:

- 5) Does the doctrine of res judicata prohibit a claim for common fund attorneys' fees in Stavenjord? (S.F. Brief pg. 27). (Also raised by Liberty Northwest at pg. 4 of its brief).
- 6) Does the retroactive application of Stavenjord constitute an unconstitutional impairment of contract between the Insurer and its policyholders? (S.F. Brief pg. 20).

In addition to the six issues listed above, Liberty Northwest also briefed three extra issues in its opening brief:

- 7) Does this Court have jurisdiction to award common fund fees? ("statutory jurisdiction," L.N. Brief pg. 2; or "pleading jurisdiction" L.N. Brief pg. 3)
- 8) Did the failure to plead common fund attorney fees deny the Insurers the right to Due Process? (L.N. Brief pg. 3).
- 9) Do the doctrines of Judicial or Equitable Estoppel prevent a claim for common fund attorney fees? (L.N. Brief pg. 5).

As Liberty Northwest confirmed in its opening brief, "the parties must raise the issues they want to preserve for appeal." (L.N. Brief pg. 2) Therefore, Stavenjord urges this Court to rule on each of these nine issues, because such a ruling would streamline the post-remand process.

III. ARGUMENT

To begin her argument on a lighter note, Stavenjord "retroactively" apologizes for the length of her opening brief; however, she is happy to report that neither the State Fund nor Liberty Northwest raised any unanticipated issue that now requires lengthy response. By this reference, Stavenjord refers the Court to her opening brief, and she thereby limits her argument below.

ISSUE # 1: DOES STAVENJORD APPLY RETROACTIVELY?

A.) Void Ab Initio:

As anticipated, the State Fund argued for the application of the overruled Chevron Oil three-factor test, and not surprisingly, the State Fund was completely silent about the fact that this case involves an unconstitutional statute. Therefore, the State Fund completely disregarded the fact that the Montana Supreme Court generally considers unconstitutional statutes void ab initio. Instead, in arguing against retroactive application, the State Fund brazenly asks this Court to enforce an unconstitutional statute from July 1, 1987 to May 22, 2001. The only purpose - money.

Retroactive application is required, because an unconstitutional statute is as inoperative as if it had never existed, that is, it is void ab initio. 16 Am.Jur.2d Constitutional Law § 203. The Montana Supreme Court has recognized on numerous occasions that unconstitutional statutes are void ab initio. For instance, in 1951 the Court said, "An unconstitutional law is void, and is as no law." Ex parte Anderson, (1951) 125 Mont. 331, 336, 238 P.2d 910, 913 (emphasis added).

In Sadler v. Connolly (1978), the Montana Supreme Court again held that "A legislative enactment declared unconstitutional is void." Sadler, 175 Mont. 484, 490, 575 P.2d 51, 54; citing, State ex rel. Schultz-Lindsay Const. Co. v. Bd. of Equalization, (1965), 145 Mont. 380, 403 P.2d 635; Billings Properties, Inc. v. Yellowstone County, (1964), 144 Mont. 25, 394 P.2d 182. Furthermore, as if there could be any doubt about the power of a void law, the Sadler Court confirmed that "the enactment in legal contemplation is as inoperative as if it had never been passed." Sadler, 175 Mont. at 490, 575 P.2d at 54 (emphasis added).

In Trusty v. Consolidated Freightways (1984), the Court again found that an offending "statute became void and unenforceable," and that "left no enforceable offset statute that could be applied." Trusty v. Consolidated Freightways (1984), 210 Mont. 148, 151-152, 681 P.2d 1085, 1087-1088.

B.) Judicial Decisions Have Retroactive Effect:

Even if the Montana Supreme Court had merely interpreted this statute, rather than found it unconstitutional and void, the Court would apply Stavenjord retroactively. The case of Haugen v. Blaine Bank of Montana (1996), explains retroactive application as follows:

[A] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.

Haugen v. Blaine Bank of Montana, 279 Mont. 1, 8, 926 P.2d 1364, 1368; quoting Rivers v. Roadway Express, Inc. (1994), 511 U.S. 298, 312-13, 114 S.Ct. 1510, 1519.

