IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 25

WCC No. 2001-0365

THOMAS R. BROEKER

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

GREAT FALLS COCA-COLA BOTTLING COMPANY

Employer.

ORDER DENYING MOTION TO QUASH LIEN

Summary: In the second of two cases the claimant seeks additional benefits based on an allegation that the insurer (State Fund) improperly included auxiliary social security disability benefits in computing the social security offset, thereby incorrectly reducing his workers' compensation benefits. In the first case he sought additional benefits based on the improper inclusion of cost-of-living adjustments in the social security rate used in determining the offset. Following the filing of his current action, he gave notice of an attorney lien under the common fund doctrine adopted in *Murer v. State Compensation Mutual Ins. Fund,* 283 Mont. 210, 942 P.2d 69 (1997), thus indicating the intent of his attorneys to seek fees with respect to any claimants who may receive additional benefits as a result of the precedent established in this case. The insurer moved to quash the notice of lien, arguing principally that attorney fees were excluded by a settlement agreement reached in the prior case brought by claimant.

Held: The prior agreement does not bar fees in the present case. The contract settles only matters arising out of the first action and has no application to other claims, including this one. The fact that a class has not yet been established to which the lien might apply is not grounds for striking the lien when a "potential" class has been identified.

Topics:

Settlements: Construing. Since a settlement agreement is a contract, the agreement is to be interpreted in accordance with rules governing interpretation of contracts.

Settlements: Construing. The initial rules governing the interpretation of contracts are similar to those applicable to statutory interpretation. As with statutes, if a contract is clear and unambiguous, it must be interpreted and applied as written.

Settlements: Construing. Where the terms of a settlement agreement expressly encompass only the issues involved in a case in litigation, the settlement applies only to those issues.

Attorney Fees: Common Fund. Where the precedent in a case arguably may establish an entitlement to additional benefits by other similarly situated claimants, a notice of attorney fees lien with regard to similarly situated claimants will not be quashed even though the litigation is in its early stages and a class of beneficiaries or entitlement has not yet been established. The purpose of the lien notice is to *preserv*e the right to attorney fees should other claimants become entitled to additional benefits as a result of the current litigation.

Attorney Fees: Lien. Where the precedent in a case arguably may establish an entitlement to additional benefits by other similarly situated claimants, a notice of attorney fees lien with regard to similarly situated claimants will not be quashed even though the litigation is in its early stages and a class of beneficiaries or entitlement has not yet been established. The purpose of the lien notice is to *preserv*e the right to attorney fees should other claimants become entitled to additional benefits as a result of the current litigation.

¶1 This is the second of two cases brought by Thomas R. Broeker (Broeker) alleging miscalculation of the social security offset taken by the State Compensation Insurance Fund. The offset is provided by law and is tied to social security disability benefits the claimant receives as a result of his workers' compensation injury. In general, the workers' compensation insurer is entitled to offset one-half of the claimant's social security disability benefits against workers' compensation benefits which would otherwise be due the claimant. § 39-71-701 and -702, MCA.

¶2 Broeker's first petition concerned the inclusion of social security cost-of-living adjustments (COLAs) when computing the offset and resulted in a decision that the COLAs cannot be included. *Broeker v. State Compensation Insurance Fund,* Decision and Judgment (March 6, 1995, corrected decision on March 25, 1995); aff'd 275 Mont. 502, 914 P.2d 967 (1996) (*Broeker I*). Following remand from the Supreme Court, further proceedings were held concerning other similarly situated claimants who may be entitled to additional benefits because COLAs had been included in computing their offsets. During those

proceedings, the parties entered into a settlement agreement which was approved by the Court. The agreement provided for the identification and payment of those other claimants and also provided for payment of attorney fees. The agreement was executed January 31, 2001.

¶3 The second petition, filed July 5, 2001, alleges that in computing Broeker's social security offset the State Fund improperly included auxiliary benefits for his children even after he was no longer receiving those benefits. Auxiliary benefits ordinarily terminate upon the child's reaching age 18 unless the child is still in school. Apparently, the Social Security Administration does not automatically give the State Fund notice of the termination of auxiliary benefits and no procedures were in effect to verify continuation of auxiliary benefits after age 18.

