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**IN THE WORKERS' COMPENSATION COURT
OF THE STATE OF MONTANA**

WCC No. 2000-0222

ROBERT FLYNN,

Petitioner,

vs.

MONTANA STATE FUND,

Respondent/Insurer,

and

LIBERTY NORTHWEST INSURANCE CORPORATION

Intervenor.

BRIEF OF J.H. KELLY, LLC AND LOUISIANA PACIFIC CORPORATION ON "FINAL, CLOSED OR INACTIVE" ISSUE

Pursuant to the Court's Amended Order Setting Briefing Schedule of January 3, 2006, respondents J.H. Kelly, LLC and Louisiana Pacific Corporation file this Brief to assist the Court in its determination of the "final, closed or inactive" issue.

This refers to the extent of the retroactive effect to be given to the Montana Supreme Court's decision in *Flynn v. State Compensation Insurance Fund*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397 (12/05/02). That case held that "an insurer is liable for one-half of the attorney fees a claimant incurs in obtaining social security disability benefits which are offset by the insurer against his or her workers' compensation benefits." (Summons, pg. 8, para. 1).

I.

DEMPSEY v. ALLSTATE INS. CO. HOLDS THAT RETROACTIVE EFFECT DOES NOT APPLY TO "FINAL OR SETTLED" CASES.

The starting point for any discussion on the retroactive effect to be given to *Flynn* is the Montana Supreme Court's 2004 decision in *Dempsey v. Allstate Ins. Co.*, 2004 MT 391, 325 Mont. 207, 104 P.3d 483 (12/30/04).

In *Dempsey*, the issue was the retroactive effect to be given to the Supreme Court's decision in *Hardy v. Progressive Specialty Insurance Co.*, 2003 MT 85, 315 Mont. 107, 67 P.3d 892 (2003), which

> " * * * determined Montana's anti-stacking statute to be unconstitutional and the anti-stacking language of Progressive's insurance policy to be void and unenforceable and further held that Progressive had to 'stack' and pay underinsured motorist benefits for each coverage for which the insured had paid a separate premium." (*Dempsey*, printed page 2).

In *Dempsey*, Allstate maintained that *Hardy* applied prospectively only, and declined to stack uninsured motorist, underinsured motorist, or medical payment benefits in claims arising before the April 18, 2003 decision in *Hardy*.

Mr. Dempsey brought a class action to force Allstate to stack medical payment, uninsured, and underinsured policy limits on all claims arising prior to the *Hardy* decision. The Supreme Court held that *Hardy* "* * * applies retroactively to cases pending on direct review and not yet final." (Id.).

The Court held that its decisions are to be applied retroactively unless all three of the so-called *Chevron* factors are met. (*Dempsey*, printed page 6). See *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). Paraphrased for sake of brevity, they are: (1) the decision to be applied retroactively must establish a new rule of law; (2) retroactive application would retard rather than further its operation; and (3) retroactive application would produce substantial inequitable results. (404 U.S. at 106-07).

The Court qualified its ruling, however:

"* * * [L]imiting a rule of law to its prospective application creates an arbitrary distinction between litigants based merely on the timing of their claims. Interests of fairness are not served by drawing such a line, nor are interests of finality. In the interests of finality, the line should be drawn between claims that are final and those that are not (the line drawn in *Harper*[1]). 'New legal principles, even when applied retroactively, do not apply to cases already closed.' [Citation omitted.] * * *" (*Dempsey*, printed page 5, our emphasis).

Stated another way:

"Therefore, we conclude that, in keeping with our prior cases, all civil decisions of this court apply retroactively to cases pending on direct review or not yet final, unless all three of the *Chevron* factors are satisfied. For reasons of finality we also conclude that the retroactive effect of a decision does not apply *ab initio*, that is, it does not apply to cases that became final or were settled prior to a decision's issuance." (*Dempsey*, printed page 6, our emphasis).

