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Attorney for Respondent/Insurer

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 2002-0676

DALE REESOR

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

LIBERTY NORTHWEST'S CONCURRENCE IN MONTANA STATE FUND'S OPENING BRIEF

COMES NOW Liberty Northwest Insurance Corporation (LNW) pursuant to the Court's Order Delineating Issues and Setting Briefing Schedule and pursuant to the Court's minute entry dated April 13, 2006, and hereby concurs with and incorporates by reference all of the legal arguments set forth by Montana State Fund (MSF) in its Opening Brief.

In particular, LNW concurs with the argument made by MSF in Section (C)(2) of its Opening Brief. In support of LNW's position regarding the issues raised, attached is the Affidavit of Kerri Wilson. Wilson echoes similar concerns raised by MSF regarding the identification and retrieval, if possible, of older LNW files and data.

Additionally, LNW hereby incorporates by reference the legal arguments and analysis made in LNW's Opening Brief, as well as LNW's Answering Brief Regarding Retroactivity, in the *Flynn* common fund matter, copies of which are attached for the Court's convenience. LNW's position in both of its *Flynn* briefs are equally applicable in this matter.

DATED this 5th day of May, 2006.

Larry W. Jones
Attorney for Respondent
Liberty Northwest Ins. Corp.

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on this 5th day of May, 2006, I mailed a copy of the foregoing LNW'S CONCURRENCE IN MSF'S OPENING BRIEF without attachments from the *Flynn* matter, postage prepaid, to the following persons:

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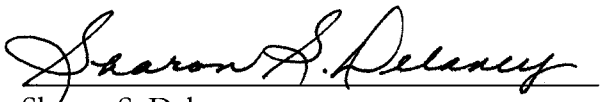

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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

DALE REESOR, Petitioner, v. MONTANA STATE FUND, Respondent.	WCC No. 2002-0676 **AFFIDAVIT OF KERRI WILSON**

STATE OF MONTANA)
: ss.
County of Missoula)

KERRI WILSON, being first duly sworn upon her oath, deposes and says:

1. From 2003 to present, I have been employed as the Branch Claims Manager for Liberty Northwest Insurance Corp. (LNW) in Missoula, Montana. From 1997 to 2003, I was employed by LNW as a Senior Case Manager in the Missoula office.

2. I have personal knowledge of the process by which LNW files and data are stored and retrieved. I am familiar with Montana's workers' compensation laws and the type of information a claims examiner needs to obtain in order to evaluate and adjust a file. Further, I am familiar with and have personal knowledge of the common fund cases that have been litigated in Montana's Workers' Compensation Court and the Montana Supreme Court. I have assisted with the implementation process in each of the common fund cases.

3. Locating LNW files on various media types is a labor-intensive, manual process, and several different procedures are employed to retrieve the stored media. The only physical files that are stored in the Montana office are those claims that are open and active. Some closed and inactive claims are stored at a facilities through out the nation through a document storage and security firm known as Iron Mountain. Over the years, some closed and inactive claim files were destroyed pursuant to LNW's records retention policies. At least some information—such as claim number, date of claim, and total benefits paid—regarding most LNW claims is stored electronically in the information system developed, owned and maintained by LNW's parent company, the Liberty Mutual Group (LMG). This system is known as BoCOMP. The nature and extent of electronically stored information depends on the date of the claim and whether the claim was active on or after certain dates. The BoCOMP system is maintained by LMG's information technology personnel who are located in Portsmouth, NH and/or Boston, MA. There are no LMG IT personnel located in Montana.

4. LNW's ability to retrieve a file or other data depends on what media type the file or data is stored, the date of the claim, when the claim was active, and how long the claim was active.

5. A claim may be closed and then re-opened. If a claim has been closed and re-opened, it may be stored in multiple forms. To conduct an adequate review of claims to determine the applicability of *Reesor,* LNW personnel may be required to examine a claim file that has information stored in multiple formats.

6. If *Reesor* applies retroactively, LNW will have to identify claimants who may be affected by the decision. BoCOMP contains no discreet data fields to identify the age of a claimant at the time of injury or at the time maximum medical improvement was declared. Instead, BoCOMP merely contains a claimant's date of birth. It is theoretically possible that a complex computer query may be formulated to calculate the age of a claimant on the reported date of injury.

