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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 **RESPONDENT'S REPLY TO PETITIONER'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 its Reply Brief regarding the class of workers' compensation cases that are "final," "closed," and/or

"inactive" for purposes of retroactive effect of judicial decisions.[1] For the reasons stated herein, the State Fund asserts that judicial decisions do not apply retroactively to cases that have been settled, adjudicated, or paid in full for two years. Further, the State Fund asserts that judicial decisions apply retroactively only to those cases currently in active litigation.

INTRODUCTION

On January 30, 2006, the parties exchanged simultaneous opening briefs on the "final, closed or inactive" issue. Upon submission of these simultaneous answering briefs, the issue will be fully briefed and ready for this Court's decision. For the reason discussed herein, the Court should hold that statutory and common law limitations severely restrict retroactive application of judicial decisions in the Workers' Compensation System.

ARGUMENT

In its Opening Brief, the State Fund articulated its position regarding the class of workers' compensation cases that are "final," "closed," and/or "inactive." As discussed in that brief, the State Fund contends that judicial decisions do not apply retroactively to claims closed pursuant to department-approved settlements, to claims adjudicated or settled pursuant to a court order, or to claims that have been paid in full, as 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 State Fund also contends that judicial decisions cannot apply retroactively to claims that are not currently in active litigation. Arguments made and authority cited in Opening Briefs filed by Respondents and Intervenors support the State Fund's position.

Pursuant to the operative rules of this Court, and for the sake of brevity, the State Fund will not repeat its earlier arguments. Instead, the State Fund will respond to arguments made in the opening briefs, particularly Petitioners' contentions with which the State Fund disagrees.

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[1] On December 6, 2005, this Court issued an order directing briefing toward the issue of determining retroactivity regarding "final, closed or inactive" claims. This followed the Supreme Court's noting in *Schmill v. Liberty Nw. Ins. Corp.*, 2005 MT 144, 327 Mont. 293, 114 P.3d 204, that the holding in *Dempsey v. Allstate Ins. Co.*, 2004 MT 391, 325 Mont. 207, 104 P.3d 483, would not apply to cases that were settled, closed or inactive. Petitioners chose to limit their briefing to cases that are "final or closed."

I. Workers' compensation claims are "final" or "settled" when: (a) resolved through a department-approved settlement; (b) adjudicated or resolved by a court-ordered settlement; (c) paid in full (i.e., all indemnity benefits have been paid to the extent required under the existing state of the law) as evidenced by the passage of two years without the initiation of litigation.

The retroactive effect of judicial decisions "does not apply to cases that became final or were settled prior to a decision's issuance." *Schmill,* ¶ 17 (quoting *Dempsey,* ¶ 31). As discussed more thoroughly in the State Fund's opening brief, cases can become "final" or "settled" for retroactivity purposes through department-approved settlement, through adjudication or court-approved settlement, or by payment in full (i.e., payment of all indemnity benefits required under the existing state of the law evidenced by the passage of two years without litigation.

In relation to all of the following separate discussions regarding settlements and the fine lines cut by Petitioners in their arguments it must be noted globally that the process of settlement and approval of workers' compensation and occupational disease claims has changed rather routinely since the 1987 legislative session. Regardless, settlements by whatever title and method of approval, resolved claims and final.

Attempted reopening of claims after settlement, whether approved by the Department, the Court, or both, requires a separate and distinct proceeding and specialized proof (of fraud, undue influence, material change of conditions, mistake of fact, etc.). Claims in this very small sub-category are fully settled, and therefore final and closed, until reopened. If a claim is proven to merit reopening, the retroactive effect of any Supreme Court decision issued after settlement may be considered by the Court. Limiting necessary rules of retroactivity based upon infrequent, anecdotal potentials is unwarranted.

A. Department-approved settlements and departmentally adjudicated cases are "settled" for retroactivity purposes.

The Workers' Compensation Act ("WCA") includes in its definition of "settled claim" "a department-approved . . . compromise of benefits between a claimant and an insurer." Mont. Code Ann. § 39-71-107(7)(a). The WCA provides for department approval of "full and final settlement[s]." Mont. Code Ann. § 39-71-741(1). This statute does not apply to settlements not classified as "full and final" settlements, but the WCA does allow parties to a workers' compensation claim "to finally settle the rights and liabilities . . . of any or all of the parties." Mont. Code Ann. §§ 39-71-518 and 519; *see also Martin v. State Compen. Ins. Fund*, (1996), 275 Mont. 190, 193, 911 P.2d 848, 849-50 (distinguishing between "full and final compromise settlements" and "final

settlements"). In addition, the Department of Labor can enter final judgment in certain workers' compensation issues. *See* Mont. Code Ann. § 39-71-204.