And finally:

"For the foregoing reasons we conclude that *Hardy* applies retroactively to require payment of stacked uninsured, underinsured motorist and medical payment insurance coverages in qualifying circumstances on open claims arising before its issuance. However, in the interests of finality, as discussed above, we limit this retroactivity to cases pending on direct review or not yet final." (Id., our emphasis).

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[1] *Harper v. Virginia Dep't. of Transportation*, 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993), establishing, in federal law cases, a rule of "full retroactive effect in all cases still open on direct review * * *." 509 U.S. at 97

II.

SCHMILL v. LIBERTY NORTHWEST INSURANCE (SCHMILL II) HOLDS THAT *DEMPSEY'S* LIMITATION ON RETROACTIVE EFFECT EXTENDS TO "THE CONTEXT OF WORKERS' COMPENSATION LAW."

There are two "*Schmill*" decisions. In the first, the Montana Supreme Court held that it was a violation of the equal protection clauses of the Montana and United States Constitutions to allow for apportionment deductions for non-occupational factors in the Occupational Disease Act, but not in the Workers' Compensation Act. Therefore, the Occupational Disease Act's apportionment provision, Section 39-72-706, MCA, was struck down as unconstitutional. *Schmill v. Liberty Northwest Ins. Corp.*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290 (2003) (*Schmill I*).

In the second, the Court addressed certain issues flowing from the decision in *Schmill I*, including whether the rule announced in *Schmill I* applied retroactively. *Schmill v. Liberty Northwest Ins. Corp.*, 327 Mont. 293, 114 P.3d 204 (2005) (*Schmill II*).

The *Schmill II* Court recognized that under *Dempsey*, the retroactive effect of an earlier decision does not apply to cases that became final or were settled prior to its issuance:

> "* * * Thus, if an occupational disease claim was settled or became final prior to our ruling in *Schmill I*, then *Schmill I* does not affect whatever apportionment might have been deducted from the claim's award." (*Schmill II*, printed page 3).

The Court's concluding comments regarding this issue are instructive:

> "As the State Fund admits, many of these claims are settled, closed or inactive. From the record before us, it cannot be determined how many of the 3,543 claims would, in the context of workers' compensation law, be considered 'final or settled' under our holding in *Schmill I*. We leave that initial determination to the WCC. (Id., our emphasis).

Thus, in addition to determining the retroactive effect of *Flynn*, this Court has been directed to conduct an inquiry into the retroactive effect of *Schmill I* on over 3,500 claims! Clearly, the Supreme Court has determined in the context of workers' compensation cases that the retroactive affect of its decision only applies to open claims, not those which are settled, closed or inactive.

III.

FLYNN SHOULD NOT BE RETROACTIVELY APPLIED TO FINAL OR SETTLED CLAIMS. ALL CLOSED OR INACTIVE CLAIMS NEED TO BE EVALUATED TO DETERMINE IF THEY ARE SUBJECT TO *FLYNN*, OR EXEMPT AS "FINAL" OR "SETTLED" CLAIMS.

We can use the rules enunciated in *Dempsey* and *Schmill II* to assist the Court in determining the retroactive effect of *Flynn*. Stated otherwise, to what claims should *Flynn* apply, and to what claims should *Flynn* not apply?

In answer to the first question: *Flynn* does apply to all cases "pending on direct review or not yet final" at the time of the decision's issuance on December 5, 2002.

In answer to the second question, based on *Dempsey* and *Schmill II*, *Flynn* does not apply retroactively to the following categories of cases:

(a) Claims that were final as of *Flynn's* date of issuance (12/05/02). "Final" cases would encompass all claims whose appeal rights had expired.

(b) Claims that were settled as of *Flynn's* date of issuance. Section 39-71-107(7)(a) and (b) provide:

"(a) For purposes of this section, 'settled claim' means a department-approved or court-ordered compromise of benefits between a claimant and an insurer or a claim that was paid in full. (our emphasis).

"(b) The term does not include a claim in which there has been only a lump-sum advance of benefits."