¶4 In prior discussions among counsel and the Court, it was apparent that there **may** be other instances where the State Fund has not received notice of termination of auxiliary benefits. During a status conference on January 23, 2002, it was agreed that in connection with its current efforts to identify claimants entitled to *Broeker I* benefits the State Fund would also determine what steps could be taken to identify claimants whose offsets included auxiliary benefits which they did not receive. As of the conference held with counsel on April 30, 2002, 184 claimants receiving auxiliary benefits had been identified for further screening

¶5 On January 25, 2002, Broeker's attorneys gave the State Fund notice of an attorney lien against any benefits found payable to other claimants on account of the auxiliary benefits issue. The lien is predicated upon the common fund doctrine established in *Murer v. State Compensation Mutual Ins. Fund,* 283 Mont. 210, 942 P.2d 69 (1997).

¶6 Thereafter, on March 15, 2002, the State Fund filed a motion to quash the lien. In its supporting brief, the State Fund argues, among other things, that any claim for attorney fees is barred by the parties' January 31, 2001 settlement agreement. The motion was fully briefed and thereafter discussed with counsel in an April 30, 2002 conference.

Discussion

¶7 The initial issue raised by the State Fund's motion is whether the January 31, 2001 settlement agreement in *Broeker I* (*Broeker I* Agreement) precludes the attorney fee claim tendered in the present case. A settlement agreement is a contract. *Roper v. Caterpillar Tractor Co.,* 98 Mont. 76, 37 P.2d 812, 817 (1934). Therefore, resolution of the issue turns on the terms of the agreement.

¶8 The initial rules governing interpretation of contracts are similar to those governing statutory interpretation. As with a statute, a contract must be construed as written. "Where the language of an agreement is clear and unambiguous, the duty of the court is to apply the language as written." *Van Hook v. Jennings,* 1999 MT 198, ¶ 5, 295 Mont. 409, 412, 983

P.2d 995 (1999). In reviewing the January 31, 2001 settlement agreement, I find it is clear and unambiguous. Nothing in the contract precludes the potential claim for attorney fees in this case.

¶9 The *Broeker I* agreement provides for payment of attorney fees in sections 4 and 6. Section 4 provides for common fund doctrine attorney fees to be paid with respect to *Broeker* benefits payable between April 19, 1985 through July 5, 1996 and with respect to *Broeker* benefits, whenever payable, for claimants injured between April 19, 1985 and July 5, 1996. This Court subsequently fixed the amount of the fee at 25% of the *Broeker* benefits. Under section 6, the State Fund paid Broeker's attorneys an additional $120,000.

¶10 State Fund argues that the *Broeker I* agreement precludes Broeker's attorneys from claiming any fees in this case. It relies on release language contained in section 11 of the *Broeker I* Agreement. That language is as follows:

> This settlement shall be submitted to the Workers' Compensation Court for consideration and approval. Upon the approval of this settlement by the Workers' Compensation Court, all claims between the parties based on the adjustment or handling of this matter, including any collateral claims and other claims or issues that could have been raised before the Workers' Compensation Court or any other court of competent jurisdiction including but not limited to claims under §§ 33-18-201 and 242, MCA, and any other Montana statute or regulations and all claims for fraud, misrepresentation, breach of the covenant of good faith and fair dealing and any other common law claim in favor of any party shall be fully and finally settled and resolved with prejudice.
>
> Upon approval of this settlement and entry of the Consent Judgment all benefit entitlement and other issues raised in or arising as a result of the *Broeker* case and decision will be considered fully and finally settled upon their merits.

(Exhibit A to Petitioner's Brief in Opposition to Insurer's Motion to Quash Attorneys' Lien at 7-8.) In particular it argues that the provision bars any further claim for attorney fees because the auxiliary benefits issue "could have been raised" in the prior proceeding. The language cited by the State Fund does not support its position.

