

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 97

WCC No. 9206-6487

JACK MURER, et al.

Petitioner

vs.

MONTANA STATE COMPENSATION INSURANCE FUND, et al.

Defendants

BEVERLY HARDY, et al

Intervenors.

FINAL DECISION AND JUDGMENT

REVERSED IN PART, AFFIRMED IN PART

Murer v. State Compensation Ins. Fund, 283 Mont. 210, 942 P.2d 69 (1997)
([No. 95-542](#))

Summary: Claimants receiving benefits challenged insurer's interpretation of 1987 and 1989 statutes placing cap on benefits. Claimants who settled their claims during pendency of litigation argued that settlement did not bar receipt of additional benefits. Claimants' attorneys sought common fund fees. Additional issues raised regarding impairment award and penalty.

Held: Workers' Court interpreted statutes as noted in following opinion, superceded by reversal of this issue in *Murer v. State Compensation Ins. Fund*, 283 Mont. 210, 942 P.2d 69 (1997) (No. 95-542). Court's denial of common fund fees also reversed in that decision. WCC held settlement agreements barred additional benefits, affirmed on appeal. Additional issues decided.

This case was filed on June 25, 1992. Since that time it has twice been to the Montana Supreme Court. *Murer v. Montana State Compensation Mut. Ins. Fund*, 257 Mont. 434, 849 P.2d 1036 (1993) (*Murer I*) and *Murer v. State Compensation Mut. Ins. Fund*, 267 Mont. 516, 885 P.2d 428 (1994) (*Murer II*). In the first appeal the Supreme Court affirmed this Court's denial of petitioners' request that their case be certified as a class action. In the second

appeal the Court held that the cap on benefits which was imposed by the 1987 and 1989 legislatures was temporary and does not apply to benefits payable after June 30, 1991.

Since the second remittitur petitioners have renewed their request for class certification. The request was denied. (Order Denying Renewed Motion for Class Certification, April 5, 1995.) Petitioners' attorneys also moved for an award of attorney fees against all benefits paid to claimants, including claimants they do not represent, on account of the precedent set in *Murer II*. The motion was denied. (Order Denying Attorney Fees under Common Fund Doctrine, August 7, 1995.) Now, and finally, pursuant to the Supreme Court's directive in *Murer II*, the Court must determine petitioners' entitlement to additional benefits, attorney fees and costs against the insurer, and a penalty.

BACKGROUND

Prior to 1987, the maximum amount of compensation benefits payable to injured workers was tied to the average weekly wage of Montana workers. Temporary total and permanent total disability benefits were pegged at two-thirds of the injured worker's actual wages, but could not exceed the average weekly wage. § 39-71-701 and -702, MCA (1985). Permanent partial disability benefits were similarly pegged at two-thirds of the worker's actual wages, but could not exceed one-half the State's average weekly wage. § 39-71-703, MCA (1985). As of July 1, 1986, Montana's average weekly wage was \$299.00. Thus, on that date the maximum rate for temporary and permanent total disability benefits was \$299.00. For permanent partial disability it was \$149.50 (one-half of \$299.00).

In 1987 the legislature imposed an additional cap on benefits. For temporary and permanent total disability benefits the legislature provided that beginning July 1, 1987, through June 30, 1989, the weekly compensation benefits for temporary or permanent total disability may not exceed the State's average weekly wage of \$299.00 established July 1, 1986. § 39-71-701(5) and -702(6), MCA (1987) (enacted by 1987 Montana Laws, ch. 464, §§ 21 and 22). It similarly capped permanent partial disability for the period July 1, 1987 through June 30, 1989, at "\$149.50, which is one-half the State's average weekly wage established July 1, 1986." § 39-71-703(3), MCA (1987) (enacted by 1987 Montana Laws, ch. 464, § 23). The 1989 legislature extended the cap to June 30, 1991 by changing the June 30, 1989 expiration date specified in the sections to June 30, 1991. (1989 Montana Laws, Spec. Sess.1 ch. 9, §§ 4-6). Both legislatures left intact the provisions setting forth the traditional caps. §§ 39-71-701(3), 702(3), and 703(1), MCA (1987-89). Thus, the special caps enacted by the 1987 and 1989 legislatures superseded the traditional caps in the event the average weekly wage increased after 1986.

The average weekly wage indeed grew after 1986. For the fiscal years (July 1 to June 30) 1987 through 1991, the applicable average weekly wage was:

1987 \$302.00

1988 \$308.00

1989 \$318.00

1990 \$323.00

The following chart shows the difference between the \$299.00 cap and the traditional caps:

Year 87/89 Cap Traditional Cap Difference

1987 \$299.00 \$302.00 \$ 3.00

1988 \$299.00 \$308.00 \$ 9.00

1989 \$299.00 \$318.00 \$19.00

1990 \$299.00 \$323.00 \$24.00

The differences for permanent partial disability are as follows:

Year 87/88 Cap Traditional Cap Difference

1987 \$149.50 \$151.00 \$ 1.50

1988 \$149.50 \$154.00 \$ 4.50

1989 \$149.50 \$159.00 \$ 9.50

1990 \$149.50 \$161.50 \$12.00

Relying on precedents which hold that the law in effect at the time of the injury governs the benefits payable to the worker, insurers interpreted the 1987-89 cap as applying to *all* benefits payable for injuries occurring between July 1, 1987 and June 30, 1991. Thus, they believed, claimants injured between those dates were forever locked into the \$299.00 and \$149.50 maximums. The petitioners, who were injured between July 1, 1987 and June 30, 1991, and earned more than the State's average weekly wage, interpreted the 1987-89 cap as applying only to benefits payable between July 1, 1987 and June 30, 1991, and not to any benefits payable thereafter. As they interpreted the freeze, the 1987-89 cap expired on July 1, 1991, thus their benefits thereafter would be subject only to the traditional cap.

