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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

ROBERT FLYNN, and CARL MILLER, Individually and on Behalf of Others Similarly Situated Petitioners, v. MONTANA STATE FUND, Respondent/Insurer and LIBERTY NORTHWEST INSURANCE CORPORATION, Intervenor.	WCC No. 2000-0222 **MONTANA STATE FUND'S BRIEF REGARDING RETROACTIVITY**

COMES NOW the Respondent/Insurer, Montana State Fund ("State Fund"), and, pursuant to this Court's Order of December 6, 2005, hereby submits this brief regarding the class of workers' compensation cases that are "final," "closed," and/or "inactive" for

DOCKET ITEM NO. 447

purposes of retroactive effect of judicial decisions.

INTRODUCTION

On August 5, 2003, this Court held that the Supreme Court's decision in *Flynn v. State Compen. Ins. Fund*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397, applied retroactively to the State Fund. Decision & Order Regarding Retroactivity & Attorney Fee, *Flynn v. State Compen. Ins. Fund*, 2003 MTWCC 55. The Supreme Court's *Flynn* decision held that, when a workers' compensation claimant obtains Social Security Disability benefits, the workers' compensation insurer may reduce the claimant's TTD or PTD benefits under Montana Code Annotated §§ 39-71-701(5) and 702(4), and is therefore benefited; thus, the insurer must reimburse the claimant for one half of any attorney fees incurred by the claimant in obtaining the Social Security Disability benefits.

Although this Court applied *Flynn* retroactively, it also recognized that, under Montana law, judicial decisions do not apply retroactively to cases that became final or were settled prior to a decision's issuance. *See Dempsey v. Allstate Ins. Co.*, 2004 MT 391, ¶ 28, 325 Mont. 207, ¶ 28, 104 P.3d 483, ¶ 28; *see also Schmill v. Liberty Nw. Ins. Corp.*, 2005 MT 144, 327 Mont. 293, 114 P.3d 204 (noting that reevaluation of claims due to retroactive judicial decisions is unnecessary for claims that are "settled, closed, or inactive"). This Court has therefore asked the parties to brief the issue of what class of workers' compensation claims are "settled," "final," "closed," or "inactive," such that retroactive judicial decisions will not affect them.

BACKGROUND

Both the importance and the uncertainty surrounding the "final, closed, and inactive" issue are underscored in the history of two workers' compensation cases: the present case, *Flynn v. State Compen. Ins. Fund*, which is currently pending before this Court, and *Stavenjord v. State Compen. Ins. Fund*, WCC No. 2000-0207, which is currently pending before the Montana Supreme Court. The Montana Supreme Court issued its *Flynn* decision on December 5, 2002, holding that a claimant who receives Social Security Disability benefits, and whose TTD or PTD benefits are therefore reduced, is entitled to attorney fee reimbursement from his insurer. *Flynn*, ¶ 18. On remand, this Court announced *Flynn*'s retroactive effect on August 5, 2003 and, on May 4, 2005, held that *Flynn* applies to all eligible claimants, irrespective of the insurer. *See Flynn*, 2003 MTWCC 55 and *Flynn*, 2004 MTWCC 75. On May 4, 2005, this Court indicated in its *Summons* that the period of *Flynn*'s retroactive applicability commenced on July 1, 1974.

On August 27, 2004, this Court determined that its decision in *Stavenjord v. State Compen. Ins. Fund*, 2001 MTWCC 25, *aff'd*, 2003 MT 67, 314 Mont. 466, 67 P.3d 229, applies retroactively to June 3, 1999. *Stavenjord v. Montana State Fund*, 2004 MTWCC

62. This Court held that the first two factors of the *Chevron* test were not met, but that the third factor, an inquiry into whether retroactive application would result in substantial inequity, applied with respect to "claims arising on and after June 30, 1987, and where MMI was reached after June 3, 1999." *Stavenjord*, ¶ 36, 45 (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, (1971), *overruled by Harper v. Virginia Dept. of Taxn.*, 509 U.S. 86, (1993)). Petitioner Debra Stavenjord appealed this Court's decision to the Montana Supreme Court and the State Compensation Insurance Fund ("State Fund") cross-appealed. The appeal and cross-appeal are currently pending before the Montana Supreme Court, having been fully briefed and argued.