¶11 Initially, the first paragraph of section 11 refers to "claims . . . based on the adjustment or handling of **this** matter." [Emphasis added.] "**This** matter" is the COLA matter raised in *Broeker I*; no other interpretation is possible. A full reading of the agreement, which is attached to this decision, demonstrates that it addresses the claims of *Broeker I*. The recitals of the agreement specifically state that the purpose of the agreement is to settle issues concerning identification and payment of the *Broeker* (COLA) benefits which were the subject of *Broeker I*. The recitals provide:

> A. An action was commenced and maintained in the Montana Workers' Compensation Court by Strause and Anderson entitled *Broeker v. State Compensation Mutual Insurance Fund,* Cause No. 9211-6631R1. The legal issues in the matter were ultimately decided by the Montana Supreme Court in *Broeker v. State Compensation Mutual Insurance Fund,* 275 Mont. 502, 914 P.2d 967 (1996);
>
> B. As a result of the *Broeker* decision other workers' compensation claimants situated similarly with Mr. Broeker may have become entitled to additional biweekly benefits (*Broeker* benefits). A process was undertaken by the parties hereto to identify the State Fund claimants possibly entitled to *Broeker* benefits and to calculate potential past due compensation;
>
> C. Several issues have arisen in relation to the entitlement for and calculation of *Broeker* benefits. The parties have reached an agreement in relation thereto which they believe addresses such issues. The purpose of the Settlement Agreement is to set forth the terms and conditions under which the State Fund will identify and pay *Broeker* benefits.

(Exhibit C to Brief in Support of Motion to Quash Attorneys' Lien at 1.) I therefore conclude that the first paragraph of section 11 applies only to the COLA matter raised and resolved in *Broeker I* and does not apply to the auxiliary benefits issue raised in the present case.

¶12 Moreover, the language in the first paragraph of section 11 is limited to "claims . . . based on adjustment or handling." The language "including any collateral and other claims or issues that could have been raised" merely elaborates the sort of adjustment and handling claims that are encompassed. While the provision might include an attorney fee claim against the State Fund arising from its adjustment or handling, it does not encompass a claim for common fund doctrine fees from claimants.

¶13 Finally, even if the language were broad enough to encompass other matters involving the offset, the claim in this case arose in 1998, after the merits of Broeker I had been fully litigated. The only issue remaining following the 1996 remand by the Supreme Court was the application of the *Broeker I* decision to other similarly situated claimants. The auxiliary benefits claim therefore could not have been pursued in the prior action.

¶14 The second paragraph of section 11 also does not support the State Fund's argument. The paragraph provides that "all benefits entitlement and other issues raised in or arising as a result of the Broeker case" are settled and closed. The "*Broeker* case" referred to is *Broeker I*; this case had not even been filed when the settlement was executed. The auxiliary benefits issue was not "raised" in *Broeker I* and it does not arise "as a result of" *Broeker I*. While some claimants identified in connection with Broeker I may also have some entitlement on account of an offset of auxiliary benefits, that entitlement is a distinct issue wholly unrelated to the COLA issue. The fact that such claimants may be a subset of

the claimants identified in connection with *Broeker I* is coincidental. Indeed, claimants with no COLAs in their offset rate could be entitled to refunds because offsets were taken for auxiliary benefits after auxiliary benefits stopped.

¶15 The State Fund also argues that permitting recovery of common fund fees from claimants who might receive benefits as a result of the present action would result in double recovery of attorney fees. Its fear is unfounded. The fees provided in *Broeker I* apply only to the additional benefits payable on account of the COLA issue; they have no application to any benefits that may result from backing out auxiliary benefits.

¶16 The State Fund next argues that there is no basis for a lien because no class has been established. The purpose of the lien notice, however, is to *preserv*e the right to attorney fees should other claimants become entitled to additional benefits as a result of the current litigation. I think it is safe to say that the State Fund, as well as myself, are on notice that auxiliary benefits may have been offset in some cases even after the claimants were no longer receiving them. No blame at this point is, or can be, assigned should that be the case.

