

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 14

WCC No. 9206-6487

JACK MURER, et al.

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer.

ORDER AWARDING ATTORNEY FEES

Summary: In *Murer v. State Compensation Ins. Fund*, 942 P.2d 69 (1997), the Supreme Court held that the petitioners' attorney was entitled to attorneys' fees from benefits obtained for non-party claimants under the common fund doctrine. The issue on remand involved what is the appropriate amount of fees.

Held: After providing notice to potential non-party claimants, holding a hearing taking input from such individuals, and hearing testimony from claimant's counsel, Court approves agreement that counsel will receive 15% of any benefits which may be paid as a result of this litigation.

Topics:

Attorneys Fees: Lien. In *Murer v. State Fund*, 942 P.2d 69 (1997), the Supreme Court held that the petitioners' attorney was entitled to attorneys' fees from benefits obtained for non-party claimants under the common fund doctrine. On remand, the WCC was required to determine the appropriate amount of fees. After providing notice to potential non-party claimants, holding a hearing taking input from such individuals, and hearing testimony from claimant's counsel, Court approves agreement that counsel will receive 15% of any benefits which may be paid as a result of this litigation.

¶1 This matter is on remand from the Supreme Court for a determination of the amount of attorney fees due the petitioning claimants' attorney, Mr. Allan M. McGarvey. In *Murer v. State Compensation Mut. Ins. Fund*, 942 P.2d 69 (Mont. 1997), the Supreme Court held that under the *common fund* doctrine the petitioners' attorney is entitled to attorney fees with

respect to benefits other claimants may receive as a result of the precedent established in this action.

¶12 Following the decision of the Supreme Court, the petitioning claimants, the respondent, and intervening claimants entered into an agreement providing that the attorney for the petitioning claimants is entitled to 15% of any benefits which may be paid as a result of this litigation. The parties requested Court approval of the agreement.

¶13 Under the Court's supervision, notice of the proposed fee was mailed to approximately 8,000 claimants who may be entitled to *Murer* benefits. Approximately 2,000 of the mailings were returned as undeliverable.

¶14 The notice invited *Murer* beneficiaries to state whether they supported or opposed the proposed attorney fee. The claimants were provided with an opportunity to reply by mail or in person at a hearing scheduled for February 17, 1998, in Helena, Montana.

¶15 The Court received 58 written responses. An overwhelming number of those responses supported the proposed 15% fee.

¶16 At the hearing held on February 17, 1998, approximately 22 persons were present in addition to the attorneys and Court staff. All were invited to comment on the proposed attorney fees. Fourteen individuals did comment. All supported the 15% attorney fee.

¶17 In addition to the public attending, the following persons were present:

Mr. Allan M. McGarvey, attorney for the Murer claimants.

Mr. James H. Goetz, attorney for Mr. McGarvey.

Mr. Bradley J. Luck, attorney for the State Compensation Insurance Fund.

Mr. Thomas E. Martello, attorney for the State Compensation Insurance Fund.

¶18 Mr. McGarvey testified as to his efforts on behalf of the claimants.

* * * * *

¶19 Having considered the testimony of Mr. McGarvey, the written and oral comments of claimants, and the record on file with the Court, I make the following:

FINDINGS OF FACT

¶10 This action was commenced as a class action. Although the class was never certified, it was clear that non-party claimants would receive the benefits of a favorable ruling in this case.

¶11 In fact, there was a favorable ruling in this case. That ruling entitles many claimants who were injured between July 1, 1987 and June 30, 1991, to additional benefits.

¶12 The amount of additional benefits at issue with respect to the individual claimants in this case was small and did not justify the time and effort expended by the petitioning claimants' attorneys.

¶13 The petitioning claimants' attorneys have spent an extraordinary amount of time and effort in prosecuting this action. Since the filing of the petition in 1992, this case has been to the Supreme Court three times. Each time, the claimants have prevailed on appeal.

¶14 Many of the issues presented in the case are complex.

¶15 The claimants' attorneys are still involved in proceedings to determine which claimants injured between July 1, 1987 and June 30, 1991, are entitled to additional benefits under the precedent established in this case. The Court is overseeing those proceedings. The proceedings present numerous issues, many of which are complex and which have no easy answers. Several time consuming conferences have been held between the Court and counsel in an attempt, which has largely been successful, to iron out remaining issues.

¶16 The attorney for the petitioning claimants has been a relentless advocate for non-party claimants who may be entitled to additional benefits as a result of the decision in this case.

¶17 The attorney fee agreement between the petitioning claimants and their attorney provide that the attorney recover 25% of any monetary recovery if the case goes to the Supreme Court, which it did.

¶18 The petitioning claimants' attorney initially asserted a 20% lien on any amount determined payable as a result of this action. However, the attorney agreed to accept a 15% fee, if approved by the Court.

¶19 All claimants subject to the 15% fee have benefitted from Mr. McGarvey's vigorous and competent representation in this case. The responses the Court has received from claimants, both in writing and at the hearing, indicate that they are aware of the benefits they may receive from his efforts; importantly, the responses indicate that they appreciate his efforts and overwhelmingly agree that he should receive 15% of any benefits they may receive as a result of his efforts in this case.

¶20 Mr. McGarvey's testimony concerning typical percentages awarded in other common fund doctrine cases established that the 15% requested in this case is reasonable.

CONCLUSIONS OF LAW

¶21 The Supreme Court has previously determined that the petitioning claimants' attorney is entitled to attorney fees with respect to all additional benefits that are payable as a result of the Court's decision in *Murer v. State Compensation Mut. Ins. Fund*, 267 Mont. 516, 885 P.2d 428 (1994). The only issue on remand is the amount to which he is entitled.

¶22 The Court is persuaded that a 15% contingent fee on all benefits payable as a result of *Murer v. State Compensation Mut. Ins. Fund*, 267 Mont. 516, 885 P.2d 428 (1994), is reasonable.

JUDGMENT

¶23 Petitioning claimants' attorney, Mr. Allan M. McGarvey, is entitled to and shall be paid 15% from all additional benefits which are payable to claimants as a result of the decision in *Murer v. State Compensation Mut. Ins. Fund*, 267 Mont. 516, 885 P.2d 428 (1994), and *Murer v. State Compensation Mut. Ins. Fund*, 942 P.2d 69 (Mont. 1997).

DATED in Helena, Montana, this 2nd day of March, 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Allan M. McGarvey

Mr. James H. Goetz

Mr. Bradley J. Luck

Mr. Thomas E. Martello

Submitted: February 17, 1998