In *Murer II* the Supreme Court adopted the petitioners' interpretation. The Court agreed that the law in effect at the time of injury fixes benefits, but it held that the 1987-89 cap was by its express terms a temporary cap applicable only to benefits actually paid between July 1, 1987 and June 30, 1991. It held that benefits paid after July 1, 1991, were subject only to the traditional cap. The Court remanded for a determination of additional benefits due the petitioners.

DISMISSAL OF PARTIES

The original petition was commenced on behalf of nine named petitioners and against two insurers. After remand, petitioners Larry Mack and William Logan, as well as respondent ASARCO, Incorporated, were dismissed pursuant to a stipulation of parties. (Order Dismissing Asarco and Setting Schedule, January 19, 1995.) The State Fund remains as the sole respondent.

RECORD

The remaining issues have been submitted upon stipulated facts and documents. The parties filed an initial stipulation on March 1, 1995, with attached documents designated A through G. Stipulated Facts and Issues, Contentions and Contested Issues (hereinafter "First Stipulation"). On July 13, 1995, they filed a Stipulation for Submission of Decision (hereinafter "Second Stipulation") which contains further stipulations of fact and issues. The Second Stipulation also sets forth a list of additional agreed exhibits. Some of the agreed exhibits were attached to Claimants' Proposed Findings and Conclusions as Exhibits P1 to P8 and SF16. The remaining exhibits were submitted separately and designated as Defendant's Exhibits, Exhibits SF1 through SF20. There is no overlap in the exhibit numbers. Therefore, the original numbers will be used when citing to the exhibits.

ISSUES PRESENTED

The petitioners and the State Fund have agreed on some of the issues which remain to be decided on remand, they disagree as to others. Despite their quibbling, I have had no difficulty in discerning what issues remain for determination. The Supreme Court remanded the case "for a calculation of benefits consistent with this opinion." 267 Mont. at 522, 885 P.2d at 432. My job is simply to determine what, if any, additional benefits are due each of the petitioners as the result of the Court's decision in *Murer II*. Insofar as their entitlement to additional benefits is affected by other unresolved issues, I must resolve those additional issues as well.

After reviewing the parties' stipulations, I have identified two sub-issues. They are (1) whether settlement agreements reached between some of the petitioners and the State Fund during the pendency of this action bar the settling petitioners from seeking additional benefits and (2) whether the temporary cap for petitioners injured between July 1, 1987 and June 30, 1989, expired on July 1, 1989.

DISCUSSION

1. The effect of the settlements.

During the pendency of this action, four of the seven remaining petitioners -- Brown, Prickett, Harbrige and Vernon -- entered into settlement agreements with the State Fund. All of the agreements were negotiated by petitioners' counsel. For the State Fund, either a

claims adjuster or in-house counsel was involved in the negotiations. Litigation counsel for the State Fund were not involved.

The settlement agreements executed by each of the four settling petitioners are virtually identical. Each agreement was executed on a form provided by the Department of Labor and Industry. The caption reads:

PETITION FOR COMPROMISE AND RELEASE SETTLEMENT

(Permanent Partial Wage Supplement and/or Rehabilitation Benefits)

Notwithstanding the parenthetical language to the caption, the operative provisions of each of the agreements contains the following language:

The parties to this matter have agreed to fully and finally **conclude all compensation and/or rehabilitation payments** due the claimant under the Workers' Compensation Act, wherein the insurer shall pay to the claimant the sum of

. . . .

The claimant hereby petitions the Division of Workers' Compensation, with the concurrence of the above named insurer, for approval of this petition and **that the claim be fully and finally closed** on the basis set forth above.

(Exs. B at 6, E at 5, F at 4 and G at 5; emphasis and underlining added.) In each case, the Department of Labor and Industry's order approving the settlement contained the following language:

IT IS FURTHER ORDERED the claimant shall accept the above amount as a compromise and release settlement and that, the insurer is **fully released and discharged from all further obligations for compensation benefits** for this injury under the Workers' Compensation Act.

(Exs. B at 7, E at 6, F at 5 and G at 6; emphasis and underlining added.)

All of the settlement agreements were executed and approved after this case was filed. Brown's settlement was negotiated in August, 1992, and approved on October 5, 1992. (Ex. B at 5-7.) Prickett's settlement was executed on June 29, 1992 and approved on July 20, 1992. (Ex. E at 5-6.) Harbrige's settlement was executed on June 29, 1992 and approved on July 21, 1992. (Ex. F at 4-5.) Vernon's settlement was executed on December 7, 1993 and approved on January 3, 1994. (Ex. G at 5-6.)

Notwithstanding the agreements, the four settling petitioners claim additional impairment benefits. Harbrige, in addition, seeks additional temporary total disability benefits. The

State Fund contends that none of the four is entitled to additional benefits because the agreements conclude its liability and bar the petitioners from claiming any further benefits.

The petitioners argue that the settlement agreements conclude only their entitlement to wage loss and rehabilitation benefits, and nothing else. Thus, they argue, the agreements do not bar them from seeking additional impairment and temporary total disability benefits.