¶17 Finally, the State Fund argues that the lien will create a logjam in the payment of *Broeker I* benefits. That contention was discussed during the Court's April 30, 2002 conference with counsel and State Fund representatives and I think we all now agree that the *Broeker I* payment process can and should proceed. With respect to files that may involve auxiliary benefits, any *Broeker I* benefits should be paid. Cris McCoy, the adjuster in charge of *Broeker* reviews, has established a procedure for further review of those files which involve auxiliary benefits. She will be contacting the Social Security Administration to ascertain the dates auxiliary benefits were paid in those cases so that she can determine if any auxiliary offsets were incorrectly taken.

¶18 The numbers of claimants involved and the magnitude of additional benefits that may be due as a result of backing out auxiliary benefits can only be ascertained by proceeding with the process already in place. Nothing said herein should be construed as indicating that there is an entitlement to attorney fees either with respect to individual claimants or against the State Fund. Meanwhile, the attorney lien will stand. If and when we identify claimants entitled to further benefits, we can establish a formula for payment that will take the lien into consideration.

¶19 Finally, I appreciate the cooperation of the parties, their attorneys, the claims adjusters, and computer experts in both this case and *Broeker I*. Their working together to resolve issues, identify claimants entitled to benefits, and get the claimants their benefits is a paradigm for the handling of cases of this sort. The tasks required in these cases will be completed earlier, more efficiently, and with far less acrimony than the standard litigation model for class actions.

ORDER

¶20 The motion to quash the notice of lien is **denied**.

DATED in Helena, Montana, this 3rd day of May, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Lawrence A. Anderson
Mr. William O. Bronson
Mr. Thomas E. Martello
Attachment: Settlement Agreement
Submitted: April 30, 2002

SETTLEMENT AGREEMENT

This Settlement Agreement, made and entered into this ,31st day of January, 2001, by and between the State Compensation Insurance Fund ("State Fund") and Howard F. Strause and Lawrence A. Anderson (" Strause and Anderson"):

RECITALS

A. An action was commenced and maintained in the Montana Workers' Compensation Court by Strause and Anderson entitled *Broeker v. State Compensation Mutual Insurance Fund,* Cause No. 9211-663IRI. The legal issues in the matter were ultimately decided by the Montana Supreme Court in *Broeker v. State Compensation Mutual Insurance Fund,* 275 Mont. 502, 914 P.2d 967 (1996);

B. As a result of the *Broeker* decision other workers' compensation claimants situated similarly with Mr. Broeker may have become entitled to additional biweekly benefits *(Broeker* benefits). A process was undertaken by the parties hereto to identify the State Fund claimants possibly entitled to *Broeker* benefits and to calculate potential past due compensation;

C. Several issues have arisen in relation to the entitlement for and calculation of *Broeker* benefits. The parties have reached an agreement in relation thereto which they believe addresses such issues. The purpose of this Settlement Agreement is to set forth the terms and conditions under which the State Fund will identify and pay *Broeker* benefits.

NOW THEREFORE, in consideration of the mutual promises contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby expressly acknowledged, the parties agree as follows:

1. <u>Handling of Claims Arising Between July 1, 1974 and June 30, 1982.</u>

The potential entitlement for *Broeker* benefits for State Fund claimants injured between July 1, 1974 and June 30, 1982, shall be considered as follows: The State Fund shall publish and pay for a notice in the major newspapers primarily serving Kalispell, Missoula, Helena, Butte, Bozeman, Great Falls and Billings on three consecutive Sundays. The notice size will be at least two columns wide and five inches high. The notice will not be in the legal section and, subject to the advertising standards of each newspaper, will be on page locations approved by Strause and Anderson.

The published notice will be directed to injured workers with injury dates between July 1, 1974 and June 30, 1982, who received workers' compensation total disability benefits through the State Fund while also receiving Social Security disability benefits as a result of their injuries who have not settled their claims. The notice will instruct such individuals to submit a request for *Broeker* benefits in writing to the State Fund along with proper documentation. Proper documentation shall include the workers' compensation claim number and written verification from the Social Security Administration of receipt of Social Security benefits.