The judicial construction of a statute is the authoritative statement about that statute regardless of whether the Court declares unconstitutionality or merely interprets the statute. Either way, the judicial ruling dates back to the statute's enactment, and not from the date of the decision. In this regard, the Montana Supreme Court has implicitly approved retroactive application in every appealed workers' compensation common fund case. In fact, a case probably does not meet the common fund criteria unless it applies retroactively, because a common fund case must have an ascertainable group of claimants with vested "past due" benefit entitlement. When a claimant establishes common fund precedent, all that remains is the administrative procedure of paying that benefit to non-participating beneficiaries. In its three leading workers' compensation common fund decisions, premised on statutory interpretation, the Montana Supreme Court approved retroactive application in Murer, Rausch, and Flynn. As a side note, it is interesting that the State Fund stipulated that the first case, Murer, was retroactively applied (Stip. Fact # 65). In operation, and by definition, all common fund cases are retroactively applied.

Certainly, there is a greater need to protect claimants subjected to the effects of an unconstitutional statute. However, the State Fund offers no authority to support its novel theory that this Court should enforce the unconstitutional OD PPD statute from 1987 to 2001. If statutory interpretation cases like Murer, Rausch, and Flynn deserve retroactive application, this Court should find greater reason for retroactive application here. This Court should apply Stavenjord retroactively to prevent the denial of equal protection to thousands of claimants.

C.) In Word and Deed - Stavenjord Was Applied Retroactively:

Although the State Fund was silent about this fact in its brief, the Montana Supreme Court already determined that Stavenjord applies "retroactively." Stavenjord was decided on April 1, 2003, but it adjudicated her Occupational Disease Permanent Partial Disability ("OD PPD") entitlement for a condition that arose on April 1, 1998. In this respect, Stavenjord was ("in deed") applied retroactively.

Furthermore, the express language in Stavenjord clearly required retroactive application:

"For that reason, we conclude that our holding in Eastman v. Atlantic Richfield Company is not applicable to those wage supplement benefits provided for at §39-71-703, MCA, and §39-72-405(2), MCA, since 1987 and we affirm the decision and judgment of the Workers' Compensation Court.

Stavenjord, ¶ 48 (emphasis added).

Not willing to draw an arbitrary retroactive application date starting on the date of its decision - April 1, 2003, or starting on the date of Stavenjord's disease onset - April 1, 1998, the Montana Supreme Court stated ("in word") that its decision was applicable to all OD PPD benefit entitlements "since 1987." This holding was logical, equitable, and in accord with the principle that a decision declares what the statute meant from the day of its enactment, not from the date of the decision. See Haugen, supra.

After losing at the Montana Supreme Court once, the State Fund essentially re-argues whether the offending OD PPD statute was unconstitutional between 1987 and 2001. To do so, the State Fund must silently pretend that Montana's OD PPD statute was "constitutional" between 1987 and 2001. Obviously, the State Fund offers no authority to disregard the Montana Supreme Court's explicit finding that this statute has been unconstitutional "since 1987." In this regard, this Court's statement in Miller v. Liberty Mutual is applicable by analogy:

To deny retroactive application would reward those insurers for their misinterpretation. Indeed, denying retrospective application would allow insurers to postpone the effect of a valid statute [or ruling] simply by misinterpreting it.

Miller, 2003 MTWCC 6, at ¶ 27.

D.) Chevron Oil Factors:

Most of the State Fund's opening brief attempts to coax the Court to employ the overruled Chevron Oil test, but Stavenjord will not reiterate her lengthy analysis about why that test does not apply. Instead, Stavenjord will address the heart of the State Fund's concern - its own monetary benefit. Essentially, for 28 pages, the State Fund's only argument is that it does not want to spend a lot of money administrating the payment of Stavenjord benefits. The State Fund goes too far, however, because it suggests to this Court that it does not have the money to pay these constitutionally mandated benefits. The State Fund's stipulated facts prove otherwise.

From 2002 to the end of 2003, well after this Court entered its 2001 rulings in Stavenjord and Schmill, the State Fund spent huge sums of money without caution. As indicated in Stavenjord's opening brief, the State Fund refunded and/or transferred over Thirty Seven Million Dollars (actually \$37,246,080.00) from its accounts in 2002 and 2003. According to NCCI estimates, the State Fund could have paid Stavenjord and Schmill benefits two to three times over again with that money. Furthermore, the State Fund did not substantially raise premiums during the last three years (only 3.5% over the combined three-year period). Finally, the State Fund retains a surplus of 121.6 Million Dollars (Stip. Fact #79), so there is clearly enough money to pay Stavenjord and Schmill benefits and yet preserve adequate reserves for other obligations. As this Court noted in Flynn, "If policy holders must absorb the costs of complying with Flynn, they have already reaped the benefits of the State Fund's failure to take a pro-rata share of attorney fees into account..." Flynn 2003 MTWCC 55, at ¶ 38. The facts here certainly prove that Montana's workers' compensation insurers have reaped a great benefit from an unconstitutional statute that now requires adjustment.

