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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

DEBRA STAVENJORD,

Petitioner,

v.

MONTANA STATE FUND,

Respondent/Insurer.

WCC NO. NO. 2000-0207

**STATE FUND'S RESPONSE TO
STAVENJORD'S REPORT REGARDING
NEED FOR COMMON FUND**

COMES NOW the Montana State Fund ("State Fund") and responds to Petitioner Stavenjord's Report Regarding the Need for a Common Fund ("Stavenjord Reply").

INTRODUCTION

- 1. Procedural Status—Remand instructions are specifically limited to identification and notification procedures involving the State Fund. Benefit implementation considerations and measures evaluating and directing the conduct of non-party insurers are not within the scope of the remaining limited proceedings directed by the Supreme Court.**

It is important to review the procedural history of this matter in order to put the present discussion and scheduled proceedings into the proper context.

The Montana Supreme Court unanimously rendered its decision in relation to common fund issues on October 6, 2006. *Stavenjord v. Montana State Fund* 2006 MT 257, 334 Mont. 117, 146 P.3d 724. The Supreme Court reversed this Court's previous approval of common fund status. ("We therefore conclude that the WCC erred in determining that *Stavenjord* created a common fund." *Stavenjord*, ¶ 28). The Supreme Court denied common fund status on several grounds, noting the present claim circumstances failed to meet the requirements set out in *Ruhd v. Liberty Northwest Ins. Corp.*, 2004 MT 236, ¶ 16, 322 Mont. 478, ¶ 16, 97 P.3d 561, ¶ 16 (citing *Mountain W. Farm Bureau Mut. Ins. Co. v. Hall*, 2001 MT 314, ¶¶ 15-18, 308 Mont. 29, ¶¶ 15-18, 38 P.3d 825, ¶¶ 15-18), including:

- a. *Stavenjord* did not create, reserve, preserve, or increase an identifiable monetary fund or benefit in which all active and non-participating beneficiaries have an interest. ("Here, by contrast, benefits due to non-participating *Stavenjord* beneficiaries will not be readily identifiable on superficial review of case files, nor can benefits due be calculated with certainty by way of a mathematical formula. . . . [B]ecause each claimant's situation will be unique, there will be no simple universal formula that can be applied to all non-participating claimants to determine to what additional money they are entitled.") *Stavenjord*, ¶ 27.
- b. Allowing common fund attorney fees when entitlement issues are numerous, and many claimants are or will be represented by counsel, creates a disincentive for necessary non-participating counsel. ("It also bears noting that many of these claimants are represented by counsel, and will require further assistance from their attorneys. A common fund reduction in fees to benefit *Stavenjord*'s counsel would create a disincentive for non-participating claimants' counsel, and could thereby threaten a

claimant's prospects for an aggressively negotiated benefit recovery.") *Stavenjord*, ¶ 27.

- c. Common fund treatment is not necessary here, where claimant and her counsel were appropriately compensated and other beneficiaries of the decision have appropriate financial incentive to pursue additional benefits. ("[T]he fact is that eligible claimants *do* have the financial incentive to pursue *Stavenjord* benefits, provided they and their counsel expend the time and effort required to reap the benefit of our decision.") *Stavenjord*, ¶ 28.

In denying common fund status, the Supreme Court concluded that much "more work remains to be done before claimants may successfully obtain their respective *Stavenjord* benefits." *Stavenjord*, ¶ 28. With this fact squarely on the Court's radar, it concluded with a limited, precise remand direction.

We remand this case to the WCC for further proceedings to include the determination of an **appropriate procedure by which potential *Stavenjord* beneficiaries will be identified and notified** of their interests related to increased *Stavenjord*-type PPD benefits.

Stavenjord, ¶ 31 (emphasis added). Conspicuously absent from the direction is any charge to this Court to initiate omnibus-type proceedings involving other non-party carriers or general implementation of the benefit decision.

Stavenjord sought rehearing. The arguments made in support are identical to those set out in the *Stavenjord* Reply. Most striking, and as occurred here, the request made argument and sought relief on matters far beyond the remand direction relating to identification and notification. It requested the reinstatement of the common fund and discussed *Stavenjord's* concerns relative to implementation issues. *Stavenjord* claimed it would be impossible for this Court to comply with the Supreme Court's Order dated October 6, 2006.