Petitioners concede that "some language in the body of the petition standing alone could be construed as closing all claims for all types of benefits" (Claimants' Proposed Findings and Conclusions at 17; underlining in original.) However, they argue that the parenthetical statement below the title of the agreements, along with section 39-71-741, MCA (1987-89), limit the scope of the settlements to wage loss and rehabilitation benefits only.

Workers' compensation settlements are contracts and as such are governed by the legal principles applicable to contracts. *Kienas v. Peterson*, 191 Mont. 325, 328, 624 P.2d 1, 3 (1980). Thus, resolution of the opposing positions requires an application of contract law.

As a general rule, contractual provisions which arguably conflict with one another should be reconciled to the extent possible in a manner which will give effect to the general intentions of the parties. "Repugnant provisions should be interpreted in a way to give them some effect, subordinate to the general intent and purpose of the entire contract." *St. Paul Fire and Marine Ins. Co. v. Cumiskey*, 204 Mont. 350, 363, 665 P.2d 223, 229 (1983).

However, none of the Montana cases which have stated this principle have involved a conflict between the title or headings of a contract and the *operative* provisions of the contract. In each case the controversy was over alleged conflicts between operative provisions in the contract. *St. Paul Fire*, 204 Mont. at 360-61, 665 P.2d at 228-29, (ambiguity created by fixtures and alterations clauses in a lease agreement); *Riis v. Day* 188 Mont. 253, 257, 613 P.2d 696, 698 (1980) (Court resolved apparently conflicting language in operative provisions giving lessees an option to renew); *Rumph v. Dale Edwards, Inc.*, 183 Mont. 359, 369, 600 P.2d 163, 169 (1979) (provisions for the extension of a lease and option to purchase were construed by looking at entire agreement and without specific resort to the rule regarding repugnant provisions); *Montana-Dakota Utilities v. Lower Yellowstone Rural Electric*, 178 Mont. 427, 435, 585 P.2d 626, 630 (1978) (potentially ambiguous language in operative provisions of utility contract were construed in manner consistent with general intent of agreement); *Brown v. Griffin*, 150 Mont. 498, 507, 436 P.2d 695, 699 (1968) (operative provision regarding the furnishing of title insurance was construed in context of a purchase and sale agreement).

We have not identified any Montana case which has addressed a conflict between an operative provision of a contract and non-operative language contained in the contract title, contract headings, or contract recitals. However, we have come upon other, albeit

rather old, precedents which address conflicts between contractual titles and operative provisions.

In *Sturm v. Boker*, 150 U.S. 312 (1893), the United State Supreme Court had to determine whether a particular transaction was a bailment or a sale of goods. The agreement of the parties was set out in an exchange of written documents. Since the Court ultimately determined that the contract was a bailment rather than sale, the parties will be referred to as "bailor" and "bailee" rather than seller and purchaser.

On September 18, 1867, the bailor wrote a letter to the bailee setting out its terms for the sale of certain weapons in Mexico. An invoice listing the weapons for sale and the dollar amounts upon which the sale was to be concluded accompanied the letter. The terms provided for the bailee to attempt to sell the weapons in Mexico and that any profit exceeding the amounts specified in the invoice be split between bailee and bailor. If unable to sell the weapons, the bailee was to return them to the bailor. On September 26, 1867, the bailee sent a reply letter accepting "the terms of said conditions of consignment." 150 U.S. at 316. In classical contract terms, the September 18, 1867 letter and invoice constituted an offer; the September 26, 1867 letter was an acceptance. Thus, the two letters and their attachments constituted the contract documents.

A similar exchange of documents took place in October of 1867 for additional weapons. The initial letter was also accompanied by an invoice, although the form of the invoice varied somewhat from the first one.

The bailee arranged to ship the weapons, along with other cargo he owned personally, to Mexico. Shipment was by two ocean plying schooners. Both schooners embarked on ill-fated journeys. The first was caught in a storm at sea and the seamen threw part of its cargo into the ocean to save the vessel. The second, for reasons not recounted by the Supreme Court, was shipwrecked and the cargo entirely lost.

Although there was insurance, the proceeds were insufficient to cover the weapons and the bailee's personal cargo. An argument over the distribution of the insurance proceeds ensued. Resolution of the disagreement required the Supreme Court to determine whether the weapons agreement was a bailment or a sale. If a sale, then the putative bailor was entitled to virtually all the proceeds since a purchaser of goods assumes the risk of loss. If the transaction was a true bailment, then the bailor was at risk and was entitled to only a part of the proceeds.

The legal battle, which initially involved the insurance companies, began in 1876, and finally reached the United States Supreme Court in 1893, some seventeen years later. The case perhaps illustrates that justice in the old days was no swifter than it is presently.

The Court resolved the dispute by examining the language in the contract documents. The bailor argued that language in the "bill-head" of the invoices (also called "bills") showed the

parties' intent that the transaction was a sale. 150 U.S. at 326. The words the bailor relied upon were "Mr. H. Sturm in joint account with Hermann Boker & Co." and "Bought of Hermann Boker & Co. in joint account." The language presumably indicated a sale. *Id.* The Court rejected the argument, pointing out that the specific terms of the offer used the words "consign" and "consigned." With regard to the language used in the bill-head, the Court said, "A printed bill-head can have little or no influence in changing the clear and explicit language of the letters, and it in no way controls, modifies, or alters the terms of the contract." *Id.* at 326-27. The Court's opinion goes on to say:

The purpose and object of the bill was to give a description and valuation of the articles to which the contract as embraced in the letters had reference, their description being important if the articles had to be returned, and their price or valuation necessary if they were sold and profits were made for division. The contract being clearly expressed in writing, the printed bill-head of the invoice can, **upon no well-settled rule**, control, modify, or alter it. [Emphasis added.]

