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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 RESPONSE BRIEF ON THE IMPLICATION OF "PAID IN FULL"**

Montana State Fund ("State Fund") submits this response brief on the implication of the phrase "paid in full," as directed by this Court's April 22, 2009, Minute Order.

I. INTRODUCTION

Counsel for Robert Flynn and Carl Miller ("Flynn"), and for Cassandra Schmill ("Schmill") have provided radical suggestions to the Court of what "paid in full" means. Both parties' suggestions narrow the meaning of "paid in full" to a nullity, improperly attempting to abrogate the intention and direction of the Montana Supreme Court's specific holding in *Flynn II*.

The fundamental flaw in the rationale of *Flynn* and *Schmill* is that they fail to acknowledge or appreciate the purpose of the present exercise. The Supreme Court has indicated that settled claims are exempt from retroactive changes in benefit entitlements created by court decisions. For the narrow purpose of retroactivity, *Flynn II* directed that traditionally settled and approved claims **and** those "paid in full" are not subject to later retroactive modification of benefit standards.

This carries with it two inescapable conclusions. First, "paid in full" must have a substantive meaning separate from traditional settlements. There is no place for Schmill's suggestion that ". . . non-settled claims . . . can never be 'paid in full' . . . ." (Opening Br. Cassandra Schmill Re Paid in Full 2, June 6, 2009 ("Schmill Br.").) Second, the definition is only utilized in the context of a retroactivity analysis. As such, it does not require closure of the claim or the abolition of further entitlement under existing law. It simply limits the application of later, judicially created, changes in benefit entitlement.

As outlined in the State Fund's initial filing, the most logical approach to defining "paid in full" which provides the necessary substantive meaning and appropriately considers it in the context of traditional retroactivity analysis is to tie the term to benefits paid to the extent allowed by the law at the time of payment. This approach is fair, since it allows for the full payment of benefits under existing law. Just as important, it is consistent with the Court's purpose and desire to implement an exception to retroactivity.

We cannot lose sight of the fact that if we, as requested by Flynn and Schmill, define the exception to retroactivity to effectively allow *carte blanche* application of later decisions to claims fully paid under previously existing standards, we have ignored and negated the rule. Defining terms so that an exception to retroactivity allows full retroactive application of newly created standards inappropriately swallows the exception.

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II. FLYNN'S CIRCULAR LOGIC

Flynn's proposal, in essence, is that the new rule does not apply to those insurers who have already complied with it:

> For purposes of this action the mandate is clear and the logic is direct. Any insurer which completely discharged its obligation to pay its fair share of the costs and fees incurred to obtain a social security award has "paid in full" its required contribution to the common fund.

(Pet'r's Opening Br. Re: Paid in Full 2, June 8, 2009 ("Flynn Br.").)

This argument cannot be the solution to the mystery of what "paid in full" means, because it entirely ignores the fact that "paid in full" is an *exception* to retroactivity. It makes no sense to say the new rule does not apply to people who already complied with it, i.e., the new rule that insurers must pay attorneys' fees when a claimant gets social security does not apply to those insurers who already paid attorneys' fees when a claimant got social security. If this definition were the rule, then "paid in full" would not be an exception to retroactivity at all, because the new rule would still apply to all claims. It would just be that some people have already done what others have not.

State Fund's position is that "paid in full" must mean something, because it is not just loose language or surplusage. It is also not a synonym for "compromised" between the parties, because then the phrase would be redundant. If one accepts Flynn's definition, paid in full means nothing as an exception to retroactivity, because only those who have complied with the new judicially-announced rule have paid in full. Claims that are "paid in full" are exempt from the new ruling. Therefore, in the Flynn context, claims that are paid in full do not have an obligation to pay the attorneys' fees, as announced in *Flynn I.* The rule cannot be that those who paid the fees are exempt from paying them. That logic is circular and cannot carry the day. Flynn's brief does not assist the Court in defining paid in full.

III. SCHMILL'S "BEE STINGS AND SLIVERS"

Schmill submitted a brief on the definition of "paid in full," though she states that the ruling in this case will not apply to her case.[1] Schmill's brief takes more time to get where it is going than Flynn's does, but in the end, its suggestion is similarly unpersuasive. Schmill contends that "paid in full" can only mean medical payments, because no other disability payments can ever truly be paid in full. This conclusion is

[1] That issue is not before this Court in this matter.

mistaken and creates an overly narrow exception to retroactivity.

Schmill bases her suggestion on two flawed premises: that indemnity payments can never be paid in full, and that "settled" must mean insurers have no potential future liability.[2] As an initial matter, Schmill's brief cannot shake its angst with the Supreme Court's decision to include "paid in full" in the definition of settled at all, and her fundamental disagreement gets her entire analysis off on the wrong track. Schmill's brief mistakenly relies on this Court's Order Adopting Order of Special Master ("Special Master's Order"), Dkt. No. 380, July 10, 2007 (Schmill Br. 2). That order preceded the Supreme Court's order in *Flynn II*, the very holding that has set the parties on the course of defining "paid in full." Of crucial importance here is the fact that the Special Master concluded that the definition of "settled" did not, in fact, include "paid in full," despite the WCC's earlier analysis in *Flynn I*.