7. Even if potential *Reesor* claims can be identified, those files will in most cases lack sufficient medical and vocational information necessary to perform an adequate analysis under § 39-71-703, MCA. Moreover, claims with a date of injury/exposure on or after July 1, 1995, require an impairment rating greater than 0% and an actual wage loss as threshold requirements for consideration of compensation for permanent partial disability.

8. Evaluating a claimant's additional PPD entitlement under § 703(5) requires determinations regarding a claimant's age, education, wage loss, and work restrictions.

9. Determining wage loss requires identified jobs. Regardless of the age of a claim and LNW's ability to locate the file, it will be difficult to accurately identify jobs that would have been available at or shortly after the time a claimant reached maximum medical improvement because that work-up would not have been done at the time.

10. Determining wage supplement benefits for claims arising from July 1, 1987, through June 30, 1991, requires knowledge of a claimant's job and earnings after returning to work. This information is not likely to be in the file.

11. Potential *Reesor* files may lack detailed vocational work-up. Few files may contain targeted vocational work-up necessary to perform a *Coles* analysis.

12. An assessment of the physical restrictions and vocational limitations requires analysis and documentation of the time-of-injury job requirements, which may not be in the file. In some instances, the time-of-injury job may no longer be available for evaluation.

13. Potential *Reesor* files may not contain an indication of work restrictions (heavy, medium or light). Obtaining accurate work restrictions after-the-fact may be difficult given the presence of subsequent injuries, occupational diseases, and the natural aging process.

14. Once the review is complete, the adjuster would need to set-up and obtain the necessary medical and vocational information on many files, make decisions based on the results, and pay benefits.

15. Each item not currently available in a file could be the basis for dispute, and the potential for litigation is an issue that can impact the time and cost involved in adjusting a claim. Furthermore, LNW believes such disputes will need to be mediated.

16. Some claimants have died since the time of claim closure which, as to those claims, compounds the problems discussed above in determining any benefits that may be due.

17. If it is ultimately determined claimant's entitlement to additional permanent partial disability benefits survive their demise, additional time and resources would be required to attempt to locate potential heirs and a personal representative for the estate.

18. A review of potential *Reesor* claims would also require adjusters to recognize and appropriately address the prior attorney liens filed in the pending common fund litigation, including but not limited to *Murer, Schmill, Stavenjord, Rausch*, and *Flynn.*

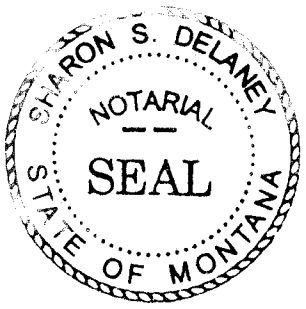
I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED this 5th day of May, 2006.

Kerri Wilson

STATE OF MONTANA)
: ss.
County of Missoula)

Subscribed to and sworn to before me on the 5th day of May, 2006, by Kerri Wilson.



Sharon S. Delaney
NOTARY PUBLIC FOR THE STATE OF MONTANA.
Residing at Missoula, Montana.
My commission expires: 6-20-2007

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on this 5TH day of May, 2006, I mailed a copy of the foregoing **AFFIDAVIT OF KERRI WILSON**, postage prepaid, to the following persons:

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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 2005-0222

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

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer

And

LIBERTY NORTHWEST INSURANCE CORPORATION

Intervenor.

LIBERTY NORTHWEST'S OPENING BRIEF REGARDING RETROACTIVE APPLICATION

Initially, two Montana Supreme Court decisions control the Court's analysis of the scope of the common fund claim in this and other cases. They are Dempsey v. Allstate Insurance Company, 2004 MT 391 and Schmill v. Liberty Northwest, 2005 MT 144. The salient holdings of those cases are set forth below.

> In the interests of finality, the line should be drawn between claims that are final and those that are not (the line drawn in Harper). "New legal principles, even when applied retroactively, do not apply to cases already closed." Reynoldsville Casket Co. v. Hyde (1995), 514 U.S. 749, 758, 115 S.Ct 1745, 1751, 131 L.Ed.2d 820, 830.

Dempsey at ¶28 (in part).

