FEB 12 2004

Bradley J. Luck, Esq.
Thomas J. Harrington, Esq.
GARLINGTON, LOHN & ROBINSON, PLLP
199 W. Pine, P.O. Box 7909
Missoula, MT 59807-7909
Telephone: (406) 523-2500
Facsimile: (406) 523-2595

David Hawkins, Esq.
Montana State Fund
P. O. Box 4759
Helena, MT 59604-4759
Telephone: (406) 444-6500
Facsimile: (406) 444-6555

Attorneys for Respondent/Insurer

FILED

FEB 13 2004

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

THE WORKERS' COMPENSATION COURT IN THE STATE OF MONTANA

DEBRA STAVENJORD, Petitioner, v. MONTANA STATE FUND, Respondent/Insurer.	WCC No. 2000-0207 **JOINT STATEMENT OF STIPULATED FACTS**

COME NOW the parties, by and through counsel of record, and hereby submit this Joint Statement of Stipulated Facts for use in connection with the post-remand briefing in the above-referenced matter.

JOINT STATEMENT OF STIPULATED FACTS

In an effort to expedite the post-remand briefing in the above-referenced matter, Debra Stavenjord ("Stavenjord"), through her counsel, agrees to bypass the discovery

process and instead stipulates to the statement of facts listed below. However, Stavenjord enters into this stipulation only for purposes of the post-remand briefing and the subsequent appeal to the Montana Supreme Court regarding retroactivity and entitlement to common fund fees.[1] The parties agree that this stipulation cannot be used by or against one another in any other proceeding.

I. RETENTION OF RECORDS

1. Montana State Fund ("MSF") maintains a records retention protocol and retains records in accordance with State Records Retention Policy.

2. Depending on the date of a claim, records are retained in one of four media types: (1) paper; (2) microfilm, which are rolls of film containing photos of documents; (3) microfiche, which are sheets of film with photos of documents that are much smaller than film; and (4) optical imaging platters, which utilize technology similar to compact disks to store documents as digital images on glass platters that assign a document number and claim number to each image.

3. From inception until 1976, all open files were maintained on paper and closed files were copied to microfilm. Beginning in 1976, open files were still maintained on paper but closed files were copied to microfiche instead of microfilm.

4. In July of 1995, MSF began using optical imaging platters in addition to paper files. Except for active files with the Old Fund unit, the use of paper files on active claims was gradually phased out and all paper files were destroyed by the summer of 2001. As noted, the only paper files remaining are active files with the Old Fund unit, which handles claims arising on or before June 30, 1990.

5. Documents presently received at MSF are imaged to disk and made available via the computer system. Each original document is date-stamped upon receipt and stored in "batches," which are groups of documents imaged at the same time. The batches are placed in boxes which are marked by date and batch number. Approximately once per month, MSF notes which boxes are more than six months old and requests permission to destroy those boxes from the State Records Retention Committee. When

---

[1] Stavenjord did no discovery to independently verify these facts, but Stavenjord stipulates here to expedite the Court's consideration of the present motions.

permission is received, which usually takes four to six weeks, the boxes are destroyed by MSF.

6. MSF stores the different types of media in various locations. Optical imaging platters are stored on site at MSF and copies are stored in secure locations. Microfilm and microfiche files are stored with the State Auditor's Office in their records vault. The Old Fund unit stores paper files on site for active claims arising on or before June 30, 1990. When these files are closed, the original documents are microfiched and the paper files are destroyed.

II. RETRIEVAL OF RECORDS

7. Locating files on various media types is a labor-intensive, manual process, and several different procedures are employed to retrieve the stored media.

8. Retrieval time depends on what media type the file is stored, the date of the claim, when the claim was active, and how long the claim was active.

9. A file's media type is determined by what storage system was in place at the time the file was closed. For files that closed before 1976, the files are stored on microfilm. For files that closed from 1976 through 1994, the files are stored on microfiche. For files that closed in 1995 or later, the files are stored on optical imaging platters.

10. A claim may be closed and re-opened. If a claim has been closed and re-opened, it may be stored on multiple or all media types. A *Stavenjord* review may include a review of a claim file with information stored on all media types.

11. To determine the media type of a claim, the adjuster must make a file request from MSF's only records person, who will search the computer system to ascertain when the claim was active and on which media it is likely to be stored. The records person will then check the records for each claim. A simple search may take ten minutes. A complex search may take three hours or longer.

