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Listed on Exhibit A

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

ROBERT FLYNN and CARL MILLER, Individually and on Behalf of Others Similarly Situated,

Petitioners,

vs.

MONTANA STATE FUND,

Respondent/Insurer,

and

LIBERTY NORTHWEST INSURANCE CORPORATION,

Intervenor.

WCC No. 2000-0222

COMMON FUND INSURERS' REPLY BRIEF ON CLAIMS "PAID IN FULL"

FILED
AUG 24 2009
OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

COME NOW the Common Fund Insurers listed on Exhibit A hereto, and pursuant to the Court's April 22, 2009 status conference and minute book hearing entry, submit this reply brief on those claims that are "paid in full" and therefore settled for purposes of Montana common fund retroactivity.

COMMON FUND INSURERS' POSITION

Our Supreme Court, in this very case, has already held that claims "paid in full" prior to *Flynn I* are settled and not subject to retroactive adjustment under the common fund doctrine. *See Flynn v. State Fund*, 2008 MT 394, ¶¶ 21, 26 ("*Flynn II*"). The only definition of "paid in full" that does not define the term out of existence and thus vitiate *Flynn II*'s holding, is that a "paid in full" claim is one in which benefit payments ceased prior to December 2, 2002, when the Montana Supreme Court decided *Flynn v. State*

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Fund, 2002 MT 279, 312 Mont. 410, 60 P.3d 397 ("*Flynn I*"). Recognizing the finality of claims paid in full is consistent with Supreme Court common fund and retroactivity jurisprudence, and it offers a workable solution to the alternative suggested by Petitioners Flynn and Schmill where "paid in full" is meaningless, and insurers could potentially[1] be expected to analyze claim files stretching back to 1974.

The Supreme Court has consistently and repeatedly noted that the policy of finality dictates that the "retroactive effect of a decision . . . does not apply to cases that became final or were settled prior to a decision's issuance." *Schmill v. Liberty Northwest Ins. Corp.*, 2005 MT 144, ¶ 17, 327 Mont. 293, 114 P.3d 204 ("*Schmill II*") (emphasis added) (quoting *Dempsey v. Allstate Insurance Co.*, 2004 MT 391, ¶ 31, 325 Mont. 207, 104 P.3d 483); *accord, Stavenjord v. State Fund*, 2006 MT 257, ¶¶ 16-17 ("*Stavenjord II*"); *Flynn II*, ¶ 8. As a result, if benefit payments terminated without dispute prior to *Flynn I*, then the claim was "paid in full." The termination of benefit payments indicates that benefits were either "paid in full," or the case was otherwise resolved by judgment or judicial or department-approved compromise.

Recognizing the finality of claims paid in full is also consistent with our Legislature's policy goals. Both the Legislature and the Supreme Court have consistently defined "settled claims" to include claims paid in full as well as those compromised with the approval of the judiciary or the Department of Labor. *See Flynn II*, ¶ 25. The definition is consistent with the legislative purpose that the workers' compensation system should be "primarily self-administering" by allowing the parties to settle claims without the involvement of the judicial system or the Department of Labor. *See* § 39-71-105(3), MCA (noting a purpose of the Workers' Compensation Act is to be "primarily self-administering" and to "minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities"). Indeed, *Flynn II* recognized that "using the definition provided by the legislature furthers the expression of legislative will absent a contrary indication and further provides consistency between the retroactivity of judicial decisions established by our cases and application of the [Workers' Compensation] Act." *Flynn II*, ¶ 25. And *Flynn II* is just as retroactive as *Flynn I*. The Court should not render superfluous and meaningless the definition specifically adopted by our Supreme Court in this very case to determine which claims are subject to retroactive adjustment.