The Supreme Court declined to revisit the common fund determination, direct any procedures related to the implementation concerns raised, or take action related to *Stavenjord's* undocumented arguments regarding this Court's and the State Fund's inability to properly identify and notify potential beneficiaries. In so doing, the Court raised the bar on its remand instruction:

[S]hould the Workers' Compensation Court determine that it will be impracticable or impossible for it to comply with our remand Order without the assistance of a Common Fund counsel, then and in that event the

Workers' Compensation Court may enter an order to such effect, which order would then be amenable to review on appeal.

Order, Nov. 9, 2006. Again, nowhere in the direction to this Court was there any mention of including other non-party insurers in this proceeding or the establishment of any process to oversee ongoing benefit entitlement.

The only Workers' Compensation insurer that was a party to the *Stavenjord* litigation was the State Fund. As a result, no procedural order can be binding upon other insurers in relation to their implementation of the decision

As a result of the decision on rehearing, the remand direction would now be:

We remand this case to the WCC for further proceedings to include the determination whether it is impracticable or impossible for the Montana State Fund to implement an appropriate procedure by which potential *Stavenjord* beneficiaries will be identified and notified of their interests related to increased *Stavenjord*-type PPD benefits.

Neither the original decision, decision on rehearing, nor either remand direction makes any mention of benefit implementation procedures.

The State Fund filed its Report to the Court Re: Identification and Notification, on January 22, 2007. The report outlines the efforts of the State Fund to identify potential *Stavenjord* beneficiaries and its plan to notify them of possible entitlement. The report demonstrates that procedures for identification and notification do not even approach being impracticable or impossible.

Stavenjord's Response focuses on insurers not a party to this proceeding, the benefit determination process and a rehash of the twice lost argument concerning common fund treatment and the payment of common fund fees to her attorney. Finally, it provides affidavits from three lawyers supporting common fund classification of the implementation of all precedent setting cases, a concept already rejected by the Supreme Court.

- 2. Counsel for *Stavenjord* properly acknowledges a lack of standing to participate in further proceedings on remand. However, the State Fund does not object to his limited participation focused upon the specific remand direction.**

Stavenjord acknowledges that she has been paid all benefits due and that the Supreme Court has denied her requests for common fund classification of the action.

Stavenjord's counsel candidly agrees that he and his client have no standing to participate in further proceedings. The State Fund desires to insure the record discloses a proper consideration of the remand direction. Therefore, the State Fund is agreeable to the participation of Stavenjord's counsel in the upcoming proceeding so long as it is limited to the legitimate, specific remand direction relating to determining if it is impracticable or impossible for the State Fund to identify and notify potential *Stavenjord* beneficiaries.

3. Stavenjord's position disregards and misstates the remand direction. The sole issue before the Court is whether it is impracticable or impossible for the State Fund to implement an appropriate procedure to identify and notify claimants of potential *Stavenjord* entitlement.

The Stavenjord Reply seeks to expand the upcoming proceeding and this Court's consideration of remand issues contrary to the specific remand instructions outlined above.

The only insurer party to the litigation is the State Fund. It has documented and will confirm its ability to properly identify and notify claimants as required by the Supreme Court. It is not in a position, nor is it required, to speak for other insurers. The factual scenarios applicable to other carriers in regard to identification and notification are company specific and likely have as many permutations as the hundreds of insurers not a party to this action.

In the event counsel for Stavenjord seeks to test the ability of the mass of other insurers to properly identify and notify potential beneficiaries of the decisions some separate proceeding can be initiated. Such an action can outline the issues and provide the joined parties appropriate due process. Litigating the rights of carriers *in absentia* or geometrically expanding the scope of this proceeding is inappropriate, unnecessary and beyond the remand direction.

The same is true of the relentless effort to make this case into a common fund. In so doing, Stavenjord misstates and expands the scope of the remand and this Court's present consideration. ("Stavenjord respectfully submits that, without Common Fund Counsel, it will be 'impossible' or 'impracticable' for the Workers' Compensation Court to comply with the Supreme Court's order to identify, notify, and **adjudicate the interests of all *Stavenjord* claimants.**") Stavenjord Reply 2 (emphasis added).

