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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 2000-0222

ROBERT FLYNN,

and

CARL MILLER,

Petitioners,

v.

MONTANA STATE FUND,

Respondent,

and

LIBERTY NORTHWEST INSURANCE CORP.,

Intervenor.

OPENING BRIEF OF LIBERTY NORTHWEST INSURANCE CORP. (INTERVENOR) RE: PAID IN FULL

Pursuant to this Court's Minute Entry dated April 22, 2009, Hearing No. 4054, Vol. XVII Liberty submits this brief on the following issue:

> Because under *Flynn v. Montana State Fund*, 2008 MT 394, ¶26, (*Flynn II*), 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.' Section 39-71-107(7)(a), MCA (2005)" what workers' compensation cases should be considered paid in full in the context of the Montana Supreme Court's decisions governing the retroactive application of its decisions?

In analyzing *Flynn II* we must be mindful of the holding in *Flynn v. State Fund,* 2002 MT 279, ¶17-18 (*Flynn I*) (emphasis added):

> The Workers' Compensation Court correctly cited the general rule of statutory preemption. We agree that the common law is preempted where the law is statutorily declared. See § 1-1-108, MCA; *Brewington v. Employers Fire Ins. Co.* (1999), 297 Mont. 243, 248, 992 P.2d 237, 241. However, the Workers' Compensation Act is silent on the issue of attorney fee apportionment following benefit recoupment. Therefore, there exists no statutory declaration which preempts the **equitable principles of the common fund doctrine**.
>
> Accordingly, pursuant to the common fund doctrine, the State Fund should contribute, in proportion to the benefits it actually received, to the costs of the litigation, including reasonable attorney fees. The Workers' Compensation Court erred when it denied Flynn's request for reasonable apportionment of attorney fees. To the extent it declined to apply the common fund doctrine, the judgment of the Workers' Compensation Court is reversed.

Liberty's position is that the analysis must be two-part. The first part is to identify the retroactive application doctrine adopted by the Montana Supreme Court in *Flynn II* and secondly, under that doctrine what workers' compensation case must be considered paid in full and settled and therefore not subject to the retroactive application of the Montana Supreme Court decision.

On the first leg of the analysis the *Flynn II* Court provides some guidance.

> Thereafter, in *Schmill v. Liberty Northwest Ins. Corp.*, 2005 MT 144, 327 Mont. 293, 114 P.3d 204 (*Schmill II*), we concluded that our decision in *Schmill v. Liberty Northwest Ins. Corp.*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290 (*Schmill I*) applied retroactively. However, in reliance on our decision in *Dempsey v. Allstate Ins. Co.*, 2004 MT 391, 325 Mont. 207, 104 P.3d 483, we recognized that "retroactive application does not mean that prior contrary rulings and settlements are void *ab initio*." *Schmill II*, ¶ 17. Rather, the policy of finality dictates that " '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) (ellipsis in original). We recognized that many "claims are settled, closed, or inactive" but indicated that we could not determine from the record which claims **in the context of workers' compensation law** should be considered "final or settled." *Schmill II*, ¶ 19. Accordingly, we left "that initial determination to the

> WCC." *Schmill II*, ¶ 19. The WCC thereafter informed all parties involved in common fund cases via email that it would "use *Flynn* as a general model for determining the *final, closed, or inactive issue* " remanded in *Schmill II*, and invited their participation.

Flynn II, ¶8 (emphasis added).

The quoted passage from *Dempsey* is found at ¶31 of that decision which reads in full:

> 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.

What *Dempsey* makes clear is that the rule of retroactive application is as much a principle of exclusion as it is inclusion. We are analyzing what cases in the context of workers' compensation law, for reasons of finality, were paid in full before *Flynn I*.

We know from the *Dempsey* quotation and the *Flynn II* decision two things. The first is that settled claims pre-*Flynn I* are not void *ab initio* when made. Secondly they can be settled (1) by Department approval, (2) by court ordered compromise settlement or (3) by a third process, independent of and in addition to the first two, by some type of payment when compared to some standard or measurement that reveals the claim has been paid in full. All three types of settlements are not subject to the retroactive application of a Montana Supreme Court decision.

Again the above quote from *Flynn II* is instructive - - "We could not determine from the record which claims **in the context of workers' compensation law** should be considered 'final or settled.'"

What is **the context of workers' compensation law** that shows us what claim was paid in full and therefore settled prior to *Flynn I*? Fortunately the answer to that question is very simple.

