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FILED

JUL 2 4 2009

OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

Robert Flynn and	)	WCC No. 2000-0222
	)	
Carl Miller, Individually and on Behalf of Others Similarly Situated, Petitioners,	)	***PETITIONERS' RESPONSE BRIEF RE: "PAID IN FULL"***
v.	)	
	)	
Montana State Fund, Respondent/Insurer,	)	
	)	
and	)	
	)	
Liberty Northwest Insurance Company, Intervenor.	)	

* * * * *

At the conference on April 22, 2009, this Court observed with concern that Respondent's interpretation of the term "paid in full" would substantially, if not completely, moot the retroactive application of judicial decisions. In opening briefs, Respondents ignore this Court's stated concern. They present arguments that deny the plain meaning of the words at issue. The resulting arguments are utterly frivolous and wholly inconsistent with Montana's retroactivity jurisprudence.

Respondents' strained interpretation of the term "paid in full" creates the very constitutional violations which this Court and the Montana Supreme Court have

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DOCKET ITEM NO. 598

expressly rejected. They seek disparate application of the term to similarly situated claimants based on the timing of the request for the given benefit. Here the benefit is total disability compensation which is past due because of insurers' excessive and illegal social security offset which failed to account for its one-half share of fees and costs incurred by the claimant to obtain the award, i.e., create the common fund. Respondents offer no principled basis for such dispirit treatment of similarly situated claimants.

Respondents would have this Court to ignore the fundamental function of courts.

Fully retroactive application of judicial decisions "...reflects the declaratory theory of law...according to which the courts are understood only to find the law, not to make it." James Beam (1991).[1] Prospectivity "...breaches the principle that litigants in similar situations should be treated the same, a fundamental component of stare decisis and the rule of law generally."[2]

Justice Souter relied upon the reasoning of Justice Harlan opposing prospectivity as "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases to flow by unaffected by that new rule."[3] Justice Blackman, concurring, argues forcefully that prospectivity violates basic norms of constitutional adjudication. He points out that unlike a legislature, courts do not promulgate new rules to be applied prospectively only, and to do such "...is to warp the role what we, as judges, play in a government of limited powers."[4] "We fulfill our judicial responsibility be requiring

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[1] *James Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535-536, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991). In *James Beam* the United State Supreme Court held in a plurality decision that once a court has applied a rule of law to the litigants in one case, it must do so with respect to all others not barred by procedural requirements or res judicata. Justice Souter reached this result by relying upon principles of equity and stare decisis. In a concurring opinion, Justice White observed that there is no precedent in civil cases for applying a new rule to the parties of the case but not others. Justice Blackman further observed that the nature of judicial review constrains the Court to require retroactive application of each new rule announced. Justice Scalia, also concurring, opined that prospectivity is impermissible because it violates the constitution.

[2] *James Beam*, Supra @ 537.

[3] *James Beam*, Supra @ 541.

[4] *James Beam*, Supra @ 547.

retroactive application of each new rule we announce."[5] "Because it forces us to consider the disruption that our new decisional rules cause retroactivity combines with stare decisis to prevent us from altering the law each time the opportunity presents itself.

In *Harper* (1993), the United States Supreme Court again addressed the role of the judiciary and the application of judicial decisions.

> Our approach to retroactivity heeds the admonition that "[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently."[6]
>
> Prospective decision-making is the handmaid of judicial activism, and the born enemy of stare decisis. It was formulated in the heyday of legal realism and promoted as a "techniqu[e] of judicial lawmaking" in general, and more specifically as a means of making it easier to overrule prior precedent.[7]
>
> Justice Holmes was prepared to hazard the guess that "[j]udicial decisions have had retrospective operation for near a thousand years."[8]
>
> ...American judges until very recent times, took it to be "the province and duty of the judicial department to say what the law it," *Marbury v. Madison*, 1 Cranch 137, 177 (1803) (emphasis added) – not what the law *shall* be. That original and enduring American perception of the judicial role sprang not from the philosophy of Nietzsche, but from the jurisprudence of Blackstone, which viewed retroactivity as an inherent characteristic of the judicial power, a power "not delegated to pronounce a new law, but to maintain and expound the old one." 1 W.

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[5] *James Beam*, Supra @ 548.

[6] *Harper v. Virginia Dept of Taxn*, 509 U.S. 86, 97, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993).

[7] *Harper*, Supra @ 105.

[8] *Harper*, Supra @ 106.

> Blackstone, Commentaries 69 (1765). Even when a "former determination is most evidently contrary to reason ...[or] contrary to the divine law," a judge overruling that decision would "not pretend to make a new law, but to vindicate the old one from the misrepresentation." *Id.*, at 69-70. "For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*." Id., at 70 (emphasis in original). Fully retroactive decision-making was considered a principal distinction between the judicial and the legislative power: "[I]t is said that that which distinguished a judicial form a legislative act is, that the one is a determination of what the existing law is in relation to some existing things already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases.[9]

Respondents invite error when they ask this Court to create a rule requiring claimants to seek a given benefit within a specific, heretofore unannounced, point in time. They ask this Court to create a new statute of limitations from wholecloth. They provide no principled basis to define the scope of the proposed new rule.

As noted in Petitioner's opening brief, *Flynn* is the law in effect at the time of each of the pre-*Flynn* claims. There is no principled way these pre-*Flynn* claims can be deemed "paid in full" unless and until the insurers pay the total disability benefits which they wrongly offset by failing to account for their one-half share of fees and costs incurred by the claimant to obtain the social security award.

An allegation of payment is an affirmative defense. See Rule 8(c) M.R.Civ.P. Without proof of payment, the Court should conclude that none of the *Flynn* claims have been "paid in full".

For the reasons set forth in Petitioner's briefs and the briefs of Cassandra Schmill, this Court should adopt the plain meaning of the words "paid in full". In so doing, the Court will abide its judicial function, reject respondents' proposed new statute of limitations and uphold Montana's retroactivity jurisprudence.

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[9] *Harper*, Supra @ 107.

Dated this 22nd day of July, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of July 2009, 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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Mina VanEngen

Collins, Marian

From: Attorneys Inc., P.C. [attorneysinc@montana.com]
Sent: Thursday, July 23, 2009 5:52 PM
To: DLI WCC Court Docs
Cc: KD Feeback; Bradley J. Luck; Larry Jones; Laurie Wallace; Cadwallader, Mark; Martello, Tom
Subject: Flynn/Miller

Attachments: 090723.Pet Resp re Paid in Full.PDF

090723.Pet Resp re Paid in Ful...

Dear Clara:

Dear Clara:

Attached for filing with the Court is Petitioners' Response Brief Re: "Paid in Full". The original will follow via regular mail.

Sincerely,

Miva VanEngen
Paralegal to Rex Palmer

Attachment

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