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FILED

JUN - 8 2009

OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS COMPENSATION COURT OF THE STATE OF MONTANA

ROBERT FLYNN and CARL MILLER, Petitioner, vs. MONTANA STATE FUND, Respondent. LIBERTY NW INS. CORP., Intervenor,	)	WCC NO. 2000-0222 OPENING BRIEF OF CASSANDRA SCHMILL RE "PAID IN FULL"

COMES NOW Laurie Wallace, counsel for CASSANDRA SCHMILL, and submits the following brief on the definition of the phrase "paid in full" as it pertains to the identification of "settled" claims for purposes of the *Flynn/Miller* common fund. Since the Court has already ruled on the "paid in full" dispute in the *Schmill* case, the Court's ruling in this case will not apply to the *Schmill* common fund.

ARGUMENT

In its decision dated November 25, 2008, the Supreme Court ruled in this case that a "settled" claim was one in which there was "a department-approved or court-ordered compromise of benefits between a claimant and an insurer or a claim that was paid in full." *Flynn v. Montana State Fund,* 2008 MT 394, ¶26, 347 Mont. 146, ¶26, 197 P.3d 1007, ¶26, quoting §39-71-107(8), MCA (7)(a), 2005. Since "settled" claims are excluded from the retroactive application of the *Flynn* decision, this Court is tasked with determining whether any *Flynn* claims have been "paid in full," and, therefore, "settled." There are a number of reasons why the Court should conclude that none of the *Flynn* claims have been "paid in full."

DOCKET ITEM NO. 588

The Court has already ruled that none of the *Schmill* claims have been "paid in full." In coming to that conclusion, the Court in *Schmill* recognized that it was not uncommon for a claimant who had not settled his case by way of stipulation or petition for settlement, "to become once more entitled to TTD benefits due to a relapse into disability," or to use medical benefits well into the future for ongoing reasonable and necessary medical care of his industrial injury or occupational disease. (Order Adopting Order of Special Master, Docket No. 380, ¶43.) Under such circumstances, the Court reasoned that such cases cannot be considered "paid in full." (Id.)

The same reasoning should be applied to *Flynn* claims. Because non-settled claims continue to expose the insurer to liability for benefits, they cannot be considered "paid in full." To conclude otherwise would allow individual insurers to indiscriminately limit benefits using differing criteria not set forth in the statutes, and without affording claimants the protection of due process.

The conclusion that non-settled claims in compensation benefits have been paid can never be "paid in full" is further supported by section 39-71-739, MCA, the language of which has not been amended since 1979:

> "**Compensation in case of changes in degree of injury.** If aggravation, diminution, or termination of disability takes place or is discovered after the rate of compensation is established or compensation is terminated in any case where the maximum payments for disabilities as provided in this chapter are not reached, adjustments may be made to meet such changed conditions by increasing, diminishing, or terminating compensation payments in accordance with the provisions of this chapter."

From 1929 to 1979, this statute read almost identical to the current version quoted above:

> "**Compensation in case of changes in degree of injury.** If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established, or compensation terminated in any case, where the maximum payments for disability as provided in this act have not been reached, adjustments may be made to meet such changed conditions by increasing, diminishing or terminating compensation payments in accordance with the provisions of this act."

In the case of *Meznarich v. Republic Coal Co.*, (1935), 101 M 78, 53 P.2d 82, the claimant was injured in the company's coal mine on April 7, 1930. TTD benefits were paid for 26 weeks pursuant to an award from the Industrial Accident Board. The claimant's disability continued so he petitioned the Board for ongoing benefits. An additional 124 weeks of benefits were awarded with the Board declaring that such benefits were "to be in full and final

settlement" of the claimant's claim. *Meznarich,* 101 M at 85. When those benefits expired, however, the claimant petitioned the Board for additional compensation alleging that his disability continued unchanged. The Board denied the request on the grounds that it did not have authority to award such benefits after having made "'an award in full and final settlement of the claim for compensation, unless there is an aggravation of the condition of the claimant after the original award.'" *Id.* p. 85-86. Meznarich appealed.

The Supreme Court reversed the Board's decision. The Court first noted that there was no provision in the WCA which gave the Board the authority to award a "final" award of less than the full compensation provided under the Act for a particular disability. On the contrary, the Court proclaimed that the Board's authority was to have continuing jurisdiction over its orders, decisions, and awards so as to "rescind, alter, or amend any such order, decision, or award" upon a finding of good cause. (Section 2952, Rev. Codes 1921.) The Court further ruled that the Board's statutory authority was to "review, diminish, or increase . . . any compensation awarded upon the grounds that the disability . . . either increased or diminished or terminated." (Section 2956, Rev. Codes 1921.)[1]

When these statutory provisions were construed together with section 2924 (subsequently designated 92-713, RCM and 39-71-739, MCA), the Court concluded that they "evidence a clear legislative intent that no case in which compensation has been awarded shall be finally closed until the maximum period of payments for the disability for which such award has been made has expired, except that, under the amendments of 1929 to section 2952, above, this power is withdrawn with respect to 'any final settlement' after the expiration of two years from the date the order awarding compensation is made, and in cases involving a compromised settlement." *Meznarich,* 101 M at 88-89.