12. Open files in the Old Fund unit with claims arising on or before June 30, 1990 may be lengthy files consisting of several volumes and thousands of pages. The adjuster in the Old Fund unit retrieves paper files, which can be disassembled and photocopied.

13. Microfiche may be either copied to other microfiche or may be copied to paper by the State Auditor's Office. With its present staff, the maximum document production by the State Auditor's Office is about 600 pages per day and the average claim file is about 90 to 100 pages. MSF also has two machines that allow it to print paper copies from microfiche. With experienced operators and minimal equipment malfunction, it is reasonable to estimate each machine could produce an average of 100 pages per hour from microfiche to paper.

14. Since July 1, 1995, all incoming fiscal year 1996 claim documents have been imaged. All incoming claim documents have been imaged since February of 1997.

15. In 1999, the State Records Retention Committee approved MSF's optical imaging system as its primary means of records retention. Six months after that approval, MSF destroyed all of its paper files.

16. Optically imaged documents can be retrieved via the MSF computer system. Entire files are printed via a FileNet printer, which can print several claim files per night. Individual pages can be printed at any workstation at about eight pages per minute.

III. COMPUTER TRANSFERS, CODING AND SEARCHES

17. Prior to July 1, 1987 and until February of 1997, claim summary information was kept on DBO2, the mainframe. The DBO2 system was used to transfer claim information to the Department of Labor & Industry.

18. During the interval from 1982 to 1997, claims usually were coded as an injury or an occupational disease on the paper file and this information may have been inputted into the DBO2 system.

19. In February of 1997, the information on the DBO2 system was transferred to CMS, a system which integrates a database and imaging software and stores claim summary information. DBO2 and CMS do not interface. Much of the information that was compacted for transfer from DBO2 could not be disassembled in the CMS system.

20. In the CMS system, financial information is produced for the user in a template-based format. Unlike the DBO2 system, the CMS system serves as claims handling software and MSF uses it to assist in adjusting claims.

21. Some occupational disease claims may be erroneously coded as injuries – and some injury claims may be erroneously coded as occupational diseases – because the coding of a claim as an occupational disease is not necessary in order to adjust the claim as an occupational disease.

22. Improper coding of claims is more likely to be an issue on claims filed prior to February of 1997, when the DBO2 system was in place and the paper file was the primary working file.

23. After February of 1997, with the CMS system in place, the customer service person taking the initial report makes a preliminary assessment as to whether the claim is an injury or an occupational disease. Although the coding of the claim remains accessible to the adjuster as the claim is adjusted, some adjusters may not have corrected the initial coding decision.

24. Under both the DBO2 system and the CMS system, occupational disease claims may not be consistently coded as such, making a computerized "sort and search" function a useful, but not comprehensive, mechanism for identifying affected claims.

25. Although a single computer run will not locate all the occupational disease claims, they can be substantially identified by using complex computer queries to search the CMS system.

26. A computer run identified 2,939 claims that were coded as occupational diseases with a claim date arising on or after July 1, 1987. Of these 2,939 claims, 378 were coded as settled. MSF spent four hours formulating this particular query and spent eight hours running the query.

27. Another computer run identified 18 claims that had a status as an injury but had a benefit transaction (i.e. payment) coded as an occupational disease.

28. For the period of July 1, 1990 through June 30, 2002, the internal actuary identified 586 claims which were coded as injuries but the nature of the reported injury may be consistent with an occupational disease.

29. Because of improper coding errors, manually reviewing each of the 3,543 potential files may be the only reliable means of identifying affected claims.

30. A manual review process would be time-consuming and would be delayed by the task of obtaining and training additional resources to review and identify particular factors in the claim files.

IV. MISSING INFORMATION FROM THE CLAIM FILES

31. Many of the occupational disease files lack documentation of medical and vocational information which is necessary to perform an analysis under Montana Code Annotated § 39-71-703.

A. Impairment Ratings

32. Most of the claims arising before June 3, 1999 – the date of the decision in *Henry v. State Fund* (1999), 982 P.2d 456 – do not have impairment ratings on file. Some claims arising after *Henry* are missing impairment ratings because some claimants were able to return to work with the same employer and did not request any vocational rehabilitation benefits.

33. Obtaining impairment ratings in older claim files creates several problems.

34. Due to the number of potentially affected claimants, consistency in ratings would require the MSF to identify a pool of physicians who would be willing to assess a retroactive impairment rating by reviewing extensive medical records and older JAMA guides.