The Special Master's reliance on *Stavenjord* also reflects how the law has changed since the time of his order. That is, *Stavenjord* left four categories available for exception from retroactivity, including "open" and "actionable." (Special Master's Order ¶¶ 41-42.) *Flynn II* clarified that there are only two categories for exemption, final and settled. Therefore, the analysis in the Special Master's Order went far afield of the eventual determinations by the Supreme Court in *Flynn II*. (Special Master's Order ¶¶ 39-40.)[3] Schmill's attempted revival of the order reflects her remaining reluctance to

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[2] Schmill states "[t]here are a number of reasons why the Court should conclude that none of the *Flynn* claims have been "paid in full." (Schmill Br. 1.) That is not the task of this briefing. The definition proposed by the Court is an exception to retroactivity. It is a blanket definition that will apply to all claims. The task here is to determine what that definition should be, not the nuts and bolts of any particular case. (If it was just about this one *Flynn* case, Schmill would not have any reason to brief the question.)

[3] Not only is the Special Master's analysis grounded on inaccurate premises, its rationale is misled as well. The Special Master mistakenly concluded that even if "settled" included "paid in full," Schmill's Class II and Class III(b) claims were not paid in full. (Special Master's Order ¶ 42.) The Special Master made the same assumption that Schmill makes here, that because someone may in the future be entitled to additional benefits, they have not been paid in full according to their prior entitlement. (Special Master's Order ¶¶ 43-44.) As explained fully in this brief, any potential future entitlement that springs to life later is irrelevant to retroactivity analysis and to a calculation of what benefits were owed and were paid in full in the past according to the entitlement at the time of the claim. The Special Master's second error was to rely on the complicating *Stavenjord* language including "closed," "inactive," "open," and

accept what is clear from the Supreme Court—"settled" includes "paid in full," means more than traditionally approved settlement agreements or stipulations and is a specific exception to retroactivity.

Another preliminary point in considering Schmill's approach is that this discussion can get tremendously bogged down in hypotheticals. The easiest way to define "paid in full" is its ordinary meaning. An amount is owed and that amount is paid. The clearest example was provided to the Court in the previous oral argument relating to the payment of the several elements making up the permanent partial disability award under Montana Code Annotated § 39-71-703. When a claimant reaches medical stability and each element is considered, totaled and paid, the claim is paid in full. Later court decisions that modify the calculation should not be retroactively applied.

What complicates the idea in the workers' compensation context is that the amount due can be paid over time or in a lump sum. If it is paid in a lump sum, nobody has a conceptual problem with saying it has been paid in full. On the other hand, if it is paid over time, it somehow seems more flexible, like the amount owing might change, or the amount cannot be paid in full. But the two choices reflect the same reality—a claimant is owed some benefits under the law that existed at the time of the claim, and no matter how the benefits get paid, the entitlement is paid in full. For the purpose of retroactivity analysis, the lump sum claimant and the installment claimant are in exactly the same shoes. Each was entitled to payments at the time of their claim, and each was paid in full according to the entitlement.[4]

With this background in mind, the implausibility of Schmill's approach becomes clear.

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"actionable." The Supreme Court has subsequently simplified the retroactivity analysis in *Flynn II*, and the Special Master's analysis did not have the advantage of the clarification. Relying on the Special Master's Order in this briefing leads one inevitably astray.

[4] This principle shows the slight inaccuracy of Intervenor Liberty Northwest Insurance Corp.'s position, because it cannot be that a claimant who chose a lump sum payment is exempt from a new rule, while a claimant who did not choose a lump sum is not.

A. Paid In Full Is Not Impossible.

Schmill's first premise is that because of the statute allowing a change in benefits if disability changes, indemnity payments can never be "paid in full." The argument creates a red herring.

> 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.

(Schmill Br. 2.)

This quotation reflects Schmill's unwillingness to accept the Supreme Court's conclusion that settled claims include those paid in full, regardless of whether a compromise releasing an insurer occurred. She starts at the end, saying non-settled claims (i.e., non-compromised claims) can never be paid in full. But the Supreme Court has already concluded that some non-compromised claims are, in fact, by definition, settled, and those are the ones that are paid in full. So there are some uncompromised claims that are settled through payment in full.

Schmill's entire argument hinges on the fact that Montana Code Annotated § 39-71-739 allows changes in benefits when a claimant's condition has changed, because an "aggravation, diminution, or termination of disability" may occur. (Schmill Br. 2.) Because entitlement to benefits can change, a claimant, hypothetically, could always be entitled to greater benefits, and therefore, hypothetically, one can never know if the claimant has been paid in full. But it is not, as Schmill contends, that payments can never be *made* in full; it is that we can never know for sure, because a claimant's disability could always change. This degree of speculation is irrelevant to an analysis of retroactivity. All we are talking about here is whether a person has been paid what he was owed at a finite point in time in the past, when his claim was filed and he was owed benefits under the statutes at the time. Any crystal ball-gazing about what may happen in the future is beside the point, because whether his entitlement changes *in the future* is not relevant to our retroactivity analysis.