Exempting claims paid in full from retroactive application of *Flynn* also provides a pragmatic and workable solution to ensure that the policy of finality has meaning. *Flynn* retroactivity conceivably stretches back over three decades to 1974. A claim in which benefit payments were terminated in 1977, for example, has long been considered "settled" and closed in every practical sense.[2] Identifying every eligible *Flynn* claimant would be extremely difficult, expensive, and time-consuming insofar as any search would likely involve claims closed long before computers were used to manage and track information. The policy of finality espoused by our Supreme Court would be

[1] As noted previously, Common Fund Insurers raised numerous defenses to the Summons issued by Petitioner, many of which the Court has not yet considered. (*See* DE # 278.) Common Fund Insurers reserve all of their rights and defenses.

[2] Indeed, any contrary ruling could require not only re-opening of claims long considered settled by the parties, but also the re-opening of any deceased claimant's estate proceedings, which conceivably may have been closed for decades.

meaningless if every insurer must comprehensively review every single Montana claim file upon the issuance of every judicial decision tweaking workers' compensation benefits. Finality and fairness dictate that claims "settled" by payment in full years or decades ago are not subject to retroactive common fund adjustment today.

PETITIONERS' POSITIONS AND RESPONSES

Both Flynn and Schmill seek to re-argue what the Supreme Court already decided in *Flynn II* – that a claim "paid in full" is not subject to the retroactive adjustment under the common fund doctrine. They do this primarily by attempting to define out of existence the category of claims "paid in full." Indeed, Schmill goes so far as to argue, contrary to the holding of *Flynn II*, that there can be no such thing as "paid in full," contending that because claimants may potentially relapse into disability at some point in the future, no workers' compensation claim may ever be "paid in full." (DE# 588 at 6.)[3]

In contrast to Schmill, Flynn takes a circular approach, arguing that because the *Flynn I* decision is retroactive, the "paid in full" exception to common fund retroactivity should not apply because it would deny the retroactive benefit of the *Flynn I* decision. (DE# 592 at 2.) Flynn would apparently give retroactive effect to *Flynn I*, but not *Flynn II*. Ultimately, both Flynn's and Schmill's arguments fail because our Supreme Court has already held in this case that claims "paid in full" are settled and not subject to retroactive adjustment under the common fund doctrine. *Flynn II*, ¶ 26. This retroactive judicial decision is not only binding precedent, it also forecloses Petitioners' arguments.

In light of the legislative policy goals and precedent, this Court should view with considerable skepticism the arguments advanced by Flynn and Schmill that no workers' compensation claim may ever be settled by payment in full. Any result that requires insurers to locate files sent to cold storage years or even decades after benefits were paid in full would render nugatory the inclusion of a claim paid in full in the definition of settled claim. It would run contrary to the Act's purpose that the workers' compensation system be primarily self-administering. Indeed, it would penalize insurers for not involving the judiciary or Department of Labor to settle <u>every</u> claim. That is not what our Legislature or Supreme Court envisioned. *Stavenjord II*, *Schmill II*, *Flynn II*.

A. Flynn's Response Does Not Address Common Fund Insurers' Position.

Although it is difficult to follow his reasoning, Flynn's response brief appears to argue that the Court must "abide its judicial function and reject respondents' proposed new statute of limitations …." (DE#598 at 4.) From the flawed premise that Common Fund Insurers and other respondents "ask this Court to create a new statute of

[3] References to documents filed in this action are identified by reference to their docket number on the electronic docket maintained by the Court in the format "DE# [docket entry number] at [page number]."

limitations from whole cloth,"[4] Flynn suggests that the Court would be engaging in prospective decision making – "the handmaid of judicial activism, and the born enemy of stare decisis." (*Id.* at 3-4 (citing *Harper v. Va. Dep't of Taxation*, 506 U.S. 86, 97 (1993).)

Flynn's argument is misplaced. The Common Fund Insurers and other respondents do not argue that a statute of limitations governs the scope of retroactivity. Nor would they after *Flynn II*, where the Court refused to adopt a two-year statute of limitations for common fund retroactivity. *Flynn II*, ¶ 32. Flynn seems to confuse the Court's inquiry, which is to determine, following *Flynn II*, what constitutes a claim "paid in full" prior to the issuance of *Flynn I*. Accusations of judicial activism in deciding this issue are particularly unwarranted where (a) Common Fund Insurers do not even argue that the Court should apply a statute of limitations, and (b) the scope of retroactivity of judicial decisions is an issue for the courts to decide.