35. The presence of interim injury, disease, or the aging process impacts the level of impairment.

36. Physicians will be asked to look back in time and assess what an impairment would have been as of the date of maximum medical improvement.

37. Obtaining impairment ratings for out-of-state claimants may be difficult and may, in some cases, be impossible.

38. Adjusters have already recognized some additional problems inherent in the process of attempting to establish an impairment award years after a claimant has reached maximum medical improvement, including the following: (1) if a claimant is now out-of-state, but can only obtain a reliable impairment evaluation in Montana, who bears the cost of travel to Montana? (2) if a claimant disputes the impairment rating, can the claimant assert a claim for a higher impairment? (3) do the statutory provisions requiring the claimant to pay for a second impairment rating apply?

B. Work Restrictions

39. Much like impairment ratings, occupational disease files may not contain an indication of work restrictions (heavy, medium or light).

40. Obtaining accurate work restrictions after-the-fact may be difficult given the presence of subsequent injuries, occupational diseases and the natural aging process.

41. An assessment of the physical restrictions and vocational limitations requires analysis and documentation of the time-of-injury job requirements, which may not be in the file. In some instances, the time-of-injury job may no longer be available for evaluation.

C. Vocational Rehabilitation

42. Occupational disease files may also lack detailed vocational work-up. Some occupational disease files may contain targeted vocational work-up necessary to perform a *Coles* analysis.

43. Determining wage loss requires identified jobs. It will be difficult to accurately identify jobs that would have been available at the time the claimant reached maximum medical improvement.

44. Determining wage supplement benefits for claims arising from July 1, 1987 through June 30, 1991, requires knowledge of a claimant's job and earnings after returning to work. This information is not likely to be in the file.

V. COSTS AND BURDENS

45. Retroactively adjusting files to comply with *Stavenjord* imposes additional costs and burdens on MSF.

46. In reviewing some sample claims currently on MSF's imaged computer system, MSF's adjusters spent 0.5 to 4.0 hours identifying what information was needed to adjust a claim under *Stavenjord.*

47. Files that are stored on paper or microfiche, or a combination thereof, will require more time for adjuster review than the files which are currently on MSF's imaged computer system.

48. Once the review is complete, the adjuster would need to set-up the necessary medical and vocational appointments on many files, make decisions based on the results, and pay benefits.

A. Costs Associated with Additional Medical Information

49. For each file on which an impairment rating is requested, a complete medical record may need to be made available to the rating physician. This may require retrieval, printing and mailing of many files. The total time required per file is likely to be very significant.

50. Based on its experience, MSF believes that the in-state pool of physicians who would be able and willing to rate a retroactive impairment is likely to be small.

51. There may be a lengthy waiting period for the claimants to be rated.

52. The current fee schedule amount for a standard impairment rating performed by a treating physician is $132.34.

53. For claimants who have to be evaluated by somebody other than their treating physicians, or for impairment ratings performed by treating or non-treating physicians that are complex in some fashion, the ratings may cost as much as $850.

54. If the rating physician requests an FCE, an additional cost of $750 would be imposed on MSF.

55. Adjuster time in identifying an appropriate physician and scheduling an appointment would be approximately 1.0 hour per file, after an initial pool of physicians has been identified.

56. Identifying out-of-state physicians would probably be out-sourced to a provider such as Corvel or Crawford, with a resultant increase in time and expense.

57. Adjusters will need to spend time in receiving, reviewing and calculating benefits after an impairment rating is rendered, and the amount of time spent per file will depend on the complexity of the claim.

B. Costs Associated with Additional Vocational Information

58. Based on its experience, MSF believes that at current pricing, rehabilitation costs would be $300.00 for a time-of-injury job analysis (which might be hypothetical); $700.00 for a wage loss evaluation and determination of transferable skills, and $250.00 for each alternative job analysis. These charges do not reflect the time, hourly expense or travel for the vocational rehabilitation counselors.

59. Physician costs for reviewing each job analysis would be approximately $50.

60. Each item not currently available in a file could be the basis for dispute, and the potential for litigation is an issue that can impact the time and cost involved in adjusting a claim. Furthermore, MSF believes such claims will need to be mediated.

C. Miscellaneous Administrative Costs

61. Given MSF's experiences in *Murer* and *Broeker*, closed and inactive files frequently lack current addresses for the claimants.

62. Locating a claimant often requires several attempts, and each attempt requires a new search. It is anticipated that there will be older claims in which the claimant cannot be located.

63. Some claimants have died in the intervening years since claim closure which, as to those claims, compounds the problems discussed above in determining any benefits that may be due.