Both this Court and the Montana Supreme Court have continued to cite to section 39-71-739, MCA, for the proposition that when a claimant's disability increases after an initial period of entitlement has ceased, the claimant is entitled to the additional benefits. (See, *Walter v. Public Auction Yards*, (1979), 181 Mont. 109, 116, 592 P.2d 497, 501 (the WCC retains jurisdiction to reduce or terminate disability payments to meet changing conditions under section 92-713, RCM 1947, now section 39-71-739, MCA.); *Woodworth v. Liberty NW Ins. Co.*, 2004 MT WCC 35, ¶24 (in the event the claimant's disability thereafter increases and he suffers a further wage loss, then his benefits must be recomputed based on the additional wage loss.); *Stavenjord v. Montana State Fund*, 2004 MT WCC 62, Decision on Common Fund Retroactivity ¶14 (if a claimant's condition deteriorates causing an increase in his impairment rating, the claimant would be entitled to the increased rating pursuant to section 39-71-739, MCA.))

As the foregoing cases make clear, section 39-71-739, MCA, not only allows the payment of additional compensation benefits in non-settled claims, but nothing in the WCA or ODA permits the final closure of an unsettled claim until and unless all compensation which can be paid has been paid. That means all possible impairment benefits (100%), all

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[1] Section 39-71-2909, MCA, (2005) combines these two previous code sections.

medical benefits, all TTD/PPD/PTD benefits both as to duration and rate, all widows/ beneficiaries benefits, all rehabilitation benefits, etc. must be paid in full before a case can be considered closed. Since, by definition, all *Flynn* claims are entitled to additional compensation and section 39-71-739, MCA, extends that entitlement indefinitely until the maximum amount of compensation has been paid, no *Flynn* claims have been "paid in full."

As the foregoing discussion makes clear, the Court does not have to define "paid in full" to conclude that no *Flynn* claims have been "paid in full" and, therefore, should not be considered "settled" for purposes of the application of the retroactivity decision. However, even if the Court wants to engage in the exercise of defining "paid in full" the Court should again conclude that none of the *Flynn* claims meet any such definition.

The statute which contains the "paid in full" phrase is section 39-71-107, MCA. That statute was enacted in 1995 and read as follows:

> "**Insurers to act promptly on claims.** (1) Pursuant to the public policy stated in 39-71-105, prompt claims handling practices are necessary to provide appropriate service to injured workers, to employers, and to providers who are the customers of the workers' compensation system.
> (2) An insurer shall provide to the claimant:
> (a) a written statement of the reasons that a claim is being denied at the time of denial;
> (b) whenever benefits requested by a claimant are denied, a written explanation of how the claimant may appeal an insurer's decision; and
> (c) a written explanation of the amount of wage loss benefits being paid to the claimant, along with an explanation of the calculation used to compute those benefits. The explanation must be sent within 7 days of the initial payment of the benefit.
> (3) An insurer shall:
> (a) begin making payments that are due on a claim within 14 days of acceptance of the claim, unless the insurer promptly notifies the claimant that the insurer needs additional information in order to begin paying benefits and specifies the information needed; and
> (b) pay settlements within 30 days of the date the department issues an order approving the settlement.
> (4) An insurer may not make payments pursuant to 39-71-608 or any other reservation of rights for more than 90 days without:
> (a) written consent of the claimant; or
> (b) approval of the department.
> (5) The department may adopt rules to implement this section."

On December 6, 2000, the Supreme Court decided the case of *Thompson v. Cigna,* 2000 MT 306, 302 Mont. 399, 14 P.3d 1222. The case involved the assessment of a penalty against a workers' compensation insurer for unreasonable delay in the payment of benefits. Much of the delay was due to the fact that the in-state adjuster did not have settlement authority in violation of Rule 24.29.804, ARM. A majority of the Supreme Court agreed with the WCC that a penalty could not be assessed under the facts of the case, but also agreed with the dissent that it was wrong that an insurer could blatantly disregard the regulations requiring an in-state adjuster with impunity.

In response to the *Thompson* decision, the 2001 Legislature amended section 39-71-107, MCA, elevating the in-state adjuster rule from a regulatory requirement to a statutory duty. The Legislature then enumerated the duties the in-state adjuster must have authority to do, including settlement of claims. The new statute also required all claims files to remain in Montana until the claim was settled. In order to comply with these provisions, the Legislature added subsection 8 (now subsection 7(a)) which defined a "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."