The form and content of the newspaper notice shall be approved by the parties and the Workers' Compensation Court. A copy of the notice is attached hereto as Exhibit 1.

A claim for *Broeker* benefits will only be considered by the State Fund if it is received within 120 days of the last publication of the notice, is in writing and is accompanied by the claim number and the required written verification of the receipt of Social Security benefits. A failure of a claimant to meet any of the noted requirements within the time specified will result in the claim not being reviewed for entitlement to *Broeker* benefits and a forfeiture of such entitlement. Phone calls will not be considered as proper claims or in lieu of the above procedure and filing requirements.

Claims made as required in this paragraph shall be reviewed by the State Fund and any *Broeker* benefits due shall be paid in the manner directed herein.

2. Handling of Claims Arising Between July 1,1982 and February 2. 1997.

The potential entitlement for Broeker benefits for State Fund claimants injured between July 1, 1982 and February 2, 1997, shall be considered as follows: Claims with potential entitlement to *Broeker* benefits during such period have been identified on a computer run (with approximately 6,667 claimants identified). All individuals listed on the computer run will be sent a letter at the address identified on the computer run advising each claimant of a potential entitlement to *Broeker* benefits and advising of the need to submit proper documentation within 120 days of the date of the letter for consideration of actual entitlement to such benefits. Proper documentation shall include a written request for

review accompanied by the State Fund claim number (or, in the alternative, the claimant's Social Security number) and written verification from the Social Security Administration of the receipt of Social Security benefits. Claimants will be advised that settled claims are closed and will not be considered for *Broeker* benefits.

Letters that are returned as undeliverable to the State Fund will not require follow up by it. Such letters will be provided by State Fund to Strause and Anderson within fourteen (14) days who may, at their own expense, attempt to identify current addresses and notify potential claimants.

No claim for *Broeker* benefits will be accepted more than 120 days after the mailing of the required notice. Claims without all of the proper documentation specified will not be processed.

Timely written claims accompanied by the proper documentation will be reviewed and any *Broeker* benefits due shall be paid in the manner directed herein.

The form and content of the letters required hereby shall be approved by the parties and the Workers' Compensation Court. A copy of the letter approved by the parties is attached as Exhibit 2.

3. Claims Identified on the CMS System.

All claims on the State Fund's CMS system on the date of this Agreement that have a completed Social Security screen will be reviewed to determine eligibility for *Broeker* benefits. Any other CMS claims (claims open and active on February 3, 1997 or thereafter, approximately 422 claims) identified in the review\process which might have an entitlement to Broekerbenefits will be reviewed. The State Fund will make reasonable efforts to identify claimants who may have an entitlement to *Broeker* benefits.

All claims with an entitlement to Broekerbenefits shall be paid in the manner directed herein.

4. Payment of *Broeker* Benefits and Attorneys' Fees.

Payment of Broeker benefits on claims with injury dates on or after July 1, 1974, that were open and active (i.e., in which total disability benefits were being paid with a Social Security offset) between July 1, 1974 and April 18, 1985, will be paid to the claimants at 100% (i.e., full *Broeker* entitlement with no reduction for common fund attorneys' fees) for that time period only. Benefits paid for the period April 19, 1985 through July 5, 1996, on such claims, will be paid to the claimants at a percentage of total benefits, with common fund attorneys' fees paid to Strause and Anderson out of the claimant's entitlement.

Claimants with dates of injury between April 19, 1985 through July 5, 1996, will be paid

their *Broeker* benefits at a percentage of the total benefits, with common fund attorneys' fees paid to Strause and Anderson out of their entitlement.

Other claimants who were paid total disability benefits with a social security offset during the period from April 19, 1985 through July 5, 1996, will be paid their *Broeker* benefits at a percentage of the total benefits, with common fund attorneys' fees paid to Strause and Anderson out of their entitlement.

