

WORKERS' COMPENSATION COURT

Hearing No. 3551
Volume XVII

Helena, Montana
February 3, 2005

DALE REESOR

Thomas J. Murphy

vs.

MONTANA STATE FUND

Bradley J. Luck
Thomas J. Harrington

WCC No. 2002-0676

An in-person status conference was held on Thursday, February 3, 2005, to discuss the common fund issues. Mr. Thomas J. Murphy represented the claimant and Mr. Bradley J. Luck and Mr. Thomas J. Harrington represented Montana State Fund. Other counsel present were Mr. Thomas J. Martello and Mr. Greg E. Overturf for the State Fund and Mr. James G. Hunt who is petitioner's counsel in *Satterlee v. Montana State Fund*. The court reporter in this matter was Ms. Carol Wright.

After discussion, counsel and myself agreed that summons should be sent to all insurers affected by the common fund claims in both cases, such summons to be accompanied by a notice of lien for each of the cases. Mr. Murphy and Mr. Hunt will take first crack at drafting the summons and liens and send them to Mr. Luck and Mr. Martello for their input. Once the parties are in agreement, the summonses and liens will be forwarded to me for my review and approval. Counsel will attempt to complete the process in one week with a goal of mailing out the summonses and lien notices in two weeks. Meanwhile, court staff will contact the Department and arrange for a list of insurers doing business in Montana from July 1, 1987 onward.

During discussion, Mr. Luck indicated that the *Reesor* decision should not apply to the period between July 1, 1991 and June 30, 1995, because of the decision in *Russette v. State Compensation Insurance Fund*, 265 Mont. 90, 874 P.2d 1217, which held that section 39-71-710, MCA (1991-1995), does not provide for termination of permanent partial disability benefits upon reaching retirement age. Thus, insurers presumably have been paying permanent partial benefits to workers injured between July 1, 1991 and June 30, 1995, even after those workers have reached retirement age. Neither Mr. Murphy nor Mr. Hunt disagreed with the analysis, thus the common fund under *Reesor* appears to encompass only claimants injured between July 1, 1987 and June 30, 1991, and those injured after June 30, 1995.

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Mr. Luck also indicated that common fund fees are precluded after June 30, 2003, as a result of amendments to the Workers' Compensation Act by the 2003 legislature. I agreed but noted that under *Murer* and other common fund cases, claimants whose entitlement to permanent partial disability benefits arises after June 30, 2003, are still entitled to the benefits, hence it makes sense to identify and include them in the common fund class even though attorney fees may not be taken with respect to their entitlements.

The State Fund also indicated its intent to contest the retroactive application of *Reesor*. Other defenses to certification of a common fund may also be interposed by the State Fund and/or other insurers, but no others were specifically identified at this time.

We discussed the facts necessary to State Fund's retroactivity defense. In *Stavenjord* an agreed set of facts were presented to the Court but Mr. Murphy indicated that it took longer to iron out the agreed facts than it would take to present facts through discovery. We agreed that the following process shall be followed: By May 3, 2005, the State Fund will present Mr. Murphy with an affidavit or statement of facts specifying the particular facts it intends to use in arguing against retroactivity. Within one month thereafter, Mr. Murphy will indicate whether he wishes to do discovery. Any such discovery shall be completed within another two months thereafter. The defense will then be briefed and argued.

Finally, we discussed the current briefing schedule in *Satterlee*. Mr. Hunt's opening brief is presently due on February 4, 2005, however, in light of the parties agreement to summons in other insurers so they can address the constitutional challenge in that case and respond to any common fund claim, we agreed that Mr. Hunt may have an additional two weeks to file his opening brief. Reference to the brief will be incorporated into the summons issued in the *Satterlee* case and the brief will be posted on the Court's WEB site. A briefing schedule for answer and reply briefs will be fixed after the time for responses to the summons has expired.

MIKE McCARTER
Judge

Minute Entry e-mailed to attorneys and mailed to Mr. Murphy on February 4, 2005.