> We also understand, however, that what follows from civil litigation is different in kind from the consequences inherent in a criminal prosecution and conviction. On many occasions we have noted the disruption that a new rule of law can bring to existing contracts and to other legal relationships. Therefore today we reaffirm our general rule that "[w]e give retroactive effect to judicial decisions," Kleinhesselink v. Chevron, U.S.A. (1996), 277 Mont. 158, 162, 920 P.2d 108, 111. We will, however, allow for an exception to that rule when faced with a truly compelling case for applying a new rule of law prospectively only.

Id. at ¶29.

> Therefore, we conclude that, in keeping with our prior case, 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.

Id at ¶31.

> For the foregoing reasons we conclude that Hardy applies retroactively to require payment of stacked uninsured, underinsured motorist and medical payment insurance coverages in qualifying circumstances on open claims arising before its issuance. However, in the interests of finality, as discussed above, we limit this retroactivity to cases pending on direct review or not yet final.

Id. At ¶37.

> Liberty and the State Fund, in briefing, devoted a considerable time to addressing the third Chevron factor. That factor requires us to weigh "the inequity imposed by retroactive application...." Dempsey, ¶21 (quoted Chevron, 404 U.S. at 107, 92 S.Ct. at 355, 30 L.Ed.2d at 306). Although, in this case, this weighing does not affect the issue of retroactivity (because of our conclusion regarding the second factor), we comment on the State Fund's treatment of the third factor because it appears that the State Fund, as well as Liberty and Schmill, may not have grasped the full impact of Dempsey. Although Dempsey emphasized a presumption of retroactivity, it also stated that retroactive application does not mean that prior contrary rulings and settlements are void *ab initio*. Dempsey, ¶31. Rather, due to reasons of finality, "[T]he retroactive effect of a decision ... does not apply to cases that became

> final or were settled prior to a decision's issuance." Thus, if an occupational disease claim was settled or became final prior to our ruling in Scmill I then Schmill I does not affect whatever apportionment might have been deducted from the claim's award.

Schmill at ¶17.

> As the State Fund admits, many of these claims are settled, closed, or inactive. From the record before us, it cannot be determined how many of the 3,543 claims would, in the context of workers' compensation law, be considered "final or settled" under our holding in Schmill I. We leave that initial determination to the WCC.

Id at ¶19.

Cases that are pending on direct review, not yet final, closed, settled or inactive do not exist in a vacuum. For example, the rules of criminal procedure differ from those in civil procedure and what is pending, final, closed, settled or inactive under criminal law may differ from civil law. Similarly, what is pending, final, closed, settled or inactive under the Montana Workers' Compensation Act may, and in fact does, differ from tort law.

Also the entitlement to workers' compensation benefits is contractual in nature and is established by the contract of hire. Carmichael v. Workers' Compensation Court, 234 Mont. 410, 763 P.2d 112 (1988). The benefits a claimant may be entitled to are determined by the Act in effect on the date of an injury/occupational disease. Hardgrove v. Transportation Insurance Company, 2004 MT 340.

What is pending, final, closed, settled or inactive is revealed by the insurer's actions on a claim under the Act's procedural options or requirements and the claimant's response, or lack of response, to that action on a claim-by-claim basis. The procedural options and requirements when combined with the insurer's actions and the claimant's response or lack of response have a finite number of possibilities confined within several distinct and reoccurring linear progressions, each of which becomes pending, final, closed, settled or inactive at identifiable points, again, revealed by the insurer's action and the claimant's response or lack of response. Without understanding the claims process, the Court cannot identify those cases which are pending, final, settled, or inactive and not subject to the common fund.

Pending or Final

For attorneys pending on direct review obviously means a case is in litigation, including the appeal process. When the appeal time has run or the appeal is completed, the case is no longer pending on direct review and is final. Kleinhesselink v. Chevron USA, 277 Mont. 158, 162, 920 P.2d 108 (1966).

The term final also would necessarily include the running of an applicable statute of limitations. Id; also see Preston, infra, at ¶37 (2-year statute of limitation in MCA 27-2-102 that would have barred claimant's petition tolled during mediation).