After this Court issued its *Stavenjord* retroactivity decision, but before the *Stavenjord* retroactivity appeal was briefed, the Montana Supreme Court decided *Dempsey v. Allstate Ins. Co.*, 104 P.3d 483. In *Dempsey*, the Montana Supreme Court attempted to reconcile its various conflicting retroactivity decisions. The *Dempsey* court held that all judicial decisions are retroactive unless all three *Chevron* factors weigh in favor of prospective application. *Dempsey*, ¶ 30. The court noted, however, that "[f]or reasons of finality," a given decision's retroactive effect "does not apply to cases that became final or were settled prior to a decision's issuance." *Dempsey*, ¶ 31.

After briefing in the *Stavenjord* retroactivity appeal was complete, the Montana Supreme Court applied *Dempsey* to a common fund retroactivity case, *Schmill v. Liberty Nw. Ins. Corp.*, 2005 MT 144, 327 Mont. 293, 114 P.3d 204 (*Schmill II*). In *Schmill II*, the court faced the issue whether to give the court's holding in *Schmill v. Liberty Nw. Ins. Corp.*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290 (*Schmill I*) retroactive effect. The court found that, with respect to *Schmill I*, the second *Chevron* factor – "whether the retroactive application of a rule of law will further or retard [the rule's] operation" – was not met, i.e., weighed in favor of retroactive application. *Schmill II*, ¶¶ 15-16. Accordingly, the court applied *Schmill I* retroactively. *Schmill II*, ¶ 16.

Although the *Schmill II* court did not need to address any other *Chevron* factors after determining factor two was not satisfied, the court also briefly discussed the third factor, which requires the court "to weigh the inequity imposed by retroactive application." *Schmill II*, ¶ 17 (internal quotations omitted). The court dismissed concerns of Liberty Northwest and the State Fund that retroactive application of *Schmill I* would require reevaluation of thousands of claims, reasoning that "many of these claims are settled, closed, or inactive," and thus exempt from *Schmill I*'s retroactive effect. *Schmill II*, ¶¶ 18-19. The court explained:

> [I]t appears that the State Fund, as well as Liberty and Schmill, may not have grasped the full impact of *Dempsey*. . . . [D]ue to reasons of finality, "[T]he retroactive effect of a decision . . . does not apply to cases that became final or were settled prior to a decision's issuance."

Schmill II, ¶ 17 (quoting *Dempsey*, ¶ 31).

Under *Dempsey* and *Schmill II*, it is clear that a judicial decision will not apply retroactively to any case that was final before the decision was issued. In the present case, that means that *Flynn* benefits are unavailable in cases that became final prior to December 5, 2002, the date of the Montana Supreme Court's *Flynn* decision. *See Flynn*, ¶ 41 ("Common fund fees are limited to claimants whose benefits were improperly offset prior to the date of the Supreme Court decision."). What is less clear is what classes of workers' compensation cases are "final," such that subsequently-decided judicial decisions will not retroactively apply to them.

ARGUMENT

I. Judicial decisions do not apply retroactively to "cases that became final or were settled prior to a decision's issuance." *Dempsey*, ¶ 31. Under this rule, judicial decisions do not apply retroactively to workers' compensation cases that: (a) were adjudicated or resolved by a department-approved or court-ordered settlement; or (b) have been paid in full by the workers' compensation insurer and two years have passed without payment of indemnity benefits or the initiation of litigation. Further, judicial decisions apply retroactively only to those cases currently in active litigation.

