

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 18

WCC No. 9206-6487

IN THE MATTER OF: JACK MURER,
JAY HARBRIDGE, SUSAN VERNON,
STEVE PICKETT, JAMES BROWN,
KEITH MORDJA, and BRUCE NELSON
in their individual capacities and also in their
capacities as representatives of a class of
workers' compensation and occupational disease
claimants and beneficiaries described herein

Petitioners

vs.

MONTANA STATE COMPENSATION INSURANCE
FUND, AND ALL PLAN I AND II INSURERS OF
THE CLASS OF CLAIMANTS AND BENEFICIARIES

Defendants.

*See Murer et al. v. Montana State Fund et al.,
283 Mont. 210 (1997) (Murer III)*

ORDER REGARDING INTERVENTION AND ATTORNEY LIEN

Summary: On remand from the Supreme Court in *Murer v. Montana State Compensation Mutual Ins. Fund*, 267 Mont. 516 (1994) (*Murer II*), attorneys for claimants asserted lien for attorneys fees on *all* additional benefits paid as a result of the precedent established in *Murer II*. The fees would be paid out of amounts otherwise payable to unnamed claimants. An attorney representing thirteen claimants affected by *Murer II*, but not named in that case, seeks to intervene in this proceeding. State Fund requests an order from this Court that it withhold twenty-five percent of benefits payable to unnamed claimants for payable as attorney fees should the attorneys in *Murer* prevail on their lien.

Held: Motion to intervene granted as to attorney fee entitlement only. State Fund's request denied.

Topics:

Attorney Fees: Common Fund. On remand from the Supreme Court in *Murer v. Montana State Compensation Mutual Ins. Fund*, 267 Mont. 516 (1994) (*Murer II*), attorneys for claimants asserted lien for attorneys fees on *all* additional benefits paid as a result of the precedent established in *Murer II*. The fees would be paid out of amounts otherwise payable to unnamed claimants. An attorney representing thirteen claimants affected by *Murer II*, but not named in that case, was granted leave to intervene in this proceeding.

Attorney Fees: Lien. On remand from the Supreme Court in *Murer v. Montana State Compensation Mutual Ins. Fund*, 267 Mont. 516 (1994) (*Murer II*), attorneys for claimants asserted lien for attorneys fees on *all* additional benefits paid as a result of the precedent established in *Murer II*. The fees would be paid out of amounts otherwise payable to unnamed claimants. An attorney representing thirteen claimants affected by *Murer II*, but not named in that case, was granted leave to intervene in this proceeding.

Common Fund Litigation. On remand from the Supreme Court in *Murer v. Montana State Compensation Mutual Ins. Fund*, 267 Mont. 516 (1994) (*Murer II*), attorneys for claimants asserted lien for attorneys fees on *all* additional benefits paid as a result of the precedent established in *Murer II*. The fees would be paid out of amounts otherwise payable to unnamed claimants. An attorney representing thirteen claimants affected by *Murer II*, but not named in that case, was granted leave to intervene in this proceeding.

This matter is before the Court following the November 21, 1994 decision of the Montana Supreme Court in ***Murer v. Montana State Compensation Mutual Ins. Fund***, 51 St. Rptr. 1145 (1994). In ***Murer*** the Court held that the \$299 cap on temporary total disability benefits which was adopted in 1987 and renewed in 1989 expired on June 30, 1991. Therefore, the cap on temporary total disability benefit payable after June 30, 1991, with respect to injuries occurring between July 1, 1987 and June 30, 1991, reverted to the state's average weekly wage at the time of the particular injury. The Court remanded the case with instructions that this Court determine the amount of additional benefits due the claimants.

One of the issues arising on remand concerns the entitlement of claimants' attorneys to attorney fees. The attorneys -- Mr. Alan M. McGarvey and the law firm of McGarvey, Heberling, Sullivan & McGarvey, P.C. ("McGarvey") -- claim they are entitled to attorney fees on *all* additional benefits paid as a result of the precedent established in this case. Their claim extends to amounts which may be paid to claimants who are not parties to this

action and who are either unrepresented or represented by other counsel. The fee would be paid out of amounts otherwise payable to those claimants. McGarvey and the State Fund have phrased the issue as follows:

Whether claimants are entitled to spread the cost of litigation proportionately to all claimants benefiting by this litigation pursuant to the common fund/substantial benefit doctrine.

(Stipulated Facts and Issues, Contentions, and Contested Issues, docketed March 1, 1995, at page 2.)