Id. at 327.

In *Arbuckle v. Gates*, 30 S.E. 496 (Va. 1898), the Supreme Court of Appeals of Virginia was confronted with a contract which was labeled "Special Selling Factor Appointment." Factors are consignees of goods which remain the property of the consignor; thus the consigned goods are immune from levy by the factor's creditors. See *id.* at 497 and Black's Law Dictionary (5th Ed.). The agreement purported to appoint Gates & Brown the factors of *Arbuckle Bros.* In addition to the title, the contract contained a declaration of intent stating the parties' intent that Gates & Brown were factors, not purchasers of goods. Notwithstanding the title of the document and the declaration of intent, the Court determined that the agreement was for the outright sale of goods. It held that neither the title nor the declaration of intent could change the nature of the agreement or the operative provisions of the agreement. After reviewing the operative provisions, the Court concluded that the agreement was an outright sale rather than a consignment of goods. *Id.* at 497. Referring to the manner in which the parties designated their agreement, the Court observed:

It does not matter by what name the parties chose to designate it. That does not determine its character. The courts look beyond mere names, and within, to see the real nature of an agreement, and determine from all its provisions taken together, and not from the name that has been given to it by the parties or from some isolated provision, its legal character and effect.

Id.

Despite the age of these two precedents, they establish a simple and rational principle: The title of a contract, or the parties' characterization of the contract, must yield to the

substantive nature and provisions of the contract. This rule accords with more recent judicial pronouncements that where contractual recitals or prefatory language conflict with unambiguous operative provisions of the contract, the operative provisions prevail. *United Virginia Bank/National v. Best*, 286 S.E. 2d 221, 223 (Va. 1982); *Fugate v. Town of Payson*, 791 P.2d 1092, 1094 (Ariz. Ct. App. 1990). The rule is also consistent with the rule of statutory interpretation that the title of an act is subordinate

to the text of the statute and may not be used to either contradict the text or to create ambiguity.⁽¹⁾ *Manuf. Acc. Corp. v. Sletten Const. Co.*, 151 Mont. 28, 35, 483 P.2d 667, 671 (1968); accord *State v. Berger*, 259 Mont. 364, 367, 856 P.2d 552, 554 (1993).

In this case, the operative language of the settlement agreement is clear and unambiguous: the claimant's entitlement to any and all compensation benefits is settled and closed. The agreement states that it concludes "all compensation . . . payments due the claimant" "Compensation payments under the Workers' Compensation Act include temporary total benefits and benefits which are payable on account of a worker's disability." *Carlson v. Cain*, 216 Mont. 129, 700 P.2d 607(1985). The agreement goes on to specifically provide that **"the claim be fully and finally closed."** The Department order approving each settlement reinforces the comprehensive nature of the settlement, stating, "[T]he insurer is **fully released and discharged from all further obligations for compensation benefits** . . ." The plain language of the agreements settle and close temporary total benefits, indemnity benefits, and all other benefits, with the exception of medical benefits, which are expressly reserved.

Petitioners argue that section 39-71-741(2), MCA (1987-89), precludes the foregoing interpretation. The subsection they cite permits permanent total disability benefits and permanent partial wage supplement benefits to be converted, in whole or in part, into a lump sum. The section, however, does not preclude claimants who are due either type of benefits from finally concluding their possible rights to other types of benefits. *Ingraham v. Champion Int'l*, 243 Mont. 42, 793 P.2d 769, (1990), which petitioners cite as authority for their contention, is inapposite. *Ingraham* merely holds that lump summing of impairment awards is not subject to the prerequisites set out in section 39-71-741(2), MCA (1987-89). *Id.* at 47-48, 793 P.2d at 772.

Petitioners also contend that the settlement agreement was prepared by the Department of Labor and Industry and designed to cover only lump summing under section 39-71-741(2), MCA (1987-89); thus, they argue, it must be construed to settle only wage supplement benefits. Their argument is unpersuasive. The fact that the agreement was prepared by the Department pursuant to section 39-71-741(2), MCA, cannot alter the plain language of the petition. The agreement allows the parties to insert "special provisions." Had the parties intended to enter into a partial settlement, they could have inserted an express provision stating that petitioners reserved their rights to further impairment

benefits, permanent total disability benefits and temporary total disability benefits. Moreover, subsection 39-71-741(2), MCA, refers to settlement of both wage supplement benefits **and** permanent total disability benefits and does not refer at all to rehabilitation benefits even though the agreement does.

Finally, petitioners ask the Court to consider the correspondence leading up to the settlement agreements. They argue that the correspondence demonstrates the parties' intent to exclude claims for other types of benefits. But the language of the agreement is clear and unambiguous, thus there is nothing for the Court to construe and it may not resort to extrinsic evidence. *Glacier Campground v. Wild Rivers, Inc.*, 182 Mont. 389, 394, 597 P.2d 689, 692 (1979).

I therefore hold that the full and final settlement agreements between the settling petitioners and the State Fund extend to petitioners' claims for additional impairment and temporary total disability benefits. They are not entitled to additional benefits.

2. Expiration of 1987 cap.

The next issue is whether claimants injured between July 1, 1987 and June 30, 1989, are entitled to increased benefits as of July 1, 1989. The petitioners injured during that period (Brown, Mordja and Nelson) assert that, as to them, the temporary cap expired on June 30, 1989.