Flynn also argues that *Flynn* is the law in effect at the time of each of the pre-*Flynn* claims.[5] (DE#598 at 4.) Flynn, however, ignores *Flynn II*, which is also a retroactive judicial decision. And under *Flynn II*, claims "paid in full" prior to *Flynn I* are settled and not subject to retroactive adjustment under the common fund doctrine. *See Flynn II*, ¶¶ 21, 26. Flynn may not agree with our Supreme Court, but like it or not, the Court has recognized a distinction between open claims entitled to retroactive adjustment in a common fund proceeding, and final or settled claims that are exempt from retroactive adjustment under the common fund doctrine.

As a final argument, Flynn contends that "none of the *Flynn* claims have been 'paid in full'" absent proof of payment. (DE#598 at 4 ("An allegation of payment is an affirmative defense.").) This argument loses sight of the issue before the Court, which is to determine the scope of retroactivity under the common fund doctrine where the Supreme Court has already held that a claim "paid in full" is settled and exempt from retroactive adjustment. In any event, Flynn's argument fails because Flynn has not filed a petition against Common Fund Insurers, and would lack standing to sue them directly. To have standing, Flynn must allege and show that he has personally been injured by Common Fund Insurers, "not that the injury has been suffered by other, unidentified members of the class to which [he] belong[s] and which [he] purport[s] to represent." *Olson v. Dep't of Revenue* (1986), 223 Mont. 464, 470, 726 P.2d 1162, 1166.

Conspicuously absent from Flynn's response brief is any discussion or even mention of the Supreme Court's ruling in *Flynn II*. Equally absent is any discussion of Common Fund Insurers' argument, which explains how Common Fund Insurers' definition of claims "paid in full" is consistent with *Flynn II* and numerous other common fund decisions.

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[4] Schmill also misreads Common Fund Insurers' argument (and *Flynn II*) in suggesting that "[i]f Respondents' definition of 'paid in full' is adopted, this Court will be inserted [sic] a statute of limitations which was clearly never intended by the legislature." (DE#597 at 2.) To repeat, Common Fund Insurers do not argue that a statute of limitations governs the retroactive scope of common fund claims.

[5] Schmill also apparently adopts Flynn's argument without addressing the equally retroactive decision in *Flynn II*. (*See* DE#597 at 3.)

B. Schmill's Response Asserts that No Claim is Ever Paid in Full Because of the Potential for a Relapse into Disability, and Seeks to Re-Argue *Flynn II*

1. Potential Relapse into Disability is a Red Herring

In her opening brief, Schmill contends that workers' compensation claims can never be "paid in full" because there always exists the possibility, however remote, that a claimant may "relapse into disability" and become entitled to additional benefits. (*See* DE# 588 at 1, 6.) Although she does not identify in her opening or response brief (or anywhere else) any potential *Flynn* (or *Schmill*) beneficiaries that have actually "relapsed into disability," Schmill bases her argument that a claim can never be paid in full on Montana law allowing benefit adjustments to be made if a claimant's disability is aggravated. (*Id.* at 2-3 (citing § 31-71-739, MCA, and interpretive cases).) According to Schmill, workers' compensation claims "can never be 'paid in full'" because the "potential for a change in disability status" may give rise to a claim for additional benefits. (*Id.* at 6.) Under Schmill's reasoning, the statutory definition of "settled claim," as adopted and applied to the common fund context in *Flynn II*, has no meaning or application, except perhaps for "bee stings and slivers." (*Id.*)

Continuing with her hypothetical scenario of a relapse into disability, Schmill devotes most of her response brief to an argument never asserted by Common Fund Insurers, or other respondent. Quite simply, she sets up a straw man of her own design and then proceeds to beat the daylights out of him. Specifically, in response to Common Fund Insurers' straightforward argument that "paid in full" would be meaningless if no claim could ever be "paid in full." Schmill argues that Common Fund Insurers wish to deny claimants benefits upon a relapse into disability. Schmill contends that "Respondents' definition of 'paid in full' would extinguish this right to additional compensation payments [upon relapse under § 39-71-739, MCA] based solely upon the insurer's determination that all benefits 'owed' have been paid." (DE#597 at 2.)