This Court should not reward the State Fund for its disregard of its constitutional obligation to provide equal OD benefits under Stavenjord and Schmill. Unlike Miller, supra, the State Fund can not even argue that it "misinterpreted" its obligation, because here the State Fund refunded and/or transferred \$37,246,080.00 after this Court entered its 2001 Stavenjord and Schmill rulings. In fact, the State Fund spent most of this money after the Montana Supreme Court entered its April 2003 ruling.

Under these circumstances, the State Fund does not meet its heavy burden to convince this Court to disregard the overwhelmingly favored rule that judicial decisions apply retroactively. As noted by this Court in Flynn, "even under Chevron, retroactive application of judicial decisions is favored. ... Thus, the burden is on the State Fund to persuade the Court that the decision in this case should not be applied retroactively." Flynn 2003 MTWCC 55, at ¶ 24. The State Fund can not meet its heavy burden of proof, because it spent the money it earned from this unconstitutional statute in order to pay selected dividends, to

suppress premium increases, and to pay political refunds to the State. Therefore, even if the Court revives the overruled Chevron Oil three-factor test, this Court should follow the well-principled rule that Stavenjord applies retroactively.

**ISSUE #2: DID THE APPELLATE DECISION IN STAVENJORD
CREATE A COMMON FUND?**

In accord with longstanding Montana precedent, such as Murer v. State Compensation Mutual Ins. Fund, 238 Mont. 210, 942 P.2d 69 (1997) (Murer III), Stavenjord asks this Court to apply the common fund doctrine. Stavenjord submits that the application of the common fund doctrine is the most expeditious and equitable method available to deliver additional OD PPD benefits to all non-participating similarly situated claimants.

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.

Stavenjord easily meets the three elements of the common fund test. First, Stavenjord "created, increased, and/or preserved" a common benefit for other OD PPD Claimants. Stavenjord satisfies the first criteria, because she litigated (and continues to litigate) the precedent that created the common fund; therefore, she is the active beneficiary. Second, Stavenjord incurred legal fees in establishing this common fund; thus, she satisfies the second requirement. Third, as in Murer, the non-participating common fund beneficiaries are readily ascertainable. Therefore, Montana's active workers' compensation insurers (thirty) and active self-insurers (fourteen) can offer no substantive argument why the common fund doctrine should not apply in Stavenjord.

The Murer III Court noted that absent its Murer decisions, no obligation to pay additional benefits would exist. Therefore, the Court recognized that attorney fees were properly awarded based on the common fund doctrine. The common fund doctrine is "deeply rooted in American jurisprudence," Murer III, 942 P.2d at 76; and this doctrine has now been applied in Montana workers' compensation cases for ten years. With the finding of an unconstitutional statute, the Stavenjord common fund claimants deserve the "deeply rooted" protections of this law.

As in Murer, Rausch, and Flynn, Stavenjord should be entitled to common fund attorney fees. Stavenjord engaged in complex and lengthy litigation, and she "established a vested right on behalf of the absent claimants to directly

receive monetary payments of past due benefit underpayments." See, Murer III, 283 Mont. at 223, 942 P.2d at 76-77. These absent claimants will receive the benefit "even though they were not required to intervene, file suit, risk expense, or hire an attorney." Murer III, 283 Mont. at 223, 942 P.2d at 77. Since 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 reasonable attorney fees from the fund. See, Murer III, 283 Mont. at 223, 942 P.2d at 76. This Court should find that the appellate decision in Stavenjord created a common fund and that the Stavenjord attorneys are entitled to reasonable attorney fees.

ISSUE #3: IF THE APPELLATE DECISION IN STAVENJORD CREATED A COMMON FUND, IS THE COMMON FUND LIMITED SOLELY TO CLAIMANTS INSURED BY NAMED RESPONDENT, STATE FUND, OR DOES IT EXTEND TO ALL PLAN I & II INSURERS?