Their contention appears meritorious. The Supreme Court has consistently held that the law in effect on the date of the claimant's injury governs his or her entitlement to benefits. *E.g. Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 322, 730 P.2d 380, 382 (1986); *accord Murer II*, 267 Mont. at 521-22. At the time of Brown's, Mordja's and Nelson's injuries, the statutes contained a temporary cap which expired as of July 1, 1989.

However, as I read the Supreme Court decision in *Murer II*, this issue has already been resolved. The Court entered the following holding:

We hold that the "cap" on benefits, of \$299.00, set by the 1987 and 1989 legislatures in § 39-71-701(5), MCA, was a temporary cap on benefits which terminated on June 30, 1991, and that on that date the appellants should have begun receiving benefits under § 39-71-701(3), MCA, at the statutory rate determined as of the date of the injury

267 Mont. at 522, 885 P.2d at 432. The holding is too specific for me to ignore or limit it. The Court says that the 1987 temporary cap, not just the 1989 temporary cap, terminated on June 30, 1991. It further states that the appellants, which include those petitioners injured between July 1, 1987 and June 30, 1989, should receive benefits under the traditional cap commencing on June 30, 1991. The documents furnished by the parties, Exs. SF2 to SF4,

show that the petitioners were aware of the effect of this holding since they petitioned for rehearing on this very point. The petition was denied.

Under the law of the case, I am precluded from considering petitioners' argument.

The rule of law of the case provides that in deciding a case upon appeal, when the Supreme Court states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent proceedings, both in the trial court and upon subsequent appeal. [Cites omitted.]

Haines Pipeline Const., Inc. v. Montana Power Co., 265 Mont. 282, 289, 876 P.2d 632, 637 (1994). If the language in *Murer II* was inadvertent, or should be construed more narrowly than I read it, then the Supreme Court can address this issue on appeal.

3. Murer's COLA.

Petitioner Murer also asserts that he is entitled to a cost of living adjustment as of July 1, 1995. He cites section 39-71-702(5), MCA (1989), which provides a COLA with respect to permanent total disability benefits. The first COLA kicks in "on the next July 1 after 104 weeks of permanent total disability benefits have been paid." *Id.*

In their first stipulation the parties agree that Murer is permanently totally disabled. (First Stipulation at 4.) In Their Second Stipulation the State Fund "agrees to apply a COLA on Mr. Murer's benefits as of the date that he **returns** to a permanent total disability status." (Second Stipulation at 1.)

Claimant's Proposed Findings and Conclusions at 5 states that Murer "is entitled to COLA beginning July 1, 1995. See Stipulation for Submission. ¶ 2." The stipulation which is cited by Murer in support of his proposed finding is the one quoted in the previous paragraph. It provides no guidance as to the date the COLA should commence.

In their proposed conclusions of law and briefs, the parties provide the Court with no further guidance concerning the matter. However, in digging through the exhibits the Court has ascertained that the benefits paid Murer were classified as follows:

08/26/90 to 05/09/91 Temporary total

05/10/91 to 06/04/92 Total rehabilitation

06/05/92 to 08/13/92 Total rehabilitation and impairment award

08/14/92 to 11/19/92 Total rehabilitation

11/20/92 to 01/14/93 Temporary total

01/15/93 to 01/28/93 Total rehabilitation

01/29/93 to 06/01/95 Temporary total

06/02/95 to 06/29/95 Total rehabilitation

(Defendant's Exhibits SF16-154 to 157.) The Court does not have the records for payments made for periods after June 29, 1995.

In correspondence and an answer to an interrogatory the State Fund contends that it was only on May 31, 1995, that it determined that Murer had reached maximum healing; it further contends that as of that date Murer's benefits must be considered total rehabilitation benefits, not permanent total disability benefits. (Ex. P-2; Defendant's Exhibits SF16-4.) The State Fund's contention is untenable and unreasonable. It conceded in the First Stipulation that Murer is permanently totally disabled. Its face sheet for payments made to Murer reflect an MMI date of April 1, 1991. (Defendant's Exhibits SF16-154 to 157.) Its files contain an IME report stating that as of January 31, 1992, Murer had reached maximum healing. (Ex. A at 2.) On April 15, 1992, it acknowledged that Murer had reached MMI and was entitled to an impairment award. (Ex. A at 3.) Between May 10, 1991 and November 19, 1992, a period of more than a year and a half (99.71 weeks), it paid Murer total rehabilitation benefits, then converted his benefits back to temporary total disability benefits. Its payment of total rehabilitation benefits was for more than three times the length specified by section 39-71-1023(2), MCA (1989). Finally, it has conceded that since his injury Murer has been totally disabled a "majority of the time." (Defendant's Exhibits SF16-4.)

In a July 10, 1995 answer to an interrogatory concerning Murer's benefits, the State Fund says that its concession of permanent total disability, made in the First Stipulation, was made after consultation between the State Fund's litigation counsel and in-house counsel and without review of the claim file. (Defendant's Exhibits SF 16-4.) The answer goes on to state:

Upon closer review of the claim files, it appears that throughout the claim there were issues concerning medical stability, the need for continuing care, whether such care was therapeutic or maintenance, and the type of care (chiropractic or through a medical doctor). It is clear that Claimant was totally disabled since the initiation of benefits, except for a short period of employment. The only question is the proper classification of total disability benefits.

Notwithstanding the coding identified, it is the opinion of counsel after reviewing all file documents, that Mr. Murer should have been considered **temporarily totally disabled or presently permanently totally disabled** during the majority of the time since the initiation of benefits. **Exact benefit categorization would require Court determination.** [Emphasis added.]