Schmill's "relapse" argument is pure hokum. Common Fund Insurers do not advocate for the extinguishment of claimants' *potential* future entitlements under § 39-71-739, MCA. Nor does their argument remotely require such extinguishment. But that question is not before the Court. Rather, the issue before the Court is the scope of retroactivity in common fund cases, and the Montana Supreme Court has consistently and repeatedly held that the "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 (emphasis added) (quoting *Dempsey v. Allstate Insurance Co.*, 2004 MT 391, ¶ 31, 325 Mont. 207, 104 P.3d 483); *accord, Stavenjord II,* ¶¶ 16-17; *Flynn II,* ¶ 8. What might happen after a decision's issuance, i.e. a future relapse into disability that gives rise to a claim for additional benefits, simply has no relevance in evaluating the retroactive scope of a purported common fund.

2. *Flynn II* Forecloses Schmill's Challenge to the Court's Adoption of the Statutory Definition of Settled Claim

Building on her argument that no claim can ever paid in full while the potential for a relapse into disability exists, Schmill first questions why she has not "seen insurers using this 'paid in full' argument to deny demands for additional compensation brought years after any benefits have been paid?" (DE#597 at 2.) Schmill posits that "the answer is clear" that "[t]his new way of 'settling' claims has not been used because it does not actually settle a claim." (*Id.*)[6] Thus, Schmill continues to resist the Montana Supreme Court's plain statement of the law that "a 'settled' claim is 'a…claim that was paid in full.'" *Flynn II*, ¶ 26.

Schmill's refusal to acknowledge Montana law is both futile and unseemly. *Flynn II* squarely defeats Schmill's unsupported argument.[7] The Supreme Court in *Flynn II* specifically clarified that "a 'settled' claim is 'a department-approved or court-ordered compromise of benefits between a claimant and an insurer <u>or a claim that was paid in full</u>.'" *Flynn II*, ¶ 26 (emphasis added).

Alternatively, Schmill argues that claims may be settled by payment in full only for those "claims which occurred on or after the [definitional] statute's effective date, July 1, 2001" because "section 39-71-107, MCA (2001), can only be applied prospectively." (DE#597 at 2-3.) In essence, Schmill argues that *Flynn I* is retroactive, but *Flynn II* is not because the Court adopted a statutory definition of "settled claim."[8] Schmill cites to no authority for her novel proposition that the judicial adoption of a statutory definition abrogates the retroactive effect of the judicial decision.

In any event, *Flynn II* forecloses her argument. The Court was clear in *Flynn II* that it was not <u>applying</u> the statutory definition of settled claim, but rather <u>adopting</u> for purposes of common fund retroactivity what the Legislature had already defined. *See Flynn II*, ¶ 25 ("Flynn/Miller's argument against the WCC's adoption of this statutory definition of 'settled claim' is unpersuasive."). As the Court explained, "using the definition provided by the legislature furthers the expression of legislative will absent a

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[6] This argument is based exclusively on counsel's assertions unsupported by authority. Even if relevant (and it is not), the anecdotal experience of one claimant and her counsel would not in any event be sufficient to establish that no insurer has ever denied benefits on the basis that benefits were previously paid in full. Schmill's counsel is also wrong. Settling a claim by means of payment in full is not a "new method" of settling claims – it is the oldest method of settlement and the one most frequently used. For the vast majority of claims that never reach this Court, the claim is settled upon full payment of all benefits – the reason that the claim does not reach litigation. Moreover, even in litigation insurers can and do rely on payment in full as a defense to additional benefits. *See Bratton v. MHN*, WCC No. 2009 – 2318, Resp. to Pet. for Hearing (admitting compensability of the original condition but denying further benefits because all benefits due and owing have been paid); *Sandru v. Rochdale Ins. Co.*, WCC No. 2003 – 0908 (admitting compensability of the original condition but denying petitioner's entitlement to further TTD benefits based upon tip income). Schmill's argument that insurers have heretofore never relied upon payment in full as a means of settling claims is pure balderdash.