64. In *Murer*, MSF utilized Internet searches in an attempt to locate claimants whose contact information had changed. Although MSF's ultimate success was fairly good, simply locating a claimant could require several hours of searching.

D. Benefit Costs from *Murer*

65. At the time of the *Murer* decision and during almost all of the *Murer* implementation process, the State Fund was under a different organizational structure, one which was more conducive to accomplishing special projects. Even with a more flexible structure, completing the implementation process was a strain on the State Fund's business operations. This was so even though the *Murer* review was limited to a four year period, July 1, 1987 through June 30, 1991, and only involved the recalculation of the disability rate for those claimants at the maximum rate. Compared to *Murer*, a *Stavenjord* review process would involve a more complex review of each claim and cover a substantially longer period of time. The internal and external resources needed to accomplish a *Stavenjord* review, along with attended costs, would be considerably more than *Murer*.

a. Approximately 3,200 claimants were entitled to additional benefits, and the timeframe used for adjusting purposes was July 1, 1987 through June 30, 1991; and

b. Administrative expenses are presently unknown but the current benefit costs and fees total $2,180,955.16.

VI. FINANCIAL IMPACT OF PROSPECTIVE AND RETROACTIVE APPLICATION OF *STAVENJORD*

66. In addition to the costs and administrative efforts discussed above, the *Stavenjord* decision will have a cost impact on employers, policyholders and MSF.

67. Workers' compensation ratemaking is prospective, as insurance rates are developed prior to the transfer of risk.

68. In accordance with Montana Code Annotated § 39-71-2330, MSF sets rates in a fashion similar to private carriers and consistent with actuarial principles.

69. Actuarial principles for determining property casualty insurance (inclusive of workers' compensation) establish this prospective approach for workers' compensation. *See* Statement of Principles Regarding Property and Casualty Insurance Ratemaking, attached as Ex. "A" and located at <http://www.casact.org/standards/princip/sppcrate.pdf>.

70. The ratemaking decisions prior to *Stavenjord* only took into consideration the benefits provided under the ODA on a prospective basis.

71. NCCI, which is a non-profit rating, statistical and data management service, has estimated that the prospective costs associated with *Stavenjord* will result in a 1.1% rate increase for the period beginning July 1, 2003. An explanation of the role of NCCI is attached as Ex. "B" and located at <http://www.ncci.com>. A report from NCCI confirming that the prospective application of *Stavenjord* will result in a 1.1% rate increase is attached as Ex. "C."

72. Ratemaking in the years prior to *Stavenjord* did not take into consideration the potential increase in permanent partial benefits now due to employees with occupational diseases if *Stavenjord* is applied retroactively.

73. MSF has estimated the cost of benefits associated with a retroactive application of *Stavenjord*. For claims arising between July 1, 1990 and May 22, 2001, the increase in benefit costs are estimated at $14 to $19 million. A memo explaining the estimated costs associated with a retroactive application of *Stavenjord* is attached as Ex. "D."

74. For claims arising between July 1, 1987 and June 30, 1990, the Old Fund will be impacted by an estimated $5 to $7 million if *Stavenjord* is applied retroactively.

75. The financial impact to MSF will be paid out of surplus funds because the costs of retroactive application were not included in the rates for prior years.

A. Depletion of Surplus Funds

76. Dividends may be declared when surplus is at an adequate level. Dividends are paid to policyholders who produced favorable results and they provide policyholders with incentives to provide a safe workplace for employees and to return injured workers to employment as soon as possible. Dividends are based on past performance and have no relationship to the forces driving future pricing.

77. In fiscal year 2001, MSF returned $4,995,259 in dividends to select policyholders. In fiscal year 2002, MSF returned $4,001,224 in dividends to select policyholders. In fiscal year 2003, MSF returned $2,949,597 in dividends to select policyholders.

78. In fiscal year 2001, MSF increased its rates by 0.0%. In fiscal year 2002, MSF increased its rates by 2.7%. In fiscal year 2003, MSF increased its rates by 2.8%. For fiscal year 2004, MSF increased rates by 11.6%.

79. Surplus is not excess, unnecessary funds. Surplus is the amount of money available, over and above liabilities, for an insurer to meet future obligations to its policyholders. MSF is required to maintain a surplus to ensure financial solvency. MSF's current surplus at the end of fiscal year 2003 was $121.6 million.

80. Ultimately, surplus is intended to assure that MSF will be able to fulfill its obligations to policyholders and injured employees.