In order to attempt to create a common fund and secure a foothold in this proceeding where none is justified, Stavenjord seeks to expand it to include matters not

only outside the scope of the remand order, but directly contrary to the Supreme Court's rationale in reversing the prior determination. Neither is appropriate.

4. Counsel's affidavits have no proper bearing on the specific remand order. In addition, the affidavits are contrary to the most current information relating to State Fund experience and competency in identifying and notifying potential beneficiaries.

As noted in the State Fund's original filing, it has extensive experience in identifying and notifying claimants of potential entitlements after precedent setting decisions or incident to ongoing proceedings. There is no question the ability of the State Fund to meet the requirements of the remand order in this action have been enhanced over the years with its ongoing experience.

The most recent efforts to identify and notify claimants occurred in the resolution of a class action. In that matter, the courts and class counsel (who happen to be one of the affiants) praised the State Fund for its good work in the very type of process under consideration here. The State Fund asks the Court to take judicial notice of the original transcripts filed in conjunction with this brief.¹

In the State District Court proceeding, Mr. McGarvey, counsel for the class, explained the process the State Fund went through to identify and notify potential beneficiaries of the settlement. He advised, "because of privacy concerns, the involvement of class counsel was somewhat limited," in terms of the complex identification process. Transcript of Settlement Approval 4, Feb. 16, 2007 ("Tr."). The process ended up with an over broad list, "but probably pretty close to exact identification of members of the class." Tr. 4. This same process, with the same employees in charge, has been undertaken in this proceeding.

The praise for the identification process effort was unanimous. The District Court felt the State Fund "went out of their way to try to comply," "tried [its] best, and went a little bit beyond." Mr. McGarvey agreed that "the State Fund really went to extraordinary means" to identify class members. Tr. 5. The same was true of the efforts to provide notice. Tr. 5-6. The Court went on to note the State Fund's "extraordinary good faith" in resolving the matter and implementing the settlement. Tr. 11.

¹ The transcripts were made in proceedings in *Pinckard v. State Compensation Mutual Ins. Fund*, WCC No. 2006-1621, and *Pinckard v. State Compensation Mutual Ins. Fund*, Cause No. ADV-96-671, Montana Eighth Judicial District Court, Cascade County.

A similar proceeding was held before this Court. The Court noted that Mr. Visser was in charge of identification and notification. Transcript of Fairness Hr'g 4, Feb. 16, 2007 ("WCC Tr."). In relation to the work of Mr. Visser and the State Fund on notification, Mr. McGarvey indicated the accepted standard was, "best notice reasonably practical under the circumstances" and that he felt, "outstanding work has been done by State Fund to meet that standard." WCC Tr. 6. The Court approved the process. WCC Tr. 8.

The most recent experience of the State Fund in exactly the type of process under review with the remand order has been documented as meeting a high standard by two courts and a team of class counsel. Mr. McGarvey's record comments concerning the outstanding work of the State Fund in identifying claimants, reviewing an overly broad list, refining it properly and giving and staying on the notice efforts are noteworthy and likely more accurately reflect the state of affairs than an overly broad form type affidavit. Regardless, given the remand issues of identification and notification the record statements of most current experience strongly trump the affidavit statements based on experience from the very first common fund a decade (and several common fund and class actions) ago.

The same comments can be made about the affidavit of Mr. Anderson. In addition, his vote to overrule the Supreme Court and declare a common fund in this proceeding is based upon his belief "that insurers will neglect the rights of many unrepresented. . . claimants." As a result, he felt "that Stavenjord should have common fund status, because it would be impractical and impossible" for this Court to "**oversee the payment of Stavenjord type benefits** without the assistance of common fund counsel." Lawrence A. Anderson Aff. ¶ 7, Mar. 16, 2007 (emphasis added). Again, this proceeding is not about the implementation process. The basis and purpose of Mr. Anderson's opinions make them wholly inapplicable to the issue before the Court.