A. Retroactive judicial decisions do not apply to cases that were final prior to the issuance of the decision.

The general rule in Montana is that judicial decisions are applied retroactively. *Dempsey*, ¶ 29 (citing *Kleinhesselink v. Chevron, U.S.A.* (1996), 277 Mont. 158, 162, 920 P.2d 108, 111). However, the Montana Supreme Court allows for an exception when there exists "a truly compelling case for applying a new rule of law prospectively only." *Dempsey*, ¶ 29. Pursuant to this exception, a decision will not apply retroactively if all three *Chevron* factors are met. *Dempsey*, ¶ 30 (citing *Chevron*, 404 U.S. at 106-107).

Dempsey also holds 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*, ¶ 31. In *Schmill II*, the court elaborated on its *Dempsey* holding, noting that the *Schmill* retroactivity holding would not affect all *Schmill I* cases, as "many of these claims are settled, closed, or inactive." *Schmill II*, ¶ 19.

However, neither *Dempsey* nor *Schmill II* clarified the meaning of "final," "settled," "closed," or "inactive;" in particular, neither case recognized that these terms carry a more nebulous meaning in the workers' compensation context than they do in the tort context. In tort cases, the definition of "final" and "settled" is clear, because tort cases always reach a discreet endpoint: each case is adjudicated on the merits, decided by

motion, settled, or voluntarily dismissed, or, if none of these, runs up against a statute of limitations after three years have passed following the date of the event at issue. In workers' compensation cases, the moment of finality is more difficult to discern. As long as a claimant has timely notified his or her employer of the claimed injury or disease and has timely filed a claim for compensation, there is no statutory time limit for the claimant to seek benefits. *See generally* Mont. Code Ann. §§ 39-72-403, 601, and 603.

Despite the lack of a specific statutory endpoint for most workers' compensation claims, strong policies in favor of limiting the retroactive application of judicial decisions militate against applying decisions retroactively to such a large and indefinite class of claims. The Montana Supreme Court noted in *Dempsey* that "[i]n the interests of finality, the line should be drawn between claims that are final and those that are not." *Dempsey*, ¶ 28. In overturning *Chevron*, the United States Supreme Court recognized that retroactivity should apply only to "cases still open on direct review." *Harper*, 509 U.S. at 97. As early as 1932, Montana recognized the risk inherent in pervasive retroactivity: It would be "manifestly unjust and improper" to penalize a party for relying on a rule of law, even though that rule of law was later judged to have been in error. *Montana Horse Prods v. Great N. Ry. Co.* (1932), 91 Mont. 194, 7 P.2d 919, 925, *aff'd, Great N. Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932); *accord Dempsey*, ¶ 18 (citing *Montana Horse Products* with approval). In *Schmill II*, the Montana Supreme Court again reiterated the importance of limiting retroactivity "due to reasons of finality." *Schmill II*, ¶ 17.

Because of these compelling public policies, it is critical to set a line of finality in workers' compensation cases that will limit the retroactive application of judicial decisions. Those claims that have been adjudicated or closed through a court-ordered or department-approved settlement should be deemed "final" for retroactivity purposes. Claims that have been paid in full (i.e., all indemnity benefits paid to the extent required under the existing state of the law) for a period of at least two years should also be considered "final" for retroactivity purposes. Finally, regardless of where the court chooses to draw the line of "finality," judicial decisions cannot apply retroactively to those claims that are not currently in active litigation.

1. Workers' compensation cases are "final" for retroactivity purposes when they are adjudicated or closed pursuant to a department-approved or court-ordered compromise settlement.

The Montana Workers' Compensation Act ("WCA") (Montana Code Annotated §§ 39-71-101, *et. seq.*) grants parties to a workers' compensation claim the power "to finally settle the rights and liabilities . . . of any or all of the parties." Mont. Code Ann. §§ 39-71-518 and 519. The WCA requires department approval of any full and final settlement. Mont. Code Ann. § 39-71-741. "Upon approval, the agreement constitutes a compromise and release settlement and may not be reopened by the department."

