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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 Company*, Intervenor.	WCC No. 2000-0222 ***PETITIONERS' REPLY BRIEF RE: "FINAL AND SETTLED."***

* * * * *

Respondents request this Court to step outside its judicial role and create procedural requirements to limit the retrospective application of court decisions. This request comes in two forms. First, the honest concession that

no applicable two year limitation exists, followed by policy arguments that favor creation of a two year limit. The sort of argument one might expect the Chamber of Commerce to make to the legislature. Second, the disingenuous claim that the two year statute of limitation applicable to denied benefits begins to run before the claimant even requests the "denied" benefits.

Both the above are improper for the same reason. They ask the Court to insert that which the legislature has omitted. This is not the Court's function. Indeed, it is anathema to the interpretation of any legislation.

The State Fund takes the first path. It concedes "[a]s 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." Next, it argues that due to vaguely articulated policy reasons, this Court should "...set a line of finality in workers' compensation cases that will limit the retroactive application of judicial decisions." As stated above, it is not the Court's function to create a limitation within a statute where the legislature has failed to do so. The Supreme Court has not asked this Court to legislate from the bench, and it should decline to do so.

Liberty takes the second path. It argues that any termination of benefits is a denial of benefits for purposes of the two year statute of limitation applicable to denied benefits. This argument would cut off benefits where reinstatement has never been requested. It would cut off lifetime medical benefits. It would even cut off claims to adjust the occasional miscalculation of an indemnity rate. This interpretation of §39-71-2905(2) is without precedent and is unsupported by the plain language of the statute. A request is a prerequisite for a denial. Liberty asks this Court to ignore that only a request for benefits followed by a denial can trigger the statute of limitation. In doing so, Liberty asks this Court to create a two year limit which begins to run even before the claimant requests the benefit.

Respondents would expand the statute which this Court has described as having "limited application" to undermine the Act.[1] No claimant could be expected to navigate the claims process without an attorney. This result violates one stated purpose of the Act; to be "primarily self administering" and to "minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities." See §39-71-105(3) MCA.

Beyond this, the two year statute of limitation did not exist before 1997. Consequently, it could not apply to pre-1997 claims under any circumstance. Further, for claims arising before 1987, the Act dictates that the statutes must be liberally construed in favor of the claimant. See § 39-71-104 MCA (1985). The arguments of each of the Respondents seek to avoid this statutory mandate applicable to the older claims.

As pointed out in Petitioners' Opening Brief, with rare exceptions not applicable here, timely filed workers' compensation claims cannot become final unless settled. Claims cannot be settled without approval of the Department of Labor. Older claims even require Court approval. Respondents would have the Court ignore these clear, uniform and controlling principles of the Act in favor of strained interpretations of tangential and variable statutes spanning sixteen legislative sessions. This in an effort to piece together a patchwork of support that is inconsistent with the clear legislative intent of the Act.

In addition to the request for an arbitrary two year statute of limitation, Respondents make a variety of arguments which also have no merit. Without authority they assert that a timely filed claim can be terminated and without Department approval.

They assert that claims are "final" when adjudicated. This defies the

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1 See PETITIONERS' OPENING BRIEF, footnote 6.

statute which expressly permits reopening of litigated claims and contemplates trial of individual issues from time to time as parties bring the issues to the Court. These individual trials would not terminate a claim to Flynn/Miller benefits unless such benefits were the issue being litigated. Likewise concerning a Court approved settlement of a single issue or multiple issues. Absent Department approval of a full and final settlement, both parties are subject to uncertainty. This uncertainty provides benefits and risks to both claimant and respondent in the litigation. One of the benefits and risks in the lack of finality. Having chosen this course in some claims, it is too late to create finality where the statute does not.

As with judicial resolution of disputes, resolution through the Department is subject to reopening. This is discussed in Petitioners' Opening Brief and is appropriate for claims settled after the Court's erroneous original decision in May 2001.

The State Fund asserts the doctrine of laches in an attempt to create finality where the controlling statute does not. The State Fund raised the argument on appeal in *Schmill II* and it was rejected by the Supreme Court. Without proof of prejudice, the doctrine of laches does not apply. The State Fund claims prejudice from delay but does not explain how it is prejudiced. Prejudice cannot be shown in a case requiring simple math to determine entitlement. The Claimant has the burden to prove costs and fees. The passage of time will have no effect on this proof. In any event, it is the claimants who have been prejudiced. The Respondents have wrongly held and invested the claimants' money for years, sometimes decades. Failure to return this money violates a stated public policy that "wage-loss benefits should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease." See §39-71-105(1) MCA (2003). The mandate of a "reasonable relationship" is disturbed by permitting the Respondents to hold funds rightly belonging to claimants.

Finally, Respondents attempt to re-write *Dempsey* (2004) to limit retroactive application of judicial decisions to cases pending on direct review **and** not yet final. In fact, the *Dempsey* ruling is disjunctive, not conjunctive. It states "all civil decisions of this court apply retroactively to cases pending on dir review ect **or** not yet final, unless all three of the *Chevron* factors are satisfied."[2] This attempted slight of hand is evidence of Respondents desperation and highlights the impotence of their overall argument. The Supreme Court would not direct this Court to determine what claims are final or settled under the terms of the Act if it intended to cut off all claim not in active litigation. Such would be a monumental violation of judicial economy.

Most of Respondents' arguments are a thinly veiled attempt to reiterate arguments against retroactive application of judicial decisions. These arguments were rejected by the Supreme Court. This Court should reject Respondents' attempt to confuse the determination of what constitutes "final and settled" under the Act with the broader question of retrospective application of judicial decisions. The Supreme Court has already determined that civil decisions apply retroactively.

Petitioner's respectfully request that this Court enter an order that in the context of workers' compensation law and for purposes of this common fund litigation, claims not filed within the time allowed by the applicable statutes of limitation are final, as are all settled claims, except that:

1. No settled claim may be considered final unless settled with the express approval of the Department of Labor.
2. Claims arising before 1987 may not be considered final until 4 years after the settlement has been approved by the Department.

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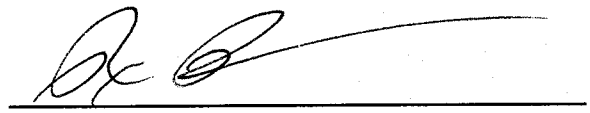
[2] *Dempsey v. Allstate Ins. Co.*, 2004 MT 291 ¶ 31, 325 Mont. 27 ¶31. Emphasis added.

3. Claims resolved by Court Order may not be considered final in the absence of a Department approved settlement.
4. Claims settled after May 18, 2001, (i.e., the date the Workers' Compensation Court wrongly ruled that insurers had no obligation to participate in the expense incurred by a claimant to obtain Social Security benefits) may not be considered final for purposes of this common fund litigation.

DATED in Missoula, Montana, this 3rd day of March, 2006.



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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of March 2006, a true and correct copy of the foregoing was served upon the following by U.S. mail, hand-delivery, Federal Express, facsimile or email:

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March 3, 2006

Patricia J. Kessner
Clerk of Court
Workers' Compensation Court
PO Box 537
Helena, MT 59624-0537

Re: *Flynn/Miller v. State Fund*

Dear Pat:

Enclosed please find the original PETITIONERS' REPLY BRIEF RE: "FINAL AND SETTLED" dated March 3, 2006.

If you have any questions or concerns, please do not hesitate to contact this office.

Sincerely,
ATTORNEYS INC., P.C.

Rex Palmer, mve

Rex Palmer

RP:mve
Enclosure
cc: Brad Luck
Tom Martello
Larry Jones