All claims, regardless of the date of injury, with an entitlement to *Broeker* benefits during the peroid on or after July 6,1996, will be paid at 100% (i.e., full *Broeker* entitlement paid to the claimant with no reduction for common fund attorneys' fees). (For example, a 1987 claim open in 1996 will receive *Broeker* benefits subject to a reduction for common fund fees from 1987 through July 5, 1996, and full benefits, not reduced for common f fund fees, thereafter.)

The Workers' Compensation Court will set the percentage attorneys' fee for those periods in which a common fund fee is paid. The State Fund Will not object to a contingency fee of 25% or less.

5. Settlements.

All settlements approved by the Department of Labor or the Workers' Compensation Court, and all settlements approved as stipulated judgments in the Workers' Compensation Court will remain closed and are not subject to any review for or entitlement to *Broeker* benefits. Letters required by Paragraph 2 hereof will not be sent to claimants on claims known to have been settled.

6. Additional Attorneys' Fees.

The State Fund will pay Strause and Anderson an additional attorneys' fee of $120,000, upon the approval of this agreement. The payment under this paragraph is in addition to common fund fees approved by the Workers' Compensation Court consistent with this agreement.

7. Deceased Claimants.

Claimants who died prior to April 5, 1996, will not be entitled to *Broeker* benefits. Claimants who died on or after April 6, 1996, will have their claims reviewed for a possible entitlement to *Broeker* benefits if a written claim providing the proper documentation set forth in Paragraphs I and 2 is timely presented (within 120 days of the publishing of notice under Paragraph I or within 120 days of the mailing of the written notice under Paragraph 2) by an acting and duly appointed Personal Representative.

8. Overpayments.

If an entitlement to *Broeker* benefits is identified on a claim in which a benefit overpayment exists, the State Fund may reduce the overpayment by taking credit for the *Broeker* benefits. However, common fund fees, if due on the claim, will be paid to Strause and Anderson before any credit is calculated.

9. Waiver of Defenses.

Upon approval of this agreement by the Court, State Fund agrees to drop all defenses to this action such as statute of limitations, latches, estoppel and waiver. State Fund will waive the defense that post July 1, 1987 claims are not subject to the *Broeker* decision and thus do not have an entitlement.

10. Court Action.

This document will be presented to the Workers' Compensation Court for its approval. Upon approval, the Workers' Compensation Court shall enter a consent judgment incorporating the terms of this agreement. However, the Court shall retain jurisdiction in the action to implement and oversee this settlement. The parties shall execute such other documents as are necessary to give full effect to the terms, conditions and spirit of this settlement.

Common fund attorneys' fees shall be awarded by the Court subject to a procedure adopted by it. The parties hereto shall cooperate in the process of considering and awarding common fund fees. The State Fund will not object to a common fund contingency fee of 25% or less.

11. Scope of Release.

This settlement shall be submitted to the Workers' Compensation Court for consideration and approval. Upon the approval of this settlement by the Workers' Compensation Court, all claims between the parties based on the adjustment or handling of this matter, including any collateral claims and other claims or issues that could have been raised before the Workers' Compensation Court or any other court of competent j jurisdiction including but not limited to claims under §§ 33-18-201 and 242, MCA, and any other Montana statute or regulations and all claims for fraud, misrepresentation, breach of the covenant of good faith and fair dealing and any other common law claim in favor of any party shall be fully and finally settled and resolved with prejudice.

Upon approval of this settlement and entry of the Consent Judgment all benefit entitlement and other issues raised in or arising as a result of the *Broeker* case and decision will be considered fully and finally settled upon their merits.

12. Further Actions.

The State Fund will cooperate in the establishment of reasonable deadlines, with Court involvement, for the completion of identification, review of claims, and payment of claims with a possible entitlement to *Broeker* benefits. Reasonable deadlines will take into consideration logistical issues relating to computer programming, file retrieval, file review and man power.

DATED this 31st day of January, 2001.

STATE COMPENSATION MUTUAL INSURANCE FUND
By \s\ Nancy Butler

Approved by:

STATE COMPENSATION INSURANCE FUND
5 South Last Chance Gulch
Helena, MT 59601

By \s\ Tom Martello
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By \s\ Howard F. Strause