Mont. Code Ann. § 39-71-741(1). Along with department-approved settlements, the WCA also includes in its definition of "settled claim" a "court-ordered compromise of benefits between a claimant and an insurer." Mont. Code Ann. § 39-71-107(7). These statutes take into account the common situation in litigated cases in which the parties settle and then file a stipulation with the court, which in turn approves the settlement and dismisses the case.

In addition, cases that have been adjudicated and are no longer pending on appeal are "final." For example, the Workers' Compensation Court ("WCC") can enter a final judgment, settling the relative rights of the parties. Mont. Code Ann. § 39-71-2905. Such a judgment is "final" under Montana law. *See Security Trust Sav. Bank of Charles City, Iowa v. Reser* (1920), 58 Mont. 501, 193 P. 532, 533 ("'Final judgment' means the finish of the judicial labor, pronouncement of the ultimate conclusion of the court upon the case, and a direction to the clerk to enter judgment."). The Department of Labor can also enter judgment on certain workers' compensation issues; such judgments are final, although they can be appealed to the WCC. *See* Mont. Code Ann. § 39-71-204.

The Montana Supreme Court has recognized that retroactivity applies to cases "pending on direct review." *Dempsey*, ¶ 31. Therefore, cases pending in the Department of Labor or WCC, or on appeal from either of these entities, are not final for retroactivity purposes. However, many adjudicated cases either are not appealed, or have been decided on appeal. Therefore, excepting those cases currently pending on appeal, adjudicated cases are also "final" for purposes of retroactive application of judicial decisions.

Workers' compensation cases that are closed by a compromise settlement, administrative order, or court decision are undeniably final and settled under Montana law.

2. Workers' compensation cases are "final" for retroactivity purposes when the claim has been paid in full, evidenced by payment of all indemnity benefits due under the existing state of the law and the passage of two years without the initiation of litigation.

The bigger challenge is determining whether there exists a class of workers' compensation claims, other than those fully and finally adjudicated or settled, to which judicial decisions should not retroactively apply. Although there is no statutory time limit for a claimant to seek benefits for a timely filed claim, the WCA does provide some guidance as to which claims should be deemed "settled" for retroactivity purposes after the passage of a significant period of time without any indemnity payment on the claim.

a. Under Montana Code Annotated § 39-71-107(7), "a claim that [has been] paid in full" is a "settled claim."

For purposes of claim handling, the WCA defines "settled claim" as "a department-approved or court-ordered compromise of benefits between a claimant and an insurer *or a claim that was paid in full*." Mont. Code Ann. § 39-71-107(7)(a) (2005) (emphasis added) (previously § 39-71-107(8) (2001)). The § 107 definition of "settled claim" "does not include a claim in which there has been only a lump-sum advance of benefits." Mont. Code Ann. § 39-71-107(7)(b).

Section 107 is extremely helpful in determining what class of workers' compensation claims is "settled" for retroactivity purposes other than those whose finality is department-approved or court-ordered. Under § 107, any claim that has been paid in full is "settled." This definition encompasses many cases that have not been fully and finally resolved through compromise or adjudication. In fact, by including both formally resolved cases and "paid in full" cases in its legislative definition of "settled," the Montana legislature indicated its intent to have more cases deemed "settled" than merely those which have been closed by compromise settlement or court approval. As described more fully below, a claim is paid in full when all indemnity benefits have been paid to the extent required under the existing state of the law, as evidenced by the absence of indemnity payments for two years, and the claimant has raised no objection by initiating litigation. Such "paid in full" claims are "settled" under § 107 and should be considered "settled" for retroactivity purposes as well.

b. For purposes of finality, a claim should be deemed "settled" for purposes of retroactivity two years after all indemnity benefits have been paid and no dispute, evidenced by the filing of litigation, has been documented.

Policy considerations weigh particularly strongly in favor of deeming "settled" or "final" for retroactivity purposes those cases in which all indemnity benefits have been paid to the extent required under the state of the law at the time of final payment and, since final payment, two years have passed. In the interest of finality, when a claimant has accepted all indemnity payments due to him and has raised no dispute by initiating litigation for two years since accepting the final indemnity payment, that claimant should not be permitted to benefit from a later judicial decision that would have affected the claim had it been decided while the claim was active.