Petitioners assert that "claims cannot be settled without a Department order granting approval of a petition for settlement," yet paradoxically claim that "Department approval . . . is not always sufficient" to settle a claim. Petrs.' Br. 3 (Jan. 30, 2006). Later in their brief, Petitioners state that "[w]hile settlement is necessary to conclude a claim, it may not be sufficient." Petrs.' Br. 5.

In part, Petitioners' statements are based upon their specious argument that no claim is "final" or "settled" that has the potential for appeal or reopening – whether such opportunity is exercised or not – or may later be set aside due to rare, extenuating circumstances such as fraud, deceit, or mistake. As will be discussed in great detail below, this Court should reject Petitioners' argument that no claim is ever final or settled.

The law is clear that workers' compensation claims can be settled or "become final" through Department decisions. Such claims fall under the holding of *Schmill* and *Dempsey* that retroactive judicial decisions do not apply to cases that "became final or were settled" prior to the date of the decision. Therefore, Petitioners' unfounded assertions notwithstanding, retroactive judicial decisions do not apply to cases that are settled or finalized through Department determinations.

B. Contrary to Petitioners' argument, department-approved compromise settlements are only one class of "settled claims" under the WCA.

Under the WCA, a "settled claim" is "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). This definition includes three separate and distinct categories of "settled" claims: (1) a department-approved compromise of benefits; (2) a court-ordered compromise of benefits; and (3) a claim that was paid in full.

Petitioners, however, attempt to persuade the Court to recognize only one of these categories of claims, alleging a "clear legislative intent that claims cannot be settled without a Department order granting approval of a petition for settlement." Petrs.' Br. 3. Petitioners cite the now-repealed Occupational Disease Act's requirement that "[f]or all relevant years the Occupational Disease Act has allowed settlements," but only if approved by the "Employment Relations Division of the Department of Labor." *See* Petrs.' Br. 3 (citing Mont. Code Ann. § 39-72-711(2) (repealed)). Petitioners also cite language from the WCA providing for department approval of compromise

settlements. Petrs.' Br. 3 (citing Mont. Code Ann. § 39-71-741). Neither of these provisions supports Petitioners' assertion that "claims cannot be settled without a Department order"; rather, both allow for the possibility of settlement of claims through a Department order.

Petitioners ignore the statutory provisions allowing for claims to settle through court order or payment in full. It would be contrary to, rather than consistent with, legislative intent to find, as Petitioners' urge this Court to do, that claims cannot be settled without department approval. The legislature has specifically provided for two other ways in which claims can be settled: by court order or by payment in full. This Court should give full effect to the statute by recognizing all three categories of settled claims.

C. Claims that have been adjudicated or settled by court order are "final."

The WCA specifically provides for the settling of claims by court order. Montana Code Annotated § 39-71-107(7)(a) includes in its definition of "settled claim" a "court-ordered compromise of benefits between a claimant and an insurer." The WCA also provides the Workers' Compensation Court the authority to enter a final judgment settling the rights of the parties. Mont. Code Ann. § 39-71-2905.[2]

Petitioners also assert – wrongly – that "[c]laims resolved by Court Order may not be considered final in the absence of a Department approved settlement." Petrs.' Br. 6. Put another way, Petitioners claim that "[e]ven claims resolved by litigation are not final." Petrs.' Br. 4. Citing Montana Code Annotated § 39-71-2909, Petitioners argue that claims resolved by litigation may be reopened upon a showing that claimant's disability has changed, and the potential for reopening the claim prevents them from being "final."

Again, Petitioners ignore the statutory language in § 107 providing that a claim can be "settled" through court order. Petitioners also ignore the fact that this "settled" language tracks exactly the language of *Dempsey* and *Schmill* providing that "settled" claims are exempt from the retroactive effect of judicial decisions. Contrary to Petitioners' implications, *Dempsey* and *Schmill* do not include conditional language indicating that the potential for reopening somehow makes a "settled" claim less than "settled" or a judgment of the Workers' Compensation Court any less "final."

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[2] The Court may take judicial notice of its long standing practice of approving settlements based upon the stipulation of parties appearing before it.

D. Claims that have been paid in full are "final."

Petitioners do not address the third category of claims that are "settled" pursuant to the statute: claims that are "paid in full." As discussed more thoroughly in the State Fund's opening brief, claims that are "paid in full" are also settled under § 107. 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 passage of two years without the initiation of litigation by the claimant.

Further, once a claim is "settled" through payment in full, it, like other settled claims, is exempt from the retroactive application of later judicial decisions.