81. A strong surplus, along with adequate loss reserves, protects injured employees, policyholders, and allows MSF to continue to operate as a strong and viable insurance carrier.

82. The amount of surplus that an insurance company needs is based on sound industry standards and conservative accounting practices.

83. MSF's long-range target is to have a reserve-to-surplus ratio of 1.5-2.0 to 1. The higher the ratio, the less adequate the reserve. For 2003, the reserve-to-surplus ratio was 3.4 to 1. For 2002, the reserve-to-surplus ratio was 2.19 to 1. MSF's lowest reserve-to-surplus ratio has been 2.18 to 1.

84. Workers' compensation insurance differs from virtually all other insurance in that it is open-ended and does not have a set policy limit.

85. For a workers' compensation carrier like MSF, there are several characteristics that have the potential for a greater volatility of results and require a stronger than average surplus to address these issues, including the following:

Extremely long-term obligations associated with claims;

MSF writes only one type of insurance in one state;

Courts are constantly changing the workers' compensation laws and benefits, making it difficult for MSF to accurately set premiums;

MSF provides the guaranteed market; and

Unlike a stockholder-owned insurance company, MSF cannot access additional capital to cover adverse financial results.

86. The insolvency of the Old Fund in the 1980s was the result of inadequate pricing and reserves. During that time, many private sector insurers left Montana.

87. MSF's surplus levels would be impaired as a result of the estimated $14 to $19 million in overall retroactivity benefit costs for the Montana State Fund. A memo discussing the depletion in surplus and the rate increase that would result if *Stavenjord* applied retroactively is attached as Ex. "E." The Old Fund financial condition would be impaired as a result of the estimated $5 to $7 million in retroactivity benefit costs, resulting in an unfunded liability. Any excess funds beyond those estimated as needed for future benefits remaining to be paid and administration of the claims, are to be transferred to the General Fund. Should the Old Fund not be adequately funded in the future, any amount necessary to pay claims must be transferred from the State of Montana General Fund to the Old Fund. An article addressing the Old Fund's current financial condition and the interplay between the Old Fund and the General Fund is attached hereto as Ex. "F." A Loss and LAE Reserve Report dated September 23, 2003, which addresses the assets and liabilities of the Old Fund, is attached hereto as Ex. "G."

88. Some of the primary factors driving workers' compensation costs upward include higher medical costs, legislative increases in benefits, impact of Supreme Court

decisions, and declining income from investments. MSF's experience indicates that the insurance market is cyclical in nature, and Montana's workers' compensation costs are currently 33% lower than they were in 1995.

89. At the request of the Employment Relations Division ("ERD") of the Montana Department of Labor & Industry, the Insurance Services Offices, Inc. ("ISO") prepared an estimate of the cost impact of *Stavenjord* and *Schmill*. A copy of the ISO report is attached hereto as Ex. "H." The ISO estimate is approximately one-third of the NCCI estimate and one-fourth of the MSF internal estimate. In arriving at its cost impact estimate, the ISO relied on data obtained from the ERD database, and its analysis is confined to claim records coded as OD/PPD claims. A large portion of the ERD database consists of claims from MSF.

90. It is MSF's position that there are two major problems with MSF's claims records in the ERD database, either of which would cause the ISO to understate its cost impact estimate: (1) many of MSF's OD claims were not coded as such by adjusters, especially on pre-1997 claims; and (2) many OD claims with impairment awards were coded as TTD claims because the PPD designation was thought to apply only to impairment awards under the Workers' Compensation Act. To the extent ISO relied on incomplete data, it calls into question ISO's conclusions which relied on that data. Errors in data are such that it would lead to an underestimation of liability.

RESPECTFULLY SUBMITTED this 11 day of February, 2004.

David Hawkins, Esq.
Montana State Fund
P. O. Box 4759
Helena, MT 59604-4759
Telephone: (406) 444-6500
Telefax: (406) 444-6555

Garlington, Lohn & Robinson, PLLP
199 West Pine • P.O. Box 7909
Missoula, MT 59807-7909
Telephone: (406) 523-2500
Telefax: (406) 523-2595
Attorneys for the Respondent/Insurer

By _____
Bradley J. Luck

RESPECTFULLY SUBMITTED this 12 day of February, 2004.

Murphy Law Firm
P.O. Box 3226
Great Falls, MT 59403-3226
Attorneys for Petitioner

By Thomas J. Murphy
Thomas J. Murphy