Although no specific period of inactivity has been set by statute, the Montana legislature set a two-year statute of limitations for disputing denied workers' compensation claims, indicating that the legislature viewed two years as the maximum

reasonable period for a workers' compensation claimant to sit on his or her rights without attempting to vindicate them. Mont. Code Ann. § 39-71-2905(2) (1997-present) ("A petition for hearing before the workers' compensation judge must be filed within 2 years after benefits are denied."). Similarly, the limitations period for a liability created by statute is two years. Mont. Code Ann. § 27-2-211(1)(c).

The policy underlying these statutes of limitations is basic fairness. The Montana Supreme Court summed up this important policy justification for statutes of limitations in *Ereth v. Cascade County*, 2003 MT 328, 318 Mont. 355, 81 P.3d 463:

> The fundamental purpose of statutes of limitations is to preclude claims in which a party's ability to mount an effective defense has been lessened or defeated due to the passage of time. The policy underlying the bar imposed by statutes of limitations is, at its roots, one of basic fairness. As we have stated in the past, our system of jurisprudence is designed to achieve substantial justice through application of the law after the parties have had an opportunity to fully present both sides of a controversy. The failure to bring an action within a reasonable time is clearly not conducive to a full presentation of the evidence nor a search for the truth. Consequently, *the law will not reward the plaintiff who sleeps on his or her rights to the detriment of a defendant.*

Ereth, ¶ 16 (emphasis added) (citations omitted).

Analogous to the policy underlying statutes of limitations is the policy justifying exempting closed cases from the retroactive effect of judicial decisions. As the court explained in *Schmill II*, "*due to reasons of finality*, the retroactive effect of a decision . . . does not apply to cases that became final or were settled prior to a decision's issuance." *Schmill II*, ¶ 17 (emphasis added) (internal quotation marks omitted). The interest of finality weighs heavily against unlimited retroactivity, as discussed more thoroughly above. *See e.g. Harper*, 509 U.S. at 97 (explaining that retroactive judicial decisions should apply only to those "cases still open on direct review"); *Dempsey*, ¶ 28 ("In the interests of finality, the line should be drawn between claims that are final and those that are not.").

Accordingly, the two-year limitations period is an ideal measure for determining finality in settled workers' compensation cases. A claimant should not be allowed to accept all indemnity payments due to him, then wait more than two years without formally disputing a benefit award, and yet still enjoy the full retroactive effect of any newly decided case.

c. The doctrine of laches also requires that inactive claims be deemed "final" for retroactivite purposes.

For similar reasons, the doctrine of laches dictates that workers' compensation claimants should not be allowed to sit on their rights for an extended period of time and then attempt to take advantage of a newly-decided case. The defense of laches is available when a claimant has demonstrated a lack of diligence which has prejudiced the defendant. *See generally In re Johnson*, 2004 MT 6, ¶ 20, 319 Mont. 188, ¶ 20, 84 P.3d 637, ¶ 20 (citation omitted).

In the *Stavenjord* decision, this Court acknowledged the lack of diligence exhibited by certain claimants, noting that the 1987 amendments to the ODA and *Eastman* [*v. Atlantic Richfield Co.* (1989), 237 Mont. 332, 777 P.2d 862] stood unchallenged for almost a decade and "the very claimants who would benefit from a decision applying *Stavenjord* retroactively sat on their hands and did nothing during that entire decade." *Stavenjord*, ¶ 34. When such claimants sit on their rights for years and then later attempt to take advantage of a newly-decided case, their lack of diligence unreasonably prejudices the State Fund. Retroactive application of judicial decisions to inactive cases will require the State Fund to pay increased benefits for which the employer paid no premium, and will result in significant administrative costs and unfunded financial burdens to the State Fund. Financial instability and increased premiums will be detrimental to all in the system and contrary to specific legislative intent. *See* Mont. Code Ann. § 39-71-105(1) ("wage-loss benefits are not intended to make an injured worker whole but are intended to assist a worker at a reasonable cost to the employer.").