The Stavenjord common fund should extend to all OD PPD Claimants, regardless of insurer, because the Stavenjord decision created a "past due" common benefit for those claimants. To hold otherwise would lead to the absurd result that this Court's rulings only apply to named party insurers. That is not and never has been the case in workers' compensation law. There is not one set of judicial decisions that apply to the State Fund, and another set of judicial decisions that apply to other insurers. Workers' compensation differs from all other types of insurance, because in workers' compensation there is no difference in the insurance coverage or policy language available. Here, since all insurers are required to comply with the same Workers' Compensation Act, all insurers are also required to comply with each new judicial decision construing that Act. In this respect, every judicial decision in workers' compensation has global application. Since every judicial decision has global application, every qualified common fund case should have global reach.

A review of common fund doctrine principles compels the conclusion that the common fund extends beyond the State Fund. First, the Stavenjord decision created a precedent inuring to the benefit of all Montana OD PPD claimants irrespective of whether they were insured by the State Fund. This is important, because the common fund doctrine applies at its essence to those funds created which are "common" between the active beneficiary (Stavenjord) and the non-participating beneficiaries (all other OD PPD claimants). The doctrine requires attorney fees to be assessed equally against all beneficiaries (active and nonparticipating). In this way, courts prevent inequity "by assessing attorney's fees against the entire fund, thus spreading fees proportionally among those benefited by the suit." Boeing Co. v. Van Gemert, et al., 444 U.S. 472, 479, 100

S.Ct. 745, 749 (1980) (citing Mills v. Electric Auto-Lite Co., 396 U.S. 375, 394, 90 S.Ct. 616, 626 (1970)).

The foundation for jurisdiction in a common fund case is not the party defendant; rather, it is the combined benefits from all claims that create the fund. Therefore, this Court has jurisdiction that allows it to equitably order all claimants to share in the common cost of the fund. This concept is also unique, because the insurers do not pay common fund fees; rather, fee payments come from the fund created. In Flynn, this Court recognized that fact: "I further note that the attorney fees requested in this case are not against the insurer but rather against benefitted claimants." Flynn 2003 MT WCC ¶ 9. The common fund is therefore property that belongs to each affected claimant regardless of the name of the claimant's insurer. As property, this Court has in rem jurisdiction over it.

Global application meets all applicable requirements of fairness, because every insurer has notice and opportunity to defend. In the case at bar, this Court promptly notified all insurers about the Stavenjord common fund. Specifically, on April 24, 2003, this Court notified all Plan I & II (non-party) workers' compensation insurers to withhold Stavenjord common fund attorney fees. See, Stavenjord 2003 MTWCC 30. Undoubtedly, this Court's notice was not news to these insurers, because many of them had previously filed amicus briefs opposing Stavenjord in the Montana Supreme Court. The list of Amicus Curiae in Stavenjord was comprehensive. Along with two (or was it eight) defense attorneys appearing on behalf of the State Fund, there were appearances by the Montana Self-Insurer's Association, the American Insurance Association, the self-insurer Plum Creek, and by the Montana Defense Trial Lawyers. It would be fruitless for these insurers to argue that they did not know Stavenjord applied to them, because their amicus briefs state otherwise. Since every workers' compensation judicial decision has global application, each defense amicus brief argued against Stavenjord. Furthermore, each defense amicus brief implicitly assumed retroactivity and global jurisdiction.

Policy reasons underlying the common fund doctrine strongly suggest that all claimants entitled to receive a common benefit should share in the cost of its creation. Conversely, it would be inequitable to require one set of claimants (those of the State Fund) to pay the entire expense the common fund. Stavenjord submits that it would be inequitable to limit global application, and it would create the necessity for other attorneys and multiple claimants to file individual suits against every Plan I or Plan II (non-party) workers' compensation insurance company. Furthermore, some deserving claimants would not receive a benefit, because some would not be alerted to assert their right. Based on this rationale, even the State Fund concedes in its brief that Stavenjord should have global application.