Mr. Beck's affidavit chooses its words carefully. That may be because his common fund experience with the State Fund was very positive. This can be seen from the record of the *Fisch, Frost & Rausch v. Montana State Fund*, 2005 MT 140, 327 Mont. 272, 114 P.3d 192. The Beck affidavit speaks generally about insurers, not the State Fund and relates to implementation issues. ("There are hundreds of insurance companies affected by the *Stavenjord*, ruling and the benefit entitlement period spans fourteen years; consequently, in my opinion, there is simply no practicable or possible way for the Workers' Compensation Court to administer this case without the assistance of Common Fund Counsel." Monte Beck Aff. ¶ 6, Mar. 23, 2007.) Mr. Beck mentions the undocumented problems occurred with other carriers and related generally to the effort to "identify, notify, **calculate and pay past due benefits.**" Beck Aff. ¶ 3 (emphasis added). His own experience indicated it was "imperative" that common fund counsel "ensure, oversee and implement the **payment of common fund benefits.**"

Beck Aff. ¶ 5 (emphasis added). He notes he is still involved with the common fund, but does not advise that he settled with the State Fund and that implementation went very smoothly, having been completed long ago. Mr. Beck's experience, and his affidavit, has no bearing on the State Fund or the particular remand issue before the Court.

5. Stavenjord's justiciable controversy argument, when applied appropriately, proves the point that common fund counsel is not necessary to ward off speculative or hypothetical future issues.

Stavenjord cites *Seubert v. Seubert*, 2000 MT 241, 301 Mont. 382, 13 P.3d 365, for the proposition that the "case or controversy" provision of the United States Constitution requires that every person with potential entitlement deserves an advocate when this Court "identifies' claimants, calculates their disputed 'interests,' and 'notifies' them of those interests." Stavenjord Reply 3. The constitutional provision, however, does no such thing. In fact, the provision requires real, not imaginary or hypothetical controversies as articulated by Stavenjord:

In *Chovanak v. Matthews* (1948), 120 Mont. 520, 525-26, 188 P.2d 582, 584-85, we stated:

By "cases" and "controversies" within the judicial power to determine, is meant real controversies and not abstract differences of opinion or moot questions. Neither [the] federal nor [our] state Constitution has granted such power. . . .

In *Marbut v. Secretary of State* (1988), 231 Mont. 131, 135, 752 P.2d 148, 150, we further defined the boundaries of a justiciable controversy:

The courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions.

Seubert, ¶¶ 18-19.

Stavenjord requests the implementation of common fund status on the basis of his purely speculative claim that it is "common knowledge—insurers do not take care of the interests of injured claimants." Stavenjord Reply 5. She seeks common fund status and fees to deal with her preconceived prejudices, to protect from theoretical problems and provide for contingencies that may later arise. The authority cited by Stavenjord provides sound fodder for denying her request—the persons she seeks to represent

have no case or controversy in relation to the scope of remaining proceedings on remand. Once identified and notified they are no different than any other claimant with potential entitlement. (However, the State Fund's proposal to individually review the file of each claimant provided notice of potential entitlement, whether they respond to the notice or not, goes beyond the normal benefit consideration procedure. See Report to Ct. 9, Jan. 22, 2007.)

Stavenjord's final case and controversial comments are also telling. She criticizes the State Fund for making "a big deal about trying to 'identify and notify'" while it "attempts to escape its duty to determine the claimants 'interests related to *Stavenjord* type PPD benefits.'" Stavenjord Reply 3. This approach and unnecessary venom, chastising the State Fund for responding to the very issue required by Supreme Court direction, exemplifies Stavenjord's blind pursuit of a common fund in a limited proceeding that does not involve oversight of benefit determinations for thousands of claimants. The State Fund's response has been comprehensive and geared to the specific direction of the Supreme Court.

6. The State Fund's identification process is sound, has been refined over the years and remains over inclusive for present purposes.

The same State Fund employees involved in overseeing several class actions and the *Pinckard* process, Bill Visser and Cris McCoy, have been and will continue to be the point persons for the identification and notification process in this matter. They are veteran adjusters who have provided valuable insight to this Court in past proceedings and are recognized as experts in the matters involved in the remand order.