> As to the first issue, Buckman challenges the retroactive application of the procedure contained in § 39-71-741(2), MCA. That statute as amended states that it "must be used by the division and workers' compensation judge in determining whether a lump-sum conversion of permanent total biweekly payments will be approved or awarded ..." Before discussing any constitutional questions, it is important that we consider the statutes which are to be applied to an injured worker with regard to lump-sum conversions or to normal benefits.
>
> [1] **Workers' compensation benefits are determined by the statutes in effect as of the date of injury**. *Trusty v. Consolidated*

Freightways (Mont.1984), 681 P.2d 1085, 41 St.Rep. 973; *Iverson v. Argonaut Insurance Co.* (1982), 198 Mont. 340, 645 P.2d 1366.

. . . .

The basis for Workers' Compensation is a contract of hire either express or implied. Section 39-71-117, MCA; § 39-71-118, MCA; 1C Larson Workmen's Compensation Law § 47.10 (1986). This Court, as well as courts of other states have held that Workers' Compensation is based on contract theory. *Estate of Baker* (1977), 222 Kan. 127, 563 P.2d 431; *Harris v. National Truck Service* (1975), 56 Ala.App. 350, 321 So.2d 690; *Spengler v. Employers Commercial Union and Insurance Co.* (1974), 131 Ga.App. 443, 206 S.E.2d 693; *Gaston v. San Ore Construction Co.* (1970), 206 Kan. 254, 477 P.2d 956; *Nadeau v. Power Plant Engineering Co.* (1959), 216 Or. 12, 337 P.2d 313; *Morgan v. Industrial Accident Board* (1956), 130 Mont. 272, 300 P.2d 954.

This Court has assumed for a number of years that the Workers' Compensation statutes in effect on the date of injury set the contractual rights between the parties. *Trusty,* 681 P.2d at 1085, 41 St.Rep. at 973. This is consistent with the provisions of the Workers' Compensation Act that the term employee or worker means "each person in this state ... who is in the service of an employer ... under an appointment or contract of hire, express or implied, oral or written." Section 39-71-118, MCA.

Buckman v. Montana Deaconess Hosp., 224 Mont. 318, 321, 325-326, 730 P.2d 380, 381-382, 384 (1986) (emphasis added).

The unique character of the application of workers' compensation law, its context, is driven home on this very point recently in *Fleming v. International Paper Co.*, 2008 MT 327, when the Montana Supreme Court rejected the retroactive application of a statute of limitations, uniformly made retroactive in other areas of the law because it is procedural, when it reasoned thusly:

¶ 26 For almost 75 years, this Court has held that the statutes in effect on the date of the accident or injury control in workers' compensation cases. *See e.g. Clark v. Olson,* 96 Mont. 417, 31 P.2d 283 (1934) ("case must be decided upon the law as it was when the accident occurred"); *Yurkovich v. Industrial Accident Board,* 132 Mont. 77, 314 P.2d 866 (1957) (the statutes in force when accident occurred applied rather than amended statutes effective six months after the accident); *Gaffney v. Industrial Accident Board,* 133 Mont. 448, 324 P.2d 1063 (1958) (the law in effect on the date the accidental injury occurred governs the extent of liability); *Simons v. C.G. Bennett Lumber Company,* 146 Mont. 129, 404 P.2d 505 (1965) (rate of compensation for work-related injury must be calculated based on the statutes in effect as of the date of the injury); *Hutchison v. General Host Corp.,* 178 Mont. 81, 582 P.2d 1203 (1978) (lower court erred in applying statutes not in effect at the time of the injury); *Trusty v. Consolidated*

> *Freightways,* 210 Mont. 148, 681 P.2d 1085 (1984) ("The statutes in effect at the time of the injury set the standards by which the benefits for the claimant are to be computed."); *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 730 P.2d 380 (1986) ("Workers' compensation benefits are determined by the statutes in effect as of the date of injury."); *Crittendon v. Terri's Rest. & Lounge,* 247 Mont. 293, 806 P.2d 534 (1991) ("The Workers' Compensation laws in effect at the time of a claimant's injury are controlling."); *Kuzara v. State Compensation Ins. Fund,* 279 Mont. 223, 928 P.2d 136 (1996) ("Workers' compensation laws in effect at the time of a claimant's injury are controlling."); *Powell v. State Compensation Ins. Fund,* 2000 MT 321, 302 Mont. 518, 15 P.3d 877 (statute in effect at the time of claimant's accidental injury governed claimant's benefits); *Simms v. State Compensation Ins. Fund,* 2005 MT 175, 327 Mont. 511, 116 P.3d 773 (the law in effect at the time of claimant's industrial accident governed his case).