Counsel for Stavenjord respectfully acknowledges that this Court ruled to the contrary on the issue of "global application" in the case of Ruhd v. Liberty

Northwest Insurance, Corp., 2003 MTWCC 38, at ¶5. That decision was appealed, and the Supreme Court held oral arguments on March 24, 2004. During those arguments, the Supreme Court Justices expressed concern about the multiplicity of litigation that would result from "per party" litigation (as opposed to global application within one common fund case). The Supreme Court recognized that these duplicative "per party" cases would have to be resolved without central administration, which would inevitably increase attorneys' fees and claim costs. The Court also expressed concern about the potential for disparate benefits for similarly situated claimants, because they had different insurers or different attorneys. Justice Warner recognized that there already is a group of ascertainable claimants, and Chief Justice Gray confirmed that Rausch I applied to all insurers equally. Justice Rice twice returned to the point that every claimant, regardless of insurer, had a vested right that merely required a properly administered plan to deliver that benefit. And, as it did here, even the State Fund conceded that the Rausch common fund case should have global application. Therefore, Stavenjord asks this Court to reconsider its opinion in Ruhd.

Stavenjord requests global application, because this approach would reduce the multiplicity of litigation, reduce fees and costs, ensure equal benefits to similarly situated claimants, promote equity, and it would allow this Court to administer the payment of these common fund benefits from one case (rather than from hundreds of individual cases). The common fund vehicle is the only reasonable method by which to deliver these benefits. Stavenjord asks this Court to find that all claimants benefited should be part of one common fund. The scope of the Stavenjord common fund should be the same as the scope of the Stavenjord decision.

ISSUE #4: DOES THE FAILURE TO REQUEST COMMON FUND FEES OR CLASS CERTIFICATION IN THE PRE-REMAND PROCEEDING BAR STAVENJORD FROM NOW REQUESTING COMMON FUND FEES OR CLASS CERTIFICATION?

This Court previously ruled that the failure to request common fund attorney fees in pre-remand proceedings does not bar a request for common fund fees after the successful appellate decision. Flynn v. State Fund, 2003 MTWCC 55, at ¶ 14. The rationale supporting this rule is that the claimant is not allowed to assert the common fund attorney fee entitlement until after she prevails on appeal. The Montana Supreme Court has previously held that post remand attorney fees cannot be denied based upon a failure to plead defense. In Re Estate of Lande, 1999 MT 179, 295 Mont. 277, 983 P.2d 316. The common fund attorney fees at issue here are similar to the fees at issue in Estate of Lande, because common fund attorney fees can not be awarded until the post remand phase of the case.

In Flynn, this Court recognized that it is essentially impossible to request common fund fees at the inception of a case like Flynn, or Stavenjord, because to meet the criteria of the common fund doctrine, the claimant must first establish a legal precedent:

Entitlement to fees from the benefitted claimants arose only after the claimant in this case successfully litigated his claim and established a precedent.

Flynn 2003 MTWCC ¶ 9.

This Court noted that its normal rule regarding the pleading of attorney fees is aimed at providing notice to the insurer, but this Court quickly noted, "The rule was not calculated to cover common fund fees." Flynn 2003 MTWCC ¶ 9. This Court explained that its rule for regular cases differs from its rule for common fund fee cases, because, "common fund fees are a legal consequence of claimant prevailing in the original action and thereby benefitting other claimants." Flynn 2003 MTWCC ¶ 13; citing, In re Estate of Lande, supra.

Since the right to common fund attorney fees can not arise until after the legal precedent is created, there should be no requirement to request such fees in advance. Based on this Court's reasoning in Flynn, and other relevant cases, Stavenjord could not request common fund fees in her pre-remand proceedings; therefore, she should not be prevented from requesting common fund fees now that her case has been affirmed by the Montana Supreme Court.

ISSUE #5: DOES THE DOCTRINE OF RES JUDICATA PROHIBIT A CLAIM FOR COMMON FUND ATTORNEYS' FEES IN STAVENJORD?

As to the issue of res judicata, this Court previously ruled against the State Fund. In Flynn v. State Fund, 2003 MTWCC 55, supra, the Court stated the straightforward principle as follows:

Res judicata applies where a matter is litigated or could have been litigated in **another** action. It has no application here since the request is made in the **same** case and the issue was not previously decided. The request is equivalent to the post-trial request for attorney fees...

Flynn 2003 MTWCC ¶ 18 (emphasis in original).

