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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' REPLY BRIEF RE: "PAID IN FULL"***
v.	)	
	)	
Montana State Fund, Respondent/Insurer,	)	
	)	
and	)	
	)	
Liberty Northwest Insurance Company, Intervenor.	)	

* * * * *

Each of the insurers' response briefs continue to ignore this Court's stated concern that the Insurers' proposed reading of paid-in-full would largely, if not completely, moot the retroactive application of judicial decisions.

State Fund argues that paid-in-full must be controlled by "existing standards." By this it means standards adopted and employed at the whim of various insurers prior to the time of any given Supreme Court decision. It does not explain how there would ever be a retroactive application of any judicial decision except on a case by case basis. Liberty argues that there should be no retroactive application of judicial

decisions for the sake of simplicity and because fishermen appreciate simplicity. The other insurers track closer with State Fund. they propose that the Court create a statute of limitations out of whole cloth. Specifically, they propose that if benefit payments terminated without dispute prior to *Flynn I* then the claim for *Flynn/Miller* benefits should be considered paid-in-full and therefore barred because any such claim "has been considered [by the insurer] 'settled' and 'closed'."

The arguments of each of the Insurers contain a common trend; they concern the retroactive application of judicial decisions without any effort to apply or even discuss the bedrock jurisprudence underlying and controlling retroactivity. None of the insurers even attempt to explain how these definitions which they propose would satisfy Montana's retroactivity jurisprudence. None of them even attempt to explain how the definition which they propose would be other than "[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."[1]

Adopting the plain meaning of the term paid-in-full avoids the problem created by the insurers' strained and unprecedented proposals. Potential *Flynn/Miller* claimants fall into two groups; those who have settled their claims and those who have not. Those who have settled have, by operation of the settlement, resolved their right to receive *Flynn/Miller* benefits. Whether the members of this group have received full payment of every potential benefit is not an issue. The inquiry stops with the determination of a knowing settlement. Consequently, this group does not raise the question of whether they were paid in full. Even if the settlement did not provide for payment of *Flynn/Miller* benefits, the settlement nevertheless extinguishes any potential entitlement.

Claimants who have not settled are, by definition, not paid in full unless and until they receive their *Flynn/Miller* benefits. This simple truth cannot change based on the relative age or relative inactivity of the given claim file; at least not without defeating the Montana rule that judicial decisions apply retroactively.

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[1] *James Beam Distilling Co. v. Georgia*, 501 U.S. 529, 541, 111 S.Ct 24396, 115 L.Ed2d 481 (1991), Justice Souter concurring.

Schmill correctly points out that under the Montana statutory scheme the only claims that can be paid in full are medical only claims with injuries occurring after 2005.[2] While this appears to be the majority of claims filed, it would not include any of the *Flynn/Miller* claimants. This is so because the class of *Flynn/Miller* claimants consists only of injured workers who have suffered total disability and have incurred fees to recover social security total disability benefits. Again, by definition, these would not include any medical only claims.

None of the *Flynn/Miller* claimants can reasonably be considered "paid-in-full" before receiving payment of the total disability benefits which represent the insurer's share of the fees and costs incurred to establish the injured workers' social security entitlement. This court should so hold.

Dated this 24th day of August, 2009.

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[2] The effective date of §39-71-704(1)(f), sixty month rule.

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August 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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