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OFFICE OF
WORKERS' 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

**STATE FUND'S STATUS REPORT
TO THE COURT**

COMES NOW the State Fund, pursuant to the Court's directive of February 5, 2004, and hereby provides the Court with a Status Report in the above-referenced matter. Counsel for Petitioner, Mr. Murphy, is filing a separate status report.

A. Stipulation Regarding Prospective Claims

As the Court is aware, a preliminary implementation issue involved the determination of a date to use for purposes of prospective application of the *Stavenjord* decision. During the in-person status conferences with the Court, the parties agreed that claims with entitlement dates occurring on or after this Court's decision on May 21, 2001 in *Stavenjord* would be considered prospective claims. Consistent with that agreement, the State Fund drafted a proposed Stipulation Regarding Prospective Claims and sent it to Mr. Murphy in September of 2003 for his review and approval. Mr. Murphy signed the Stipulation Regarding Prospective Claims in January of 2004, and the Court approved it on January 22, 2004.

As noted below in Section C, the parties did not reach an agreement regarding retroactivity.

B. Joint Statement of Stipulated Facts

As the Court undoubtedly understands, formulating and finalizing the Joint Statement of Stipulated Facts required extensive research, numerous revisions and multiple attorney conferences. *Stavenjord* insists on including an incomplete procedural history in her Status Report which fails to mention all the research, revisions and conferences that were required in order to develop and finalize an agreed factual record. The State Fund believes the inclusion of the procedural history is inappropriate because it incorrectly insinuates an improper or unnecessary delay in resolving post-remand issues. Contrary to *Stavenjord*'s suggestion, the State Fund believes the record will demonstrate that it has worked diligently with *Stavenjord* on a reasonable basis toward a timely resolution of post-remand matters.

On February 11, 2004, the parties finalized the Joint Statement of Stipulated Facts. On today's date, the Court should receive the original, fully-executed Joint Statement of Stipulated Facts for filing.

C. Threshold Issues For Immediate Briefing

The following threshold issues are appropriate for immediate briefing:

1. Whether the decision in *Stavenjord* is retroactive, and if so, whether it is retroactive to the date of the Montana Supreme Court's decision in *Henry v. State Fund*, 1999 MT 126, 294 Mont. 449, 982 P.2d 456, or to an earlier date?;
2. Whether the failure to plead *ab initio* an entitlement to common fund attorney fees or class certification in the pre-remand proceedings bars a post-remand request for common fund fees?; and
3. Whether the decision in *Stavenjord* creates a common fund, and if so, to what extent?

In addition to the threshold issues listed above, the parties have discussed several non-threshold implementation issues with the Court during the in-person status conferences. Should the decision require retroactive implementation as a common fund, Respondent anticipates that these additional issues will require adjudication by the Court. Although not an exhaustive list, some of the implementation issues known at this time include the following:

- a. If *Stavenjord* applies retroactively, are settled files included or excluded in the implementation process;
- b. If *Stavenjord* applies retroactively, are deceased claimants included or excluded in the implementation process;
- c. If *Stavenjord* applies retroactively, is a *Broeker*-type notification to claimants appropriate as opposed to identifying claimants based on a file-by-file review;
- d. If *Stavenjord* applies retroactively, how are benefits going to be determined if sufficient medical and vocational information in a file is missing or lacking, especially since a claimant's current physical condition most likely will not be reflective of the claimant's condition at maximum healing;

e. If *Stavenjord* applies retroactively, do the companion doctrines of res judicata and collateral estoppel serve to bar any additional entitlement on claims which were settled or adjudicated and dismissed;

f. If *Stavenjord* applies retroactively, does the statute of limitations or laches serve to bar any additional entitlement on claims which failed to timely present a demand for benefits under Montana Code Annotated § 39-71-703; and

g. If *Stavenjord* applies retroactively, does the recent case of *St. James Community Hosp., Inc. v. District Court, Eighth Judicial District*, 2003 MT 261, 317 Mont. 419, 77 P.3d 534 (prohibiting health care providers from producing the names of patients because such information is private and constitutionally protected) limit the State Fund's ability to disclose information to Mr. Murphy concerning affected claimants?

The State Fund requests the right to revise this list throughout the duration of the post-remand litigation, especially since many of the implementation issues will not be discovered unless *Stavenjord* is applied retroactively and the parties actually begin the implementation process.

D. Proposed Briefing Schedule

The parties are requesting the Court to approve the following briefing schedule regarding the threshold issues of common fund entitlement and retroactivity:

1. Simultaneous Opening Briefs shall be filed on or before March 5, 2004;
and
2. Simultaneous Answer Briefs shall be filed on or before March 19, 2004.

E. State Fund's Objection to Stavenjord's Request for An Order Requiring All Issues to Be Identified

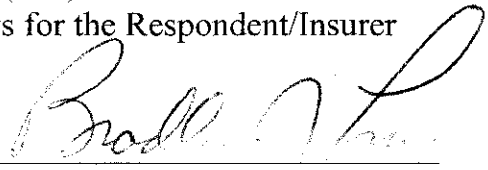
Stavenjord is requesting an order requiring all non-threshold implementation issues to be identified and argued in the briefs addressing the threshold issues. Stavenjord is also requesting an order deeming all non-threshold implementation issues waived unless they are identified by February 20, 2004. The State Fund objects to

Stavenjord's request because the identification and arguments concerning the non-threshold implementation issues will only be necessary if *Stavenjord* is given retroactive application. Therefore, the State Fund seeks to expressly reserve its right to revise its list of non-threshold implementation issues throughout the duration of this post-remand litigation because many of the implementation issues will not be discovered unless and until the parties are actively engaged in the implementation process.

RESPECTFULLY SUBMITTED this 13 day of February, 2004.

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By 
Bradley J. Luck

CERTIFICATE OF MAILING

The undersigned, a representative of the law firm of Garlington, Lohn & Robinson, PLLP, hereby certifies that on the 13 day of February, 2004, she mailed a true and correct copy of the foregoing *State Fund's Status Report to the Court*, postage prepaid, to the following:

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