As argued in Issue #4 above, it was essentially impossible for Stavenjord to request common fund fees at the inception of her case, because to meet the criteria of the common fund doctrine, she was first

required to establish a legal precedent. Therefore, Stavenjord could not litigate common fund attorney fees at the inception of her case. Instead, Stavenjord presented a timely request for common fund attorney fees in the post remand phase of this case, and that issue was not previously decided. Consequently, as this Court held in Flynn, the doctrine of res judicata should not bar Stavenjord from requesting common fund attorney fees.

ISSUE #6: DOES THE RETROACTIVE APPLICATION OF STAVENJORD CONSTITUTE AN UNCONSTITUTIONAL IMPAIRMENT OF CONTRACT BETWEEN THE INSURER AND ITS POLICYHOLDERS?

The State Fund presents a novel and somewhat repugnant impairment of contract argument. (S.F. Brief, pp. 20-21). The State Fund argues that "The Montana Constitution prohibits a statute from retroactively impairing contracts." (S.F. Brief, pp. 20). The State Fund completely misses the mark with this argument in two important respects: First, Stavenjord was a court decision (not a statute), which is being retroactively applied; Second, as argued in Issue #1 above, the Stavenjord decision construes the statute from its inception and "not from the date of the decision." Therefore, there was no impairment of contract, because this offending 1987 statute was always unconstitutional.

Essentially, the State Fund argues that a prior contract between an employer and its insurer somehow has the power to preclude a claimant from receiving her constitutionally mandated benefit. Preposterous. If the State Fund's argument held, then no court could ever interpret a statute or to declare it unconstitutional. However, the State Fund's argument here is very useful, because it betrays the fundamental weakness of the State Fund's attack on retroactive application of judicial decisions in Issue #1. By arguing that a contract can somehow restrain the Court from construing a statute, the State Fund does more for the demise of its anti-retroactivity argument than any argument Stavenjord could otherwise present.

Stavenjord asserts that no party can enter a contract to diminish the rights of a claimant. Certainly, an employee can not enter a contract that will abrogate her right to full workers' compensation or occupational disease benefits; yet, the State Fund contends that her employer can (and did) enter such a contract. Section 39-71-409 MCA (1997) states:

No agreement by an employee to waive any rights under this chapter for any injury to be received shall be valid.

This Court should hold that the Stavenjord decision did not impair any contract, but if it did, then this Court should find that contract void as against public policy.

Finally, when this Court reviews the State Fund's impairment of contract argument, Stavenjord hopes that this Court will find another compelling reason why judicial decisions should always be retroactively applied.

ISSUE #7: DOES THIS COURT HAVE JURISDICTION TO AWARD COMMON FUND FEES?

In accord with Murer, Stavenjord asked this Court to apply the common fund doctrine pursuant to its inherent power to supervise additional Stavenjord Common Fund benefit payments. See, Murer v. State Compensation Mutual Ins. Fund, 283 Mont. 210, 942 P.2d 69 (1997) (Murer III). For this Court to have jurisdiction to award common fund attorney fees, it must find that Stavenjord met the three elements of the common fund doctrine. See, Mountain West Farm Bureau Mut. Ins. Co. v. Hall, 2001 MT 314, 308 Mont. 29, 38 P.3d 825.

As argued in Issue #2 above, Stavenjord easily met the three elements of the common fund test. First, Stavenjord "created, increased, and/or preserved" a common benefit for other OD PPD Claimants. Stavenjord satisfies the first criteria, because she litigated and created the precedent that created the common fund; therefore, she was the active beneficiary. Second, Stavenjord incurred legal fees in establishing this common fund; thus, she satisfied the second requirement. Third, as in Murer, these common fund beneficiaries are readily ascertainable. Therefore, the workers' compensation insurers at bar can not offer any substantive argument why this Court should not have Murer common fund jurisdiction.

Furthermore, as argued in Issue #3 above, this Court acquired in rem jurisdiction of the common fund property when the Court notified all Plan I & II (non-party) workers' compensation insurers to withhold Stavenjord common fund attorney fees. See, Stavenjord 2003 MTWCC 30. However, the foundation for the Court's jurisdiction in a common fund case is not the party defendant; rather, it is the combined benefits from all claims that create the fund. Therefore, this Court has jurisdiction that allows it to equitably order all claimants to share in the common cost of the fund. After all, the insurers do not pay common fund fees; rather, fee payments come from the fund created. In Flynn, this Court recognized that fact: "I further note that the attorney fees requested in this case are not against the insurer but rather against benefitted claimants." Flynn v. State Fund 2003 MT WCC ¶ 9, supra.