(*Id.*) The answer fails to provide any substantiation for its failure to characterize benefits paid after 26 weeks of total rehabilitation benefits as permanent total disability benefits. It fails to provide any substantiation for the State Fund's apparent, though subtly phrased, denial that Murer is entitled to a COLA effective July 1, 1995.

The facts presented to the Court show that Murer is entitled to a COLA effective July 1, 1995, and that the State Fund's refusal to commence the COLA on that date was unreasonable.

4. Mordja claim for increase in impairment award.

Keith Mordja was injured on January 17, 1988. (First Stipulation at 7; Ex. C at 1.) On June 14, 1990, he was determined to be maximally healed and his physician gave him a 30% whole person impairment rating. (First Stipulation at 8; Ex. C at 2.) On June 27, 1990, the State Fund notified claimant that his impairment rating entitled him to 150 weeks of benefits commencing June 14, 1990. (Ex. C at 3.) A warrant for benefits due for the period of June 14 to 27 was enclosed and Mordja was told that he could elect to receive his "future benefits" in a lump sum, discounted by 9%. (*Id.*) He elected the lump sum and the State Fund paid it. The lump sum was calculated using his temporarily capped rate of \$149.50 per week. At the time of his injury the traditional cap, computed pursuant to section 39-71-703(a)(1)(i), MCA (1989), was \$159.00, a difference of \$9.50 per week.

Mordja has not entered into any settlement agreement and seeks an additional \$9.50 per week for all 150 weeks. Despite the decision in *Murer II* the State Fund has refused to increase his impairment award, even for that portion which is attributable to weeks after July 1, 1991.

Mordja's claim for increased benefits prior to July 1, 1991, is **denied** for the reasons set forth in section 2 of the discussion. His claim for increased benefits which would have been payable on and after July 1, 1991, is **granted**. Even though all benefits were paid in a lump sum, 95.43 weeks of those benefits were attributable to July 1, 1991 and thereafter. Mordja is entitled to an additional \$9.50 for those weeks, or a total of \$956.59.

The State Fund's refusal to pay the additional benefits was **unreasonable**. More than 95 weeks of the benefits were attributable to the time period *after* the temporary cap had expired. In paying the benefits in a lump sum the State Fund *discounted the future benefits to present value* (See § 39-71-703(1)(a)(iii), MCA (1987)), thus acknowledging that the benefits were attributable to the later time. The matter was not reasonably debatable.

5. Reasonableness of the State Fund's defenses.

The petitioners' argue vigorously that the State Fund's defenses in this matter have been unreasonable and that they are entitled to an award of attorney fees and penalties. Since the statutes governing attorney fees and the penalty differ, we will consider the

reasonableness of the State Fund's conduct and then separately address the requests for attorney fees and a penalty.

Initially, petitioners have **not** argued that the State Fund's interpretation of the temporary cap was unreasonable.⁽²⁾ They contend only that the State Fund's refusal to pay additional benefits *after* the Supreme Court decision in *Murer II* was unreasonable. (Claimants' Proposed Findings and Conclusions and Claimants' Reply Brief.) Since the State Fund has denied additional benefits for several different reasons, each of the reasons must be evaluated separately.

a. Refusal to increase benefits on July 1, 1989, with respect to claimants injured between July 1, 1987 and June 30, 1989.

The resolution of this issue in favor of the State Fund answers claimants' contention that the State Fund's position was unreasonable. Moreover, even if I have misread the Supreme Court decision, I am firmly convinced that my reading, and therefore the State Fund's reading, of the decision is reasonable.

b. Reliance on the settlement agreements as barring additional benefits to four of the seven petitioners.

Again, this issue has been resolved in favor of the State Fund, answering any contention that the State Fund's position was unreasonable. I am also convinced that even if I have wrongly decided the issue, the position of the State Fund is well within the bounds of legitimate advocacy.

c. Murer and Nelson impairment benefits.

After remand the State Fund stipulated that Murer and Nelson are permanently totally disabled. Based on that stipulation, the State Fund argued that neither petitioner was entitled to an impairment award in the first place, hence they are not entitled to any increase in impairment benefits paid after July 1, 1991. The State Fund further asserted that it should be reimbursed for the impairment awards already paid to Murer and Nelson, and requested the Court to order repayment of the awards from their future benefits. (First Stipulation at 5, 6-10.) Ultimately, in the Second Stipulation filed on July 13, 1995, the State Fund withdrew its contentions and agreed to increase the impairment benefits payable to these petitioners on and after July 1, 1991.

The State Fund's position regarding the impairment benefits was unreasonable in the first place. It paid impairment awards to both Murer and Nelson in 1992.

Thereafter it continued to pay Murer temporary total disability benefits for several years (Ex. SF16), while it paid Nelson total rehabilitation benefits from April 1992 through July 1995 (*Id.*). Only after the Supreme Court's adverse decision in *Murer*

// did the State Fund suddenly change positions and assert that the impairment awards were never due and should be repaid. Its position flew in the face of the Supreme Court's holding in *Ryles v. Springhill Ranch Eggs*, 247 Mont. 276, 283, 806 P.2d 525, 529-30, (1991), in which the State Fund was held estopped from recharacterizing temporary total disability benefits as permanent partial benefits where it was not laboring under any mistake of fact when it paid the temporary total disability benefits. And, it flew in the face of the fact that the State Fund on January 19, 1995, even before it raised the issue, paid the increased amount due under *Murer II* for indemnity benefits. (First Stipulation at 5; Ex. A at 4; Second Stipulation at 1.)

d. Mordja impairment benefits.

