

Rex Palmer
ATTORNEYS INC., P.C.
301 W Spruce
Missoula, MT 59802
(406) 728-4514
ATTORNEYS FOR PETITIONER

FILED

FEB 12 2001

OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

ROBERT FLYNN)	WCC No. 2000-0222
Petitioner,)	
v.)	
MONTANA STATE FUND,)	
Respondent/Insurer for)	PETITIONER'S OPENING BRIEF
)	
SALISH KOOTENAI COLLEGE)	
Employer.)	

* * * * *

PRELIMINARY

The Parties have agreed to submit this matter for decision based upon agreed facts and with the understanding that the Court will contact the parties if it concludes that additional facts are needed to resolve the issues at bar.

ISSUES

1. Whether State Fund should be required to bear a pro rata share of attorney fees incurred by Flynn to establish his Social Security claim?
2. Whether State Fund should be required to pay the \$199.44 of total disability benefits it terminated and refused to pay on and after September 26, 2000.

3. Whether State Fund should be required to pay a penalty, attorney fees and costs (pursuant to §39-71-611 and 612 and 2907) for terminating and refusing to pay certain total disability benefits.

PROCEDURAL BACKGROUND

Petitioner filed his Petition for Hearing on October 30, 2000. On November 2, 2000, the Petition was scheduled for trial for the week of January 15, 2001. Respondent submitted its Response on December 6, 2000, indicating that “[t]here is no need for a trial in this matter. The issue presented is purely one of statutory interpretation. This matter should be submitted on briefs.”

On December 7, 2000, the Court wrote to the parties that “[f]rom our review of the pleadings, it does appear that the issues raised involve statutory interpretation without disputed facts.”

The Parties concurred that the issues in dispute could be submitted for decision on briefs based upon agreed facts.

FACTS

The Parties have submitted an Agreed Statement of Facts consisting of 27 paragraphs. This brief will refer to the various agreed facts but will not repeat them *in toto* herein.

ARGUMENT

1. **State Fund should be required to bear a pro rata share of attorney fees incurred by Flynn to establish his Social Security Claim.**

Flynn suffers permanent total disability as a result of occupational disease. Flynn made claims for both workers’ compensation and Social Security benefits. State Fund accepted his occupational disease claim while the social security administration denied his claim for social security benefits.

Through litigation, Flynn ultimately established his entitlement to social security benefits.

Flynn's Social Security award directly benefits State Fund by permitting State Fund to reduce total disability benefits by one-half of the social security award.

Flynn incurred \$4,000 in attorney fees to establish his social security claim. Flynn contends State Fund should bear one-half of these fees since it received one-half of the benefits.

Stahl (1991)¹ held that a workers' compensation insurer was not required to share attorney fees incurred by an injured worker to establish his social security claim. Murer (1997)² held that when a party, through active litigation, creates a common fund which directly benefits another, the non-participating beneficiary can be required to bear a portion of the litigation costs, including reasonable attorney fees.

The express reason underlying the Stahl decision was that no statutory or contractual authority required the insurer to share attorney fees incurred to establish a claimant's social security claim. The Stahl Court overlooked the common fund doctrine which is neither statutory nor contractual. By adopting the common fund doctrine, Murer effectively overruled Stahl.

If Stahl were still controlling, Murer would reach the opposite result concerning fees. Specifically, in Murer there was no statutory or contractual authority to spread the cost of litigation among all the beneficiaries to that litigation. Under Stahl the Murer litigants would have born the entire cost of the successful litigation. The common fund doctrine prevented this result. Likewise, the common fund doctrine protects Flynn from bearing the entire cost of litigation to establishing social security benefits which he shares equally with State Fund.

Under Stahl the passive beneficiary, the insurer, always gets more benefit

¹ Stahl v. Ramsey Constr. Co., 248 Mont. 271, 811 P.2d 546 (1991).

² Murer v. State Comp. Mutual Ins. Fund, 283 Mont. 210, 942 P.2d 69 (1997).

from a social security award than does the active beneficiary, the injured worker. This is unfair and against good public policy.

Pushed to its logical conclusion, Stahl creates an absurd result. For example, one-half of Flynn's social security benefit is \$116.41. If he had suffered an industrial injury while working approximately 20 hours per week at \$9.00 per hour, his workers' compensation benefit would be extinguished by his social security award and he would owe \$4,000 attorney fees out of his pocket. This result is not only unfair, it even creates a disincentive for certain injured workers to pursue social security benefits. Nobody could be expected to retain counsel and engage in litigation when success results in a financial net loss.

Application of the common fund doctrine makes this absurd result less likely by splitting the cost of successful social security litigation between the beneficiaries.

2. State fund should be required to pay the \$199.44 of total disability benefits it terminated and refused to pay on and after September 26, 2000.

State Fund claims it has overpaid Flynn more than \$14,000. The alleged overpayment occurred as a result of benefits paid by State Fund to Flynn before and after his Social Security award. The parties have not agreed on the amount of overpayment or the method or timing of recoupment. The disagreement over the amount of overpayment, if any, is the primary impediment to an agreement over the method and timing of recoupment. The parties are hopeful that they can resolve their differences over method and timing of recoupment after the Court rules on issue number one above.