The common fund doctrine is "deeply rooted in American jurisprudence," Murer III, 942 P.2d at 76, and it has been applied for ten years to Montana workers' compensation cases. This Court should find that the common fund doctrine conveys upon it the jurisdiction necessary to award common fund attorney fees.

ISSUE #8: DID THE FAILURE TO PLEAD COMMON FUND ATTORNEY FEES DENY THE INSURERS THE RIGHT TO DUE PROCESS?

As to the issue of Due Process, the Court previously ruled against the Insurers. In Flynn v. State Fund, 2003 MTWCC 55, supra, the Court stated:

The State Fund is receiving due process right now by defending against the common fund claim. It has been given both notice of the claim and an opportunity to be heard, the very things it claims it is being denied. What it really objects to is the timing of the claim. Moreover, any common fund fees will be assessed against the benefitted claimants, not the State Fund.

Flynn 2003 MTWCC ¶ 19.

As argued in Issue #4 above, it was impossible for Stavenjord to request common fund fees at the inception of this case. Therefore, Stavenjord presented a timely request for common fund attorney fees in the post remand phase of her case. Consequently, as this Court held in Flynn, Stavenjord properly requested common fund attorney fees, and that did not violate the insurers' right to Due Process. Both Liberty Northwest and the State Fund (and any other insurer that chose to accept the Court's invitation to appear) will receive Due Process right now. All affected insurers have been given both notice of the claim and the opportunity to be heard. Therefore, these insurers received their full measure of Due Process protection.

ISSUE #9: DO THE DOCTRINES OF JUDICIAL OR EQUITABLE ESTOPPEL PREVENT A CLAIM FOR COMMON FUND ATTORNEY FEES?

As to this issue of judicial estoppel, the Court previously ruled against the Insurers. In Flynn v. State Fund, 2003 MTWCC 55, supra, the Court summarized first and analyzed later:

The argument is without merit. The doctrine of judicial estoppel, cited by the State Fund, precludes a party from taking a position inconsistent with a prior position or representation taken or made in court. (citation omitted). The doctrine is inapplicable here because the State Fund is simply wrong in its characterization of claimant's positions in this Court and the Supreme Court.

* * *

By arguing his potential entitlement to common fund with respect to his personal entitlement, he was not making any representation as to his potential entitlement to common fund fees from benefitted claimants in the event he succeeded.

Flynn 2003 MTWCC ¶ 16.

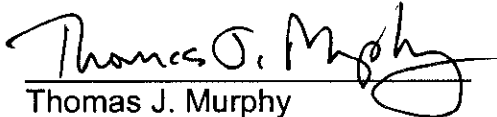
As argued in Issue #4 above, it was impossible for Stavenjord to request common fund fees at the inception of this case. Therefore, Stavenjord presented a timely request for common fund attorney fees in the post remand phase of this case. Consequently, as this Court held in Flynn, Stavenjord properly requested common fund attorney fees, and she was not estopped from doing so.

As in Flynn, Stavenjord never made an adverse representation as to her potential entitlement to common fund fees from benefitted claimants in the event she succeeded. Therefore, the insurers once again argue "without merit" that Stavenjord is judicially or equitably estopped from requesting common fund attorney fees.

IV. CONCLUSION

For the reasons stated above, Stavenjord asks this Court to apply the appellate decision in Stavenjord retroactively; to find that Stavenjord did create a common fund, which, irrespective of insurer, includes all eligible Occupational Disease PPD Claimants; and to allow counsel to recover common fund fees for this litigation. Stavenjord respectfully urges this Court to rule on each of the nine issues raised by the insurers, because such a ruling would streamline this already very lengthy post-remand process.

DATED this 13th day of April 2004.

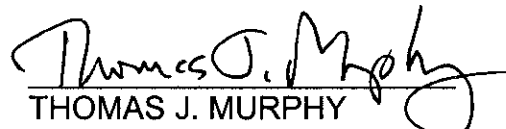

Thomas J. Murphy
Attorney for Stavenjord

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of April 2004, a true and correct copy of the foregoing STAVENJORD'S RESPONSE BRIEF - POST REMAND ISSUES was served upon the attorneys for the Respondent via first class mail to the addresses listed below:

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