The State Fund detailed the progression of reviews performed in the identification process. The progression verifies the increased sophistication of the State Fund's processes and the cumulative effect of additional reviews of similar populations because of other holdings and litigation. The previous report also verifies the significant resources and energies focused on the projects, culminating in the refined listing. Rather than documenting inconsistent statements as claimed, the report verifies the proper and sophisticated progression of reviews verifying that it is far from impossible or impracticable for the State Fund to identify and notify claimants as directed.

7. Stavenjord's continued argument concerning represented verses unrepresented claimants has no place in this proceeding.

The Court and parties are involved in a limited, defined proceeding regarding identification and notification. Virtually every brief filed by Stavenjord claims the necessity to revisit the common fund request because many claimants do not have attorneys. This position has been repeatedly ignored as material by the Supreme Court

and should be by this court in the present context. As indicated above, the Supreme Court decision specifically discussed representation issues, finding common fund counsel and fees a disincentive for claimants to secure proper, voluntary representation.

8. The State Fund properly requested direction relative to notice for deceased claimants.

On the one hand, Stavenjord claims insurers (presumably including the State Fund) intend to improperly handle everything from notice to benefit determination. On the other hand, she complains about the State Fund's seeking court direction on the simple issue of notice to deceased claimants. The scope of this proceeding is limited to identification and notice. The State Fund asked for the Court's direction because that was the proper thing to do. It intends to provide notice to claimants identified as deceased to insure the process is over-inclusive.

Stavenjord's arguments in regard to deceased claimants are premature benefit entitlement questions. Her claim that the deceased claimants have "cogent legal argument that may entitle them to receive benefits" (Stavenjord Reply 11) is likely accurate from a procedural standpoint, but beyond the scope of this proceeding. This is the type of issue and legal service that the Supreme Court specifically considered in denying the common fund:

Moreover, because each claimant's situation will be unique, there will be no simple universal formula that can be applied to all non-participating claimants to determine to what additional money they are entitled. It also bears noting that many of these claimants are represented by counsel, and will require further assistance from their attorneys. A common fund reduction in fees to benefit Stavenjord's counsel would create a disincentive for non-participating claimants' counsel, and could thereby threaten a claimant's prospects for an aggressively negotiated benefit recovery.

[T]he fact is that eligible claimants *do* have the financial incentive to pursue *Stavenjord* benefits, provided they and their counsel expend the time and effort required to reap the benefit of our decision. Because more work remains to be done before most claimants may successfully obtain their respective *Stavenjord* benefits, the concern with unjust enrichment to non-participating beneficiaries that underlies the common fund doctrine's intended purpose is largely absent here.

Stavenjord, ¶¶ 27-28. Any entitlement issue regarding the interests of deceased claimants will be brought before this Court at an appropriate time by the State Fund or any of the many counsel representing estates.

CONCLUSION

Stavenjord concludes her filing by underscoring her concerns are not within the purview of this proceeding and proving the points made above:

It will be 'impractical or impossible' to supervise the payment of *Stavenjord*-type benefits without common fund counsel. Multiple non-party insurers must be joined and evaluated by counsel.

Stavenjord Reply 12.

Stavenjord's mission to secure common fund oversight and fees has resulted in an unnecessarily contentious approach on her behalf. The State Fund applauds the good work performed by counsel in handling the claim of Ms. Stavenjord. The Supreme Court specifically took that into account when considering and rejecting, twice, the request for common fund status. There is no truth or place in this proceeding for the pivotal contention that:

Having lost the entitlement and retroactivity issues, the new goal of the Insurers is to proceed without oversight. The Insurers want to evade payment, and that is the only plausible purpose for them to dodge oversight.

Stavenjord Reply 10.

As evidenced by its efforts to identify and notify claimants in the *Pinckard* case, the State Fund has honed its skills over the years of working through such processes. It has verified (and will support the position in responding to any questions or concerns raised by the Court in the hearing on April 26, 2007) a proper process for identifying and plan for notifying all potential beneficiaries of the *Stavenjord* decision as required by the Supreme Court.

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DATED this 20 day of April, 2007.

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By 
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CERTIFICATE OF MAILING

I, the undersigned, of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for Respondent/Insurer, hereby certify that on this 20th day of April, 2007, I mailed a copy of the foregoing State Fund's Response to Stavenjord's Report Regarding Need for Common Fund, postage prepaid, to the following persons:

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