For the reasons discussed above, two years is the maximum period a claimant should be allowed to sit on his or her rights without attempting to vindicate them and still be able to benefit from a retroactive judicial decision. In accordance with the doctrine of laches, the Court should hold that claims that have stood formally unchallenged for more than two years should be deemed "final" for retroactivity purposes.

B. Regardless of what claims are deemed "final," "settled," "closed," or "inactive," only those claims in active litigation should be permitted to benefit from the retroactive effect of judicial decisions.

In *Dempsey*, the court noted that "[i]n the interests of finality, the [retroactivity] line should be drawn between claims that are final and those that are not (the line drawn in *Harper*)." *Dempsey*, ¶ 28. However, as explained elsewhere in *Dempsey*, the actual line drawn in *Harper* was not drawn at the point of finality, but rather at the point separating cases in active litigation from those that are not. *See Dempsey*, ¶ 23. As quoted in *Dempsey*, the *Harper* court actually held that new rules "must be given full

retroactive effect in all cases *still open on direct review*." *Harper*, 509 U.S. at 97 (emphasis added).

The limitation of retroactivity to "cases pending on direct review" has firm footing in Montana law. Montana follows the general rule that unless a manifest injustice would result, "a change of law between the law applied at trial and the time of appeal requires this Court to apply the changed law." *Brockie v. Omo Constr., Inc.* (1994), 268 Mont. 519, 526, 887 P.2d 167, 171, *overruled on other grounds by Porter v. Galarneau* (1996), 275 Mont. 174, 911 P.2d 1143, 1150 (citations omitted). In *Brockie*, the court held that a decision decided after Brockie's wrongful death trial, but before his appeal was decided, applied to Brockie's claim. *Brockie*, 887 P.2d at 171 (applying *Newville v. State* (1994), 267 Mont. 237, 883 P.2d 793). Likewise, in *Kleinhesselink*, the court gave retroactive application to a decision decided while *Kleinhesselink* was pending on appeal. *Kleinhesselink*, 920 P.2d at 111 (applying *Stratemeyer v. Lincoln County* (1993), 259 Mont. 147, 855 P.2d 506). In *Hand*, the court applied *Schmill I* retroactively because Hand's claim was in active litigation when *Schmill I* was decided. *Hand v. Uninsured Employers' Fund*, 2004 MT 336, ¶ 28, 324 Mont. 196, ¶ 28 103 P.3d 994, ¶ 28.

Pursuant to *Harper*'s "under direct review" rule, only cases in active litigation at the time of the precedent-setting decision are entitled to any retroactive effects of the new decision.

CONCLUSION

For the foregoing reasons, the definition of "final" in the workers' compensation context must be expansive enough to encompass not merely the rare claim which ends in a court decision or department-approved compromise settlement, but also the more common, but also "final," claim which is settled by way of payment in full and a passage of two years with neither indemnity payment nor formal dispute. Further, only those cases in active litigation and therefore "under direct review" should be entitled to retroactive effects of subsequently-decided judicial decisions.

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DATED this 27th day of January, 2006.

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CERTIFICATE OF MAILING

I, the undersigned, of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for Respondent, certify that on this 27th day of January, 2006, I mailed a copy of the foregoing Montana State Fund's Brief Regarding Retroactivity, postage prepaid, to the following persons:

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January 27, 2006

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Re: Flynn/Miller v. Montana State Fund
WCC No. 2000-0222

Dear Ms. Kessner:

Enclosed please find for filing Montana State Fund's Brief Regarding Retroactivity. Thank you for your assistance. If you have any questions, please call.

Very truly yours,

GARLINGTON, LOHN & ROBINSON, PLLP

Bradley J. Luck (rad)

Bradley J. Luck

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