[7] In addition, as noted above, Common Fund Insurers do not advocate for the extinguishment of claimants' *potential* future entitlements to additional benefits under § 39-71-739, MCA. The issue before the Court, however, is not whether potential *Flynn* beneficiaries are entitled to additional benefits based on relapses into disability, but whether they are entitled to *retroactive* benefits for claims paid in full years ago under the common fund doctrine.

[8] Schmill also suggests that the definition of settled claim may not be applied retroactively because the "extinguishment of a right to benefits is undeniably a substantive right . . . ." (DE#597 at 2.) Schmill does not cite any authority or explain, however, how the statutory and judicial definition of "settled claim" for purposes of defining the scope of judicial retroactivity extinguishes a right to benefits. If a claim is settled, there is no right to retroactive common fund benefits in the first place. *See Flynn II*, ¶ 16.

contrary indication and further provides consistency between the retroactivity of judicial decisions established by our cases and the application of the Act." *Id.* Moreover, *Flynn II* is just as retroactive as *Flynn I* and other judicial decisions. *See Flynn II*, ¶ 16 (noting that *Dempsey v. Allstate Ins. Co.*, 2004 MT 391, ¶ 31, held that "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").

As a final argument, Schmill complains that Common Fund Insurers are seeking "to nullify the retroactive application of the a decision of the Montana Supreme Court which would require an insurer to go back through its records and pay proper workers' compensation benefits." (DE#597 at 3.) Schmill argues that certain workers, i.e. those whose claims were final or settled before the decision in *Flynn I*, "will never achieve equal footing with workers whose claim [sic] arose after *Flynn I* . . . ." (*Id.*) Schmill may not agree with our Supreme Court, but like it or not, the Court has recognized a distinction between open claims entitled to retroactive adjustment in a common fund proceeding, and final or settled claims that are exempt from retroactive adjustment under the common fund doctrine. *See Flynn II*, ¶¶ 16, 21 (reaffirming "the retroactivity principles set forth in *Dempsey* and *Schmill II*—applicable to cases not 'final' or 'settled'—for purposes of this and future cases" (emphasis added)). For reasons of finality, the retroactive effect of a decision does not apply to cases that became final or were settled prior to a decision's issuance. *Flynn II*, ¶ 16 (citing *Dempsey*, ¶ 31). Schmill offers the Court no reason to depart from this well-established and binding precedent.

CONCLUSION

For the foregoing reasons, Common Fund Insurers respectfully submit that a claim is "paid in full" and settled for purposes of common fund retroactivity if benefit payments terminated prior to the issuance of *Flynn I* on December 2, 2002.

Dated this 24th day of August 2009.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the following counsel of record, by the means designated below, this 24th day of August 2009:

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August 24, 2009

Clerk of Court
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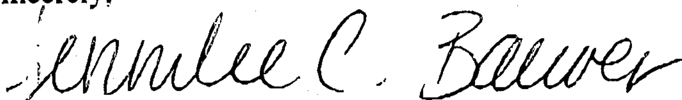
RE: Flynn v. Liberty NW Ins. Co. & MT State Fund
WCC No. 2000 – 0222
MT Supreme Court No. DA 06-0734

Dear Clerk of Court:

Enclosed please find the original and one copy of Responding Insurer's Reply Brief on Claims "Paid in Full", which was fax filed on today's date. After filing the original, please time-stamp the copy and return it to our office in the enclosed envelope.

Please call if you have any questions.

Sincerely,



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SINCERELY.

JENNILEE C. BAEWER, Certified PLS

Legal Admin. Assistant to Steven W. Jennings