I have already held that the State Fund's position regarding payment of Mordja's impairment benefits attributable to the period on and after July 1, 1991, was unreasonable.

e. Murer COLA benefits.

I have already held that the State Fund's position regarding payment of COLA benefits to Jack Murer was unreasonable.

6. Attorney fees.

Attorney fees are governed by section 39-71-612, MCA (1987-89), which provides:

39-71-612. Costs and attorneys' fees that may be assessed against an insurer by workers' compensation judge. (1) If an insurer pays or submits a written offer of payment of compensation under chapter 71 or 72 of this title but controversy relates to the amount of compensation due, the case is brought before the workers' compensation judge for adjudication of the controversy, and the award granted by the judge is greater than the amount paid or offered by the insurer, a reasonable attorney's fee and costs as established by the workers' compensation judge if the case has gone to a hearing may be awarded by the judge in addition to the amount of compensation.

(2) An award of attorneys' fees under subsection (1) may only be made if it is determined that the actions of the insurer were unreasonable. Any written offer of payment made 30 days or more before the date of hearing must be considered a valid offer of payment for the purposes of this section.

(3) A finding of unreasonableness against an insurer made under this section does not constitute a finding that the insurer acted in bad faith or violated the unfair trade practices provisions of Title 33, chapter 18.

Under this section, the Court's authority to award attorney fees is governed by a number of restrictions and requirements. In this case there are three rules that apply.

Initially, the plain language in subsection (1) limits an award of attorney fees to cases in which the case goes to hearing and the claimant obtains a judgment against the insurer. Where the insurer concedes liability during trial, the requirement is satisfied. *Krause v. Sears, Roebuck*, 197 Mont. 102, 641 P.2d 458, (1982). But where the concession of liability occurs prior to trial, the requirement is not met and attorney fees must be refused. *Komeotis v. Williamson Fencing*, 232 Mont. 340, 344-45, 756 P.2d 1153, 1156 (1988).

Additionally, the Court can only award attorney fees with regard to issues upon which the claimant prevails. *Buckman v. Montana Deaconess Hospital*, 238 Mont. 516, 521, 776 P.2d 1210, 1213 (1989). Thus, petitioners cannot recover attorney fees for time spent litigating issues which were decided adversely to them.

Finally, the conduct of the insurer in denying benefits must be found to be unreasonable. If the insurer has acted reasonably in forcing the matter into litigation, then attorney fees must be denied.

Petitioner Mordja prevailed with respect to his claim for additional impairment benefits and the State Fund's refusal to pay the additional benefits has been determined to be unreasonable. Thus, he is entitled to attorney fees.

The Court was not required to adjudicate Murer's and Nelson's entitlement to an increase in their impairment benefits only because the State Fund stipulated on July 13, 1995, that those petitioners should receive the increase. (Second Stipulation at 1 and 3.) It paid Nelson the additional benefits on July 10, 1995. (*Id.* at 3.) It had previously paid Murer the additional benefits in January 1995 (*id.* at 1), even though it thereafter contested his entitlement to the increase. I have already held that the State Fund's position regarding the increase was unreasonable in both cases. However, I must still determine if the other requirements of section 39-71-612, MCA, are met.

In Nelson's case, the acknowledgment of liability and payment came too late. The trial in this matter was scheduled for the week of July 10, 1995. At a pretrial conference held on July 5, 1995, the parties agreed that in lieu of trial they would submit the case on an agreed statement of facts and exhibits. It was only with that agreement the Court vacated the trial setting. The parties then notified the Court during the week of July 10th that they had not reached a final stipulation concerning the agreed statement of facts. It was only after the Court ordered them to trial at the earliest available date that they filed their July 13, 1995 stipulation finally submitting the case. The State Fund's eleventh hour concession and payment of Nelson's benefits was the equivalent of conceding liability at trial.

Under *Krause*, Nelson is entitled to attorney fees.

Attorney fees are unavailable to Murer with respect to his claim for additional impairment benefits. He actually received the additional benefits six months prior to the scheduled trial. The attorney fee statute makes no provision for an award of attorney fees where the benefits have been paid, even though the insurer is seeking an order for the claimant to repay them.

Murer, however, is entitled to attorney fees with regard to his COLA claim. He prevailed on the claim and I have determined that the State Fund's opposition to the claim was unreasonable.

Petitioners did not prevail on issues involving the effect of the settlement agreement and the expiration date of the cap. Moreover, I have held that even if I have wrongly decided those issues, the State Fund's legal positions regarding them were reasonable. Attorney fees regarding these issues are therefore denied.

In summary, petitioners shall recover attorney fees with respect to the Mordja and Nelson claims, and with respect to Murer's COLA claim. Otherwise, their request is denied.

7. Penalty.

Petitioners' request for a penalty is governed by section 39-71-2907(1), MCA (1987-89), which provides in relevant part:

39-71-2907. Increase in award for unreasonable delay or refusal to pay. (1) When payment of compensation has been unreasonably delayed or refused by an insurer, either prior or subsequent to the issuance of an order by the workers' compensation judge granting a claimant compensation benefits, the full amount of the compensation benefits due a claimant between the time compensation benefits were delayed or refused and the date of the order granting a claimant compensation benefits may be increased by the workers' compensation judge by 20%. The question of unreasonable delay or refusal shall be determined by the workers' compensation judge, and such a finding constitutes good cause to rescind, alter, or amend any order, decision, or award previously made in the cause for the purpose of making the increase provided herein.