III. Settled claims, including those arising before 1987 and after May 18, 2001, are "final" for retroactivity purposes.

Dempsey and *Schmill* are clear that the retroactive effect of a judicial decision "does not apply to cases that became final or were settled prior to a decision's issuance." *Dempsey*, ¶ 31. Notably, *Dempsey* does not place restrictions on the terms "settled" and "final" regarding department approval, exhaustion of appeal rights, or potential for reopening. If a claim is "settled" or "final," later judicial decisions do not retroactively apply to that claim.

Petitioners attempt to circumvent any sort of finality through several means. As discussed above, Petitioners argue that court judgments and court-ordered settlements are not final because they require department approval, yet paradoxically argue that department-approved settlements are not final because they require court approval.

Petitioners also argue that "claims arising before 1987" may not be considered final until "4 years after the settlement has been approved by the Department." Petrs.' Br. 3. Although it is difficult to follow Petitioners' reasoning in this section, it appears Petitioners believe that "for claims arising before 1987, all Department orders allowing full and final compromise settlements are subject to review by the workers' compensation judge" upon a change in the claimant's disability. Petrs.' Br. 3 (citing Mont. Code Ann. § 39-71-2909 (1985)). However, Petitioners go on to state that the above review "does not extend to any settlement delineated as a 'full and final compromise settlement.'"

In their argument contesting the finality of pre-1987 settlements, Petitioners appear to be confused about the difference between settlements designated "final settlements" and those designated "full and final compromise settlements." Mont. Code Ann. § 39-71-204 (1985). Although the distinction is confusing, the law is clear, and both types of settlements are "settled" for retroactivity purposes. Under Montana Code

Annotated § 39-71-2909 (1985), "full and final compromise settlement[s]" are not subject to Department review and are therefore final, even under Petitioners' reasoning. "Final settlements" reached before 1987, though "settled," could be reopened by the Court under certain circumstances for up to four years. Mont. Code Ann. § 39-71-2909 (1985). Such claims, like the other categories of "settled" claims discussed above, are no less "settled" simply because they may be reopened under certain circumstances. Once "settled," these claims fall under the holdings of *Dempsey* and *Schmill* and are exempt from retroactive application of judicial decisions.[3]

This same reasoning applies to settlements entered into after May 18, 2001. Such claims are "settled" under the statute. Even if the Court found that a limited class of settled claims must be reopened because the settlements were entered into based specifically upon this Court's ruling in *Flynn*, that does not invalidate the vast majority of settled claims. For all purposes other than *Flynn*, claims settled after May 18, 2001, are undeniably "final" for purposes of the retroactive effect of judicial decisions.

IV. Claims that are no longer in active litigation are "final."

Petitioners also fail to observe the limitation of retroactivity to cases pending on direct review. *See Dempsey*, ¶ 28; *Harper v. Virginia Dept. of Taxn.*, 509 U.S. 86, 97 (1993). The State Fund maintains that this Court should recognize this limitation, and stands on its reasoning in its opening brief.

CONCLUSION

Judicial decisions do not apply retroactively to settled claims, claims closed pursuant to department order, claims closed pursuant to court order, or claims that have been paid in full, as 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. Nor do judicial decisions apply retroactively to claims that are not currently in active

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[3] Part of the confusion raised by Petitioner's arguments relates to semantics. As *Schmill II* noted, retroactivity "does not apply to cases that become final or were settled prior to a decisions issuance." *Schmill II*, ¶ 17. In that context, "final" is separate from "settled." The discussion in the State Fund's initial brief used the term "final" in relation to all resolved or inactive claims. The word is also a term of art in relation to a specific kind of settlement which, as noted, could be reopened with changed circumstances within four years of approval. An approved final settlement is no different than an approved full and final compromise settlement for our purposes --- both petitions settled the claim.

litigation. The Court should reject Petitioners' attempts to limit the field of "final, closed, or inactive" claims beyond the parameters of Montana statutes and case law.

DATED this 23rd day of February, 2006.

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By _____
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CERTIFICATE OF MAILING

I, the undersigned, of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for Respondent, certify that on this 23rd day of February, 2006, I mailed a copy of the foregoing **RESPONDENT'S REPLY TO PETITIONER'S BRIEF REGARDING RETROACTIVITY**, postage prepaid, to the following persons:

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February 23, 2006

Ms. Pat Kessner, Clerk
Workers' Compensation Court
P.O. Box 537
Helena, MT 59624-0537

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

Dear Ms. Kessner:

Enclosed please find for filing Respondent's Reply to Petitioner'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

BJL:rad
Enc.
c: Mr. Rex L. Palmer (w/enc.)
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