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## Workers' Compensation Court

Mike McCarter  
Judge

TO: Parties of Record

FROM: Mike McCarter *mmc*  
Judge

DATE: February 24, 2004

RE: Debra Stavenjord v. Montana State Fund WCC No. 2000-0207  
Cassandra Schmill v. Liberty NW Ins. Corp. WCC No. 2001-0300

I recommend the following phrasing of issues for *Stavenjord* and *Schmill* briefing:

1. Does the failure to request common fund fees or class certification in the pre-remand proceedings in both *Stavenjord* and *Schmill* bar the petitioners in those cases from now requesting common fund fees or class certification?
2. Do the appellate decisions in *Stavenjord* and *Schmill*, 2003 MT 67 and 2003 MT 80, apply retroactively?
3. Did the appellate decisions in *Stavenjord* and *Schmill*, 2003 MT 67 and 2003 MT 80, create common funds in the respective cases? If so, as a *general matter*, what claimants are encompassed by the common funds?
4. If common funds are created as a result of the appellate decisions in *Stavenjord* and *Schmill*, 2003 MT 67 and 2003 MT 80, are the common funds limited solely to claimants insured by the named respondents in those cases, or do the funds encompass all claimants irrespective of their insurers?

As I indicated, it is unlikely that I will revisit issues 1 and 4 unless there are new arguments that I failed to consider in my prior rulings on those issues. But I also understand the need to preserve the issues for purposes of appeal.

MM:cw

c: Mr. Thomas J. Murphy  
Ms. Laurie Wallace  
Mr. Larry W. Jones  
Mr. Bradley J. Luck  
Mr. Thomas J. Harrington  
Mr. David A. Hawkins

WORKERS' COMPENSATION COURT

Hearing No. 3426  
Volume XVI

Helena, Montana  
February 20, 2004

DEBRA STAVENJORD

Thomas J. Murphy

vs.

MONTANA STATE FUND

Bradley J. Luck and  
Thomas J. Harrington

WCC No. 2000-0207

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CASSANDRA SCHMILL

Laurie Wallace

vs.

LIBERTY NORTHWEST INSURANCE  
CORPORATION

Larry W. Jones

WCC No. 2001-0300

A telephone conference was held with above counsel. All attended by telephone except for Mr. Jones, who was personally present.

Initially I inquired as to the status of the stipulation in *Schmill*. Counsel agreed to have the final stipulation to the Court by Friday, February 27, 2004.

We then discussed a briefing schedule and agreed on the following schedule:

- March 5<sup>th</sup> – Simultaneous opening briefs in *Stavenjord*.
- March 23<sup>rd</sup> – Simultaneous opening briefs in *Schmill*.
- April 13<sup>th</sup> – All reply briefs.

We discussed the issues to be briefed and agreed on four: (1) whether common fund fee claims are barred by the failure to plead a common fund prior to remand; (2) whether there is a common fund; (3) whether the appellate decisions are retroactive; and whether any common fund is global, i.e., applicable to all insurers. I agreed to redraft the issues and send them to counsel for their consideration.

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We also discussed the other issues identified in Mr. Murphy's brief and we agreed that most of them have either been resolved in the proceedings in *Murer* or *Broeker* or are likely to be resolved without great controversy in administering any common funds that arise in these cases. The one issue which might require appellate guidance is the applicability of the recent decision in *St. James Hospital, Inc. v. District Court*, 2003 MT 261. That decision concerns release of medical records and patient information; it is doubtful it applies to disclosure of claimant's names utilizing confidentiality agreements such as used in *Murer*, *Broeker* and other cases, and in implementing any common fund in these cases, we may be able to proceed without disclosing medical information without permission of claimants. Counsel for State Fund and Liberty are going to review *St. James Hospital* and discuss how it may impact any common fund proceedings, then discuss the matter further with petitioners' counsel. Counsel will then get back to me and let me know if they think it is an issue which should be discussed further and perhaps briefed now.

MIKE McCARTER  
Judge