The conditions for a penalty have been met with respect to the Mordja and Nelson claims and Murer's COLA claim.

In *Handlos v. Cyprus Indus. Minerals*, 243 Mont. 314, 794 P.2d 702 (1990), the Supreme Court construed section 39-71-2907, MCA, as authorizing a penalty where the insurer concedes liability during trial. In *Lovell v. State Compensation Mut. Ins. Fund*, 260 Mont. 279, 289, 860 P.2d 95, 102 (1993), the Court construed the statute to permit a penalty where liability is conceded "on the courthouse steps." The concession of liability with respect to Nelson was made on the courthouse steps.

Since the insurer's opposition to Mordja's and Nelson's claims and Murer's COLA claim was unreasonable, a penalty of 20% is assessed with respect to the amounts determined to be due those three petitioners.

While the Court has also found the State Fund's position regarding Murer's impairment claim to be unreasonable, a penalty cannot be assessed. Actual payment of the disputed benefits was made six months before the date fixed for trial. While section 39-71-2907, MCA, authorizes a penalty when liability is conceded on the courthouse steps, it has not been extended to cases in which the benefits have in fact been paid months prior to trial. *Paulsen V. Entech, Inc*, WCC No. 9209-6591 (February 22, 1994).

The petitioners are not entitled to a penalty with respect to their other claims because they have not prevailed on those claims or have failed to persuade me that the State Fund's conduct was unreasonable.

JUDGMENT

1. Petitioners James Brown, Steve Prickett, Jay Harbrige and Susan Vernon are not entitled to additional benefits under the Supreme Court's decision in *Murer v. State Compensation Mut. Ins. Fund*, 267 Mont. 516, 885 P.2d 428 (1994).

2. Petitioners Keith Mordja and Bruce Nelson are not entitled to an increase in the benefits paid to them between July 1, 1989 and June 30, 1991.

3. Petitioner Jack Murer is entitled to, and the State Fund shall pay him, a cost-of-living increase effective July 1, 1995.

4. Petitioner Keith Mordja is entitled to, and the State Fund shall pay him, an additional \$9.50 for 95.43 weeks of impairment benefits. The total amount due, and which shall be paid, is \$956.59.

5. Petitioners James Brown, Steve Prickett, Jay Harbrige and Susan Vernon are not entitled to attorney fees or a penalty.

6. The State Fund shall pay petitioner Jack Murer attorney fees for time spent litigating his COLA entitlement in an amount to be determined by the Court.

7. The State Fund shall pay petitioner Jack Murer a 20% penalty on COLA payments.

8. The State Fund shall pay petitioner Bruce Nelson attorney fees for the time spent litigating his entitlement to additional impairment benefits in an amount to be determined by the Court.

9. The State Fund shall pay petitioner Bruce Nelson a penalty of \$81.00 based on the \$405.00 in additional impairment benefits already paid by the State Fund. (Second Stipulation at 3.)

10. The State Fund shall pay petitioner Keith Mordja attorney fees for the time spent litigating his entitlement to increased impairment benefits in an amount to be determined by the Court.

11. The State Fund shall pay petitioner Keith Mordja a penalty of \$191.32 based on the amount (\$956.59) determined to be due him.

12. All petitioners are entitled to their costs. They shall submit an affidavit of costs within ten days of this decision. The State Fund shall thereafter have ten days in which to file its objections, if any.

13. For the reasons set forth in this Court's August 7, 1995, Order Denying Attorney Fees under Common Fund Doctrine, the petitioners' attorneys are not entitled to attorney fees with respect to any benefits payable on account of the precedent established in *Murer II* to claimants they do not represent

14. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

15. This JUDGMENT is certified as final for purposes of appeal.

DATED in Helena, Montana, this 20th day of November, 1995.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Allan M. McGarvey

Mr. Charles G. Adams (Courtesy Copy)

Mr. Roger M. Sullivan

Mr. Mark E. Cadwallader (Courtesy Copy)

Mr. James H. Goetz

Mr. Chuck Edquest (Courtesy Copy)

Mr. Bradley J. Luck

Mr. Thomas M. Keegan (Courtesy Copy)

Mr. Ira Eakin

Ms. Janice S. VanRiper (Courtesy Copy)

Mr. Larry W. Jones

Honorable Gordon R. Bennett (Courtesty Copy)

1. Where ambiguity exists in a statute the Court may consider the title in resolving the ambiguity, *State v. Berger*, 259 Mont. 364, 367, 856 P.2d 552, 554 (1993), but in this case there is no ambiguity in the text of the settlement agreement.

2. As this Court indicated during one of the hearings held after remand, the petitioners' faced an uphill battle if they asserted that the State Fund's original interpretation of the 1987 and 1989 caps was unreasonable. (Ex. SF 13 at 51-52.) The original decision of the Workers' Compensation Court adopted the State Fund's interpretation of the 1987 and 1989 caps. As I pointed out during the hearing, the Judge who made the original decision (retired district court judge Gordon Bennett) is "a very honorable judge with lots of gray hairs and a great deal of wisdom." Until the 1987 and 1989 caps were adopted, benefits payable to claimants have been the amounts fixed at the moment of their injuries and have not changed over time. While a careful examination of the specific language used by the legislature shows that benefits for claimants injured between July 1, 1987 and June 30, 1991, were to increase on July 1, 1991, the State Fund's and Judge Bennett's erroneous interpretation of the statute was understandable. The State Fund's arguments were not outside the pale of legitimate advocacy.