In this connection, we are mindful of Section 39-71-204(3) and (4) which provide:

> "(3) The department has continuing jurisdiction over all its orders, decisions, and awards and may, at any time, upon notice, and after opportunity to be heard is given to the parties in interest, rescind, alter, or amend any order, decision, or award made by it upon good cause. (our emphasis).
>
> "(4) Any order, decision or award rescinding, altering, or awarding a prior order, decision or award has the same effect as original orders and awards."

This section allows for Department rescission of orders and settlements entered into based on fraud or mutual mistake, but provides no authority for setting aside a judgment entered by the Workers' Compensation Court. *State Compensation Ins. Fund v. Chapman*, 267 Mont. 484, 885 P.2d 407 (1994). A new interpretation of an existing statute is not fraud or mutual mistake. Neither is it good cause.

A Workers' Compensation Judge has the authority to review, diminish, or increase awards pursuant to Section 39-71-2909 which provides:

> "The judge may, upon the petition of a claimant or an insurer that the disability of the claimant has changed or that the claimant has received benefits through fraud or deception, review, diminish, or increase, in accordance with the law on benefits at set forth in chapter 71 of this title, any benefits previously awarded by the judge. An insurer's petition alleging that the claimant received benefits through fraud or deception must be filed within 2 years after the insurer discovers the fraud or deception."

A new interpretation of a statute is not a change in disability of the claimant. It is only a change in the law.

We are also mindful of Section 39-71-741 dealing with "Compromise settlements and lump-sum payments." Under subsection (1), "* * * [a]n agreement that settles a claim for any type of benefit is subject to department approval. * * *" Upon approval,

" * * the agreement constitutes a compromise and release settlement and may not be reopened by the department."

That, however, is different from setting aside an order or settlement due to mutual mistake of fact. "If a party can show a mutual mistake of any material fact, impacting the contract to such an extent that the intended bargain of the parties is defeated, the contract may be rescinded. * * *" *South v. Transportation Ins. Co.*, 275 Mont. 397, 913 P.2d 233 (1996)(Court's emphasis).

Therefore, all "settled" claims that are not subject to "good cause" rescission based on a mutual mistake of material fact are protected from *Flynn's* retroactive reach. Settled includes "a claim that was paid in full" as well as compromised claims. Section 39-71-107(7)(a).

There is no formal procedure for "closing" claims in Montana. Instead, an insurer or self-insured employer who wishes to terminate benefits on a claim on which payments have been made may do so "only after 14 days' written notice to the claimant* * * and the department. * * *" Section 39-71-609(1).

The claimant then has <u>two years</u> to file a petition for hearing before a Workers' Compensation Judge. Section 39-71-2905(2).

In the instant case, all claims where benefits have been denied pursuant to Section 39-71-609(2), and more than two years have elapsed without a petition for hearing being filed, should be considered "final" in a workers' compensation law context. They would thus be beyond the retroactive reach of *Flynn*.

It is clear that *Flynn* is limited to those claims which are currently open or those for which the date upon which the appeal period runs on a dispute. All other means to modify an order or decision are not amenable to change simply through a new interpretation of a statute.

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Respectfully submitted this 30th day of January, 2006.

RONALD W. ATWOOD, P.C.

By: Ronald W Atwood

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CERTIFICATE OF SERVICE BY MAIL

I, Kimberley J. Wouters, hereby declare and state:

I am over the age of eighteen years, employed in the City of Portland, County of Multnomah, State of Oregon, and not a party to the within action. My business address is Ronald W. Atwood, P.C., 333 S.W. Fifth Avenue, 200 Oregon Trail Building, Portland, Oregon, 97204.

On January 30, 2006, I served the within **BRIEF OF J.H. KELLY, LLC, AND LOUISIANA PACIFIC CORPORATION ON "FINAL, CLOSED OR INACTIVE" ISSUE,** on the parties in said caused by placing a true thereof enclosed in a sealed envelope with postage prepaid thereon in the United States Post Office at Portland, Oregon, addressed as follows:

Mr. Rex L. Palmer
Attorneys Inc., P.C.
301 W. Spruce
Missoula, MT 59802

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED January 30, 2006 at Portland, Oregon.

KIMBERLEY J. WOUTERS
Legal Secretary