The inescapable conclusion, driven by the holdings in *Buckman* and the example of *Fleming* is that the third settlement process is a payment of workers' compensation benefits measured by the statutory entitlement to those benefits as that entitlement existed under the statutes in effect on a claimant's date of injury/OD. For example, if a TTD claimant with a date of injury of 7/1/1991 was paid all the TTD he was owed pre-MMI less a SSDI offset, then under the statue in effect on his date of injury, § 39-71-701, MCA (1991), he was paid in full. § 39-71-116(23), MCA (1991). The statutes tells us the **type** of benefit owed (TTD pre-MMI) and is the standard to measure **how much** of the benefit must be paid to satisfy the statutory entitlement. In the context of workers' compensation law, in which the court instructed this analysis had to be made, the statutes in effect on the date of injury set the contractual rights of the parties - - i.e., how much is owed and when it is paid in full.

The result of this analysis in the above hypothetical is that if the same TTD claimant had not been paid all the TTD owed, he was not paid in full and his claim is not settled.

By way of anticipation Liberty will address a critique of its analysis that might be made in an attempt to avoid a reasoned discussion of *Buckman* and the example of *Fleming.* "To avoid an absurd result and to give effect to a statute's purpose we read and construe the statute as a whole." *SLH v. Thirsty Bar,* 2000 MT 362, ¶17. The distinction must be made between an absurd result and a desired result. We must also be mindful that we are not arguing over the interpretation of the statute and instead are grappling with the court-created rule in *Flynn I,* quoted above which is based in equity.

What is inequitable about not paying *Flynn I* benefits to a claimant who has already received the full benefits of his contractual bargain with his employer? What is inequitable about holding a claimant to his contractual agreement when that contractual obligation has been paid in full by his employer?

> Although we conclude that the Workers' Compensation Court had no specific statutory authority to set aside its judgment based on a petition filed 18 months after the judgment was entered, we agree

> that under some circumstances the court may have inherent equitable power to do so. **However, even the court's equitable power is not without limitation and must be subject to predictable rules if the finality of judgments is to mean anything.**

State Fund v. Chapman, 267 Mont. 484, 489-490, 885 P. 2d 407, 411 (1994) (emphasis added).

Predictable rules that provide for finality and closure in our business dealings and employment relationships are essential if we are to have the benefit of the rule of law and a manageable workers' compensation system. There is no predictability or finality to workers' compensation claims if Supreme Court decisions require us to go back over decades and reevaluate and recalculate contractual obligations of employees and employers previously made and which they discharged by the offer and the acceptance of workers' compensation benefits under the statues that existed on the date of injury/OD. The concept of "paid in full" not only has to have a meaning but it must have one that is consistent with the concept of a settlement that is not void *ab initio* when a later Supreme Court decision expands workers' compensation liability. Liberty's analysis offers the finality and predictability that we have in all other contractual relationships and which arises from the context of workers' compensation law.

Liberty's analysis also promotes one of the bedrock public policies underlying our workers' compensation system for over 20 years.

> Montana's workers' compensation and occupational disease insurance systems are intended to be primarily self-administering. Claimants should be able to speedily obtain benefits, and employers should be able to provide coverage at reasonably constant rates. To meet these objectives, the system must be designed to minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities.

§ 39-71-105(3), MCA (1987).

DATED this 6 day of June, 2009.

Larry W. Jones
Attorney for Intervenor

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day June, 2009, I served the original of the foregoing OPENING BRIEF OF LIBERTY NORTHWEST INSURANCE CORP. (INTERVENOR) RE: PAID IN FULL, on the following:

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And a copy of the same to the following:

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Sent: Monday, June 08, 2009 1:39 PM
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Cc: sjennings@crowleyfleck.com; attorneysinc@montana.com; bjluck@garlington.com; Jones, Larry W
Subject: Flynn/Miller, WCC 2000-0222, Opening Brief of LNW Re: Paid in Full

Attachments: Document.pdf

Document.pdf
(366 KB)

Greetings:

Attached is a copy of Opening Brief of Liberty Northwest Insurance Corp. (Intervenor) Re: Paid in Full for filing. I have also mailed a copy.

Thanks.

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