State Fund's proposal does not, as Schmill implies, undermine the statutory requirements of § 39-71-739. As Schmill points out, there is a statutory process that provides flexibility in responding to changes in circumstance, whether for better or worse. However, again, these decisions are made in real-time. If one is paid in full according to the benefits available at the time of the claim, if the condition changes, § 739 kicks in and one's *entitlement* may change.

Schmill's emphasis on § 739 actually supports State Fund's position, because it shows that while a claimant may be paid in full (and therefore exempt from the retroactive application of a new judicial decision), one is always entitled to the statutory benefits appropriate to one's current condition. The disability may change at a later date, but that is exactly what § 739 is for. A claim can be paid in full despite the fact that the disability may later change, entitling the claimant to additional payments.

For our purposes, the later change in disability would be paid under § 739 and benefit standards existing on the date of injury, not some later modification to the law arising from new precedent. In the context of the § 703 example discussed above, a claimant could be paid in full based on a partial disability calculation and years later argue that his entitlement was increased and seek additional compensation under § 739. The "paid in full" definition would not bar that effort, it would only require that judicially created modifications to PPD entitlement occurring after payment in full would not apply retroactively to the claim.

Contrary to the dire assertions raised by Schmill, nothing in the proposed workable and practical definition of "paid in full" precludes a claimant from properly requesting and securing additional compensation if her condition changes.

B. Schmill Loses Sight of the Fact That "Paid In Full" Is an Exemption to Retroactivity.

Schmill makes a similar mistake as Petitioners when she states that "[s]ince, 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.'" (Schmill Br. 4.) By definition, not all *Flynn* claims are entitled to additional compensation, because some are final or settled. Some claimants have been fully paid all compensation to which they were entitled, and therefore, their claims are settled and exempt from Flynn's new rule. Section 739 does nothing to change the fact that some claimants will have been paid in full according to the benefits they were entitled to. Schmill extends the argument by claiming that this Court should simply skip deciding what "paid in full" means, because by definition no *Flynn* claim has been paid in full. This thinking nullifies the Supreme Court's conclusion that "paid in full" means something and this Court's request that the parties brief the issue.

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C. More Than Medical Payments Can Be "Paid In Full."

Schmill's final argument introduces an element to the retroactivity analysis that cannot be found in the Supreme Court's decisions. (Schmill Br. 5-6.) Schmill suggests that exemption from retroactivity somehow depends on the insurer's continuing liability. The statutes regarding lump sum settlements require court approval, after which an insurer is no longer liable on a settled claim. Non-compromised claims, in contrast, may result in future liability for an insurer. As a result, Schmill argues, paid in full can only mean medical payments, because that, too, is the only way an insurer is no longer liable. In essence, in Schmill's view, "settled" must mean the insurer has no potential further liability.

That conclusion is not found anywhere in the analysis of *Flynn II* and reads an additional element into the definition approved by the Supreme Court. If that analysis was relevant to retroactivity, the Court could have used that very definition—settled means the insurer can have no future liability on the claim. But the Court did not define it that way, and specifically included paid in full as an additional category of claims considered settled for retroactivilty exclusion. The fact that disability *can* change, and an insurer can have future liability, does not mean that a claimant cannot be paid in full at any particular point in time for all benefits to which he is entitled. So, the inclusion of the second phrase simply reflects that there can be two potential modes of finality in a settled claim: fully compromised for all time, or paid in full according to what is owed. The rationale for excluding all such claims from retroactivity is appropriate and within the purview of the Supreme Court. (The concept of retroactivity itself is a judicially created one. The exceptions to such a rule are appropriately formed by the Courts.)

Schmill's argument is factually incorrect as well. Payment of medical costs does not mean that there will never be a change in condition or indemnity payments in the future, so even medical payments do not ensure that an insurer will never have future liability. To hold otherwise would eviscerate the phrase "paid in full," which is what Schmill intends by limiting paid in full to medical claims.

IV. CONCLUSION

The fact that one disagrees with the direction of *Flynn II* that "settled" for retroactivity exclusion purposes means more than traditionally approved petitions and stipulations does not justify ignoring the specific holding. There is a certain irony in Flynn and Schmill's efforts to apply some precedent by ignoring others.

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If we consider and give effect to the Supreme Court's definition of settled within the context of its purpose, an exception to retroactivity, the State Fund's suggested approach is logical, workable and consistent with existing and applicable principles.

DATED this 22nd day of July, 2009.

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CERTIFICATE OF SERVICE

I, the undersigned, of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for Respondent, certify that on this 22 day of July, 2009, I mailed a copy of the foregoing MONTANA STATE FUND'S RESPONSE BRIEF ON THE IMPLICATION OF "PAID IN FULL," postage prepaid, to the following:

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