Twice, State Fund has unilaterally terminated Flynn's benefits in order to recoup the alleged overpayment. First, it terminated benefits for eight (8) weeks in April and May, 1996. After several communications with Flynn, State Fund finally paid the last of these benefits after July 10, 1996. State Fund paid these benefits only after Flynn repeatedly directed its attention to Mackney (1993).³

³ Mackney v. State Fund, Mont. WCC No. 9211-6622, June 18, 1993.

Next, State Fund unilaterally terminated Flynn's benefits in the amount of \$199.44 (approximately 6½ days) in late September 2000. Again Flynn objected and asked that the terminated benefits be paid to him. On October 24, 2000, State Fund agreed to reinstate full payment of ongoing benefits. Unlike the 1996 termination of benefits, this time State Fund refused to pay the \$199.44 it had withheld.

State Fund currently retains the funds it unilaterally withheld. Flynn has never agreed to this. Mackney clearly and unequivocally prevents unilateral recoupment by an insurer to offset overpayments created by Social Security awards.

Based on Mackney and in the absence of any authority to the contrary, State Fund should be required to pay Flynn the \$199.44 of total disability benefits it terminated and refused to pay on and after September 26, 2000.

3. State Fund should be required to pay a penalty, attorney fees and costs for terminating and refusing to pay certain total disability benefits.

An award for fees or penalty must be based upon a finding that the actions of the insurer were unreasonable.

Claimant submits that under the agreed facts before the Court, State Fund's termination of benefits in 1996 was unreasonable. Likewise, State Fund's termination and refusal to pay benefits on and after September 26, 2000, was unreasonable.

State Fund should be required to pay a penalty on the benefits it terminated in 1996 and should be required to pay reasonable attorney fees and a penalty for the benefits it terminated and refused to pay on and after September 26, 2000.

State Fund's conduct was unreasonable because it terminated and refused to pay total disability benefits without any basis. Its action was without any basis in statute, contract or decisional law. Worse, its action was in direct derogation of the rule enunciated in Mackney, a dispute to which it was a party and which it did not appeal.

State Fund cannot possibly claim ignorance. In 1996 it terminated benefits for eight (8) weeks, a total of \$1,740.72. It paid \$793.44 of the terminated benefits relatively soon after demand, but this does not make the termination reasonable. Flynn did not receive the remaining \$947.28 of the terminated benefits until after July 10, 1996, more than three (3) months after State Fund had terminated the benefits on April 3, 1996. State Fund accepted Flynn's claim and agreed to pay total disability benefits. Its delays and refusals to pay these benefits were unreasonable per se. State Fund should pay a 20% penalty on the entire \$1,740.72 of total disability benefits it wrongfully terminated and delayed paying in 1996.

After specific direction from the Court in Mackney, followed by the events in 1996, one might expect State Fund to either initiate negotiation with Flynn or file a petition in Court to settle the recoupment issue. Instead, at the same time it conceded permanent total disability, it once again unilaterally terminated Flynn's benefits for over six (6) days on and after September 26, 2000. After numerous requests and filing of Flynn's Petition for Hearing, State Fund still refuses to pay the \$199.44 it wrongfully terminated.

This unreasonable termination and refusal triggers attorney fees as well as a 20% statutory penalty.

Pursuant to §39-71-611 and 612 and 2907, State Fund should be required to pay a penalty, attorney fees and costs for terminating and refusing to pay certain total disability benefits as described above. The penalty should be calculated based upon the weekly benefit rate established by State Fund's own calculation.

DATED this 9th day of February 2000.



Rex Palmer
ATTORNEYS INC., P.C.
301 W Spruce
Missoula, MT 59802
(406) 728-4514
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of February 2001 a true and correct copy of the foregoing was served upon the following by U.S. mail, hand-delivery, Federal Express, or facsimile:

Ann E. Clark, Legal Counsel
Special Assistant Attorney General
Montana State Fund
PO Box 4759
Helena, MT 59604-4759
(406) 444-6480
ATTORNEY FOR RESPONDENT

{X} U.S. Mail
{ } Hand Delivered
{ } Federal Express
{ } Facsimile

Margaret Martin

ATTORNEYS INC., P.C.

A Professional Corporation

REX PALMER

ROBERT STUTZ

301 W Spruce • Missoula, MT 59802

(406) 728-4514 • Fax (406) 728-5601 • attorneysinc@montana.com • www.montana.com/attorney

February 9, 2001

Patricia J. Kessner, Clerk of Court
Workers' Compensation Court
PO Box 537
Helena, MT 59624-0537

Re: Robert Flynn

Dear Ms. Kessner:

Enclosed please find the original PETITIONER'S OPENING BRIEF dated February 9, 2001.

If you have any questions or concerns, feel free to contact me.

Sincerely,
ATTORNEYS INC., P.C.



Rex Palmer

RP:mm

Enclosure

cc: Ann Clark