In pursuit of the attorney fee claim, McGarvey notified the State Fund that he has an attorney lien on amounts due all claimants as a result of the Supreme Court decision. The lien is confirmed in a letter to one of the State Fund's counsel on December 4, 1994, wherein McGarvey advises Mr. Bradley J. Luck:

The final purpose of this letter is to document our assertion of a lien on benefits paid to any claimant pursuant to this ruling. This lien is based upon the workers' compensation statutes, the Montana attorney lien statutes, and the common fund doctrine. This demand is asserted on behalf of the law firm of McGarvey, Heberling, Sullivan & McGarvey, P.C., and on behalf of the individual claimants we represent to assure that the named plaintiffs are not unfairly saddled with the burden of the costs and fees associated with this litigation. The amount of the lien so asserted depends in part upon the size of the common fund, in part on the amount of additional work that is hereafter necessary to implement the ruling, and ultimately depends upon the Court's determination of the appropriate common fund fee and apportionment of costs. In any event, the lien asserted is not greater than 25% of benefits paid pursuant to this ruling nor less than 10% of such payments.

As you are aware, any payments by an insurer in derogation of this lien subjects the insurer to liability to this firm and to our clients for the amount of the lien. Therefore, if it is now or hereafter becomes apparent that your clients intend to make payments to the claimants in derogation of the lien hereby asserted, we would ask that you advise us immediately so that any controversy may be properly resolved by the Court.

(Exhibit A to Brief in Support of Motion to Intervene.)

Attorney Ira Eakin represents thirteen claimants who are affected by the Supreme Court's decision in this case and by McGarvey's lien. On their behalf he has filed a petition to intervene to oppose the lien, which he characterizes as "invalid." (Motion to Intervene at 2.) The applicants in intervention also want the Court to determine the additional amounts which may be due them under the *Murer* decision. However, it does not appear from the materials they have submitted that the State Fund is contesting its liability for additional benefits under *Murer*. The State Fund has merely notified applicants that it intends to withhold twenty-five (25%) percent of the additional benefits which may be due. If there are particular disputes concerning the amounts due individual applicants, they are not apparent from the Motion to Intervene.

After reviewing the procedural history of this case, the Court concludes that it is not precluded from taking up the attorney fee issue. The issue arises out of claimants' successful prosecution of their main claim in this action. While the Supreme Court remanded the case with instructions that this Court determine the benefits due the claimants, that directive must be viewed in the context of the issues presented on appeal. The appeal concerned this Court's grant of summary judgment to respondents and denial of claimant's motion for partial summary judgment. Those rulings cut-off the parties' opportunity to adjudicate subsidiary issues. Therefore, I conclude that the Supreme Court's directive on remand was not intended to preclude the parties from now litigating those subsidiary issues, including McGarvey's entitlement to attorney fees, if any, from non-party claimants.

Rule 24(a), Mont.R.Civ.P. , sets forth specific criteria for intervention as a matter of right. It provides:

Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The applicants in this case have demonstrated a concrete interest in the attorney fee issue; it is out of their potential benefits that McGarvey seeks to collect fees. They will be directly affected by any decision of the Court. Denial of their application to intervene would, as a practical matter, impair their ability to protect their interests, and their interests are not

presently represented by existing parties. In short, all of the criteria for intervention of right are met. Their motion is therefore **granted** with respect to the attorney fee issue.

However, the applicants' motion to intervene for other purposes is **denied**. Initially, it is not at all clear that the amounts due them will be contested. Secondly, they have not demonstrated that they have any other issues in common with the claimants in this case. They clearly fail to meet the criteria for mandatory intervention. They also fail to meet the criteria for permissive joinder under Rule 24(b), Mont.R.Civ.P., which provides in relevant part:

Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

Only the second clause has potential application, and its requirements are not met since applicants have not shown there is a common question of law or facts.

While the State Fund does not oppose intervention with respect to the attorney fee issue, it makes an additional request of the Court. Specifically, it asks that the Court issue an order directing it to withhold the amounts claimed by McGarvey. (Defendant's Response to Motion to Intervene at 2.) It makes its request "[i]n order to protect itself from the competing claims of claimants, these intervenors, and other claimants around the state who are similarly situated to these intervenors"

The Fund is caught in the cross-fire. If it ignores McGarvey's notice of lien and McGarvey prevails, it may subject itself to an additional twenty-five (25%) percent liability. If it refuses to dishonor the lien and the Court finds the lien invalid, claimants who are not represented by McGarvey may allege that the Fund's withholding of any portion of their benefits was unreasonable and request imposition of a penalty and attorney fees.

The Court acknowledges the dilemma but declines to order the Fund to withhold the amounts claimed by McGarvey. The validity of McGarvey's lien has not been briefed or argued, and he has not at this time shown a probability of success. However, it is also difficult to see how the State Fund's withholding of the amounts claimed by McGarvey could constitute unreasonable conduct which would give rise to imposition of a penalty or attorney fees. While the State Fund is certainly obligated to look out for the interests of claimants, it is not required to disregard its own interests.

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Dated in Helena, Montana, this 8th day of March, 1995.

(SEAL)

/s/ Mike McCarter
JUDGE

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c: Mr. Allan M. McGarvey
Mr. Roger M. Sullivan
Mr. Bradley J. Luck
Mr. Michael C. Prezeau

Mr. Charles G. Adams
Mr. Kevin Braun
Mr. Ira Eakin
Mr. Chuck Edquest (Courtesy Copy)