The phrasing of subsection 8 differentiates between a claim settled by written agreement between a claimant and an insurer, and one which is settled upon being paid in full. Both the WCA and ODA require either "a department-approved or court-ordered compromise of benefits between a claimant and an insurer" when a claim is to be settled by way of a lump sum payment of benefits. In the WCA, the lump sum statute, section 39-71-741, MCA, states in pertinent part:

> "**Compromise settlements and lump sum payments.** (1) By written agreement, benefits under this chapter may be converted in whole or in part into a lump sum. An agreement that settles a claim for any type of benefit is subject to department approval . . ."

In the ODA, the lump sum settlement provisions, sections 39-72-405 and -711, stated in pertinent part:

> "**39-72-405. General limitations on payment of compensation.** When an employee has an occupational disease incurred in and caused by the employment . . . compensation may be paid, not exceeding $10,000, by an agreement between the insurer and a claimant . . .
>
> **39-72-711. Lump-sum and compromised settlements.** . . . (2) Whenever there are contested issues as to an insurer's liability for a claim under this chapter, . . . a claimant and an insurer may enter into a full and final compromise settlement of the claim. However, such settlements are not binding on the parties until approved by

> the department. After the department approves a full and final compromise settlement, the claim is closed and the insurer's liability for a settled claim is forever released."

When a claim is not settled pursuant to the payment of a lump sum, there are no similar requirements under either the WCA or the ODA to have a written agreement between a claimant and an insurer setting forth the benefits to be paid and when. This is because, as noted previously, there is no way to be certain what a claimant's ultimate benefit entitlement will be and when it will end. This point is underscored each time the WCC finds a claimant *currently* permanently totally disabled, but then expressly proclaims that the claimant's total disability status could change in the future. I.e., *Shephard v. Borden, Inc.*, 2000 MT WCC 28, ¶52.

Considering the foregoing analysis in light of the "paid in full" language of section 39-71-107(7)(a), MCA (2005), allows for only one conclusion. A claim in which indemnity benefits have been paid can never be "paid in full." A "paid in full" claim, therefore, is one in which only medical benefits have been paid. Pursuant to section 39-71-615, MCA, an insurer can make payments of medical only claims, such as bee stings and slivers, without accepting liability for the claim. If the claim remains a medical only claim and medical benefits expire pursuant to the 60 month rule of section 39-71-704(1)(f), MCA (2005), such a claim would be "paid in full."

Medical only claims can never present issues of a changing disability status and, therefore, a changing benefit entitlement. It is the potential for a change in disability status that underlies section 39-71-739, MCA, and prevents the use of arbitrary criteria to prematurely terminate a claimant's entitlement to benefits. Only in cases in which the claimant has never become disabled can a single criteria, the expiration of 60 months, be used in a uniformly, nondiscriminate manner to close cases without a written agreement between the claimant and the insurer. Only in such cases can a claim be "paid in full."

CONCLUSION

This Court concluded in *Schmill* that claims that were not settled by way of a department-approved or court-ordered settlement agreement were not "paid in full" because non-settled claims continued to expose the insurer to liability for benefits. Section 39-71-739, MCA, gives to all claimants disabled by an industrial injury or occupational disease an indefinite entitlement to benefits. It is only when a claimant has suffered a non-disabling, medical only industrial injury or occupational disease that benefits are finite and can be terminated, and thus "paid in full," after a 60 month period of non-use. Based upon this definition of claims "paid in full" the Court should conclude that none of the *Flynn* claims have been "paid in full."

DATED this 6 of June, 2009.

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By: [signature]
LAURIE WALLACE

Certificate of Mailing

I, Robin Stephens, do hereby certify that on the 5 day of June, 2009, I served a true and accurate copy of the OPENING BRIEF OF CASSANDRA SCHMILL RE "PAID IN FULL" by U.S. mail, first class, postage prepaid to the following:

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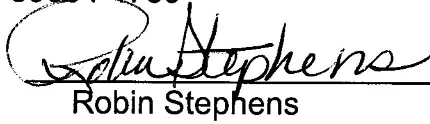

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June 5, 2009

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

RE: FLYNN/MILLER v. MONTANA STATE FUND, et al.
WCC No. 2000-0222

Dear Ms. Wilson:

Enclosed please find the Opening Brief of Cassandra Schmill RE "Paid in Full" in regard to the above-referenced matter.

Should you have any questions concerning this matter, please contact me directly.

Sincerely,

LAURIE WALLACE
BOTHE & LAURIDSEN, P.C.

LW/rs
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cc: Larry Jones
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