Workers' Compensation Claims Adjustment

There are identifiable points of pending, final, closed, settled or inactive cases in the context of denied liability, payment under §608 with a later denial and accepted liability claims. The major decisions that can be involved in the adjustment of a claim are as follow:

- Initial Liability Denied
  - Burden of Proof
  - Thirty-day notice (injury only)
  - One-year claim filing
  - Employee
  - Covered employment
  - Excluded Claims
    - Mental cause – mental effect
    - Mental cause – physical effect
    - Volunteer
    - Recreational activity exception to employment
  - Course and scope of employment
    - Causation
    - Traveling
    - Alcohol or drug usage
- §608 Payment under reservation of rights with later denial
- Intial Liability Accepted
  - Occupational disease or injury
  - AWW calculation
  - TTD rate
  - Payment or non-payment medical testing, evaluation and/or treatment
  - Primary\secondary medical services
- Maximum Medical Improvement
  - Physical restrictions
  - Impairment rating
  - Employability
  - Actual wage loss
  - PPD, PTD, rehabilitation benefit liability
  - Post-MMI medical treatment
    - Continued MMI
    - Palative\maintenance care
- Rehabilitation Benefits
  - Disabled worker
  - Impairment rating

- Rehabilitation plan with reasonable vocational goals, reasonable re-employment opportunity and/or reasonable increase in worker's wages
- Length of plan
- Auxiliary benefits

- Settlement
  - Amount
  - Special provisions
  - Reopening

Common Defenses – Initial Denial of Liability

Common to all claims is the one-year claim filing requirement (defenses) and for **injury** claims the thirty-day notice requirement. MCA 39-407(8), 601, 603.

Also common to all claims are the requirements (defenses) of MCA 39-71-407(1)-(7) (13) (course and scope of employment, burden of proof, alcohol and drug and usage). The definitions of employee, injury and employments covered also provide defenses common to all claims. MCA 39-71-118, 119, 401.

If an insurer denies liability based on any of these defenses, then an **injury claimant** has two years within which to file a petition with the Court to contest the denial, excluding the time spent in mediation. MCA 39-71-2905(2); Preston v. Transportation Insurance, 2004 MT 339. For an occupational disease claimant, the two-year statute begins to run on the issuance after mediation of the occupational disease evaluation. Kessel v. Liberty Northwest, 2005 MTWCC 45. Hereinafter the two-year statute of limitations and the enlargement of that time created by case law is simply referred to as the two-year period or the two-year statute of limitation.

Other grounds for denied liability are set forth above.

For this group of denied liability claims, the case is closed or inactive until the two-year statute of limitations has run, when it is then final.

Res Judicata

A second type of case not subject to the common fund is any that has been litigated in which the issue in Flynn\Miller could have been litigated, but was not, and the time for appeal has run. Grenz v. Fire & Casualty of Connecticut, 2001 MT 8.

Medical Only

The third type of claim not subject to the common fund is a medical only claim. The common fund in Flynn v. State Fund, 2002 MT 279 is based on the award of Social Security disability benefits. As a matter of law, they cannot be awarded to a claimant with a non-wage loss claim.

Settled Cases

The fourth type of case not subject to the common fund is a settled case. A worker's compensation settlement is governed by MCA 39-71-741 and requires Department of Labor approval, MCA 39-71-741; in Murer v. State Fund, 283 Mont. 210, 942 P.2d 69(1997), the Montana Supreme Court held a settled claim is not subject to the common fund.

§608 Payment/Denial

The Act allows for three types of benefit payments in a claim: medical (MCA 39-71-704), wage loss (MCA 39-71-701-703), and rehabilitation benefits (MCA 39-71-1006). An insurer may make payment of any of these three classes of benefits under a reservation of rights without an admission of liability (MCA 39-71-608) and then terminate payment with or without notice (MCA 39-71-609). Whether the case is pending, settled, final, closed or inactive after termination of benefits under §609 depends on the claimant's response to a termination of benefits paid under §608. The termination is clearly a denial of benefits. If the claimant does nothing, then when the two-year period for filing a petition runs, the case is final. During the two-year period it is inactive or closed.

Accepted Liability

The same progression and identifiable points of pending, final, closed, settled or inactive occur in an accepted liability wage loss claim. The adjustment of a claim involves decisions across time related to the three categories of benefits. Obviously not all cases involve all possible decisions, but the major decisions that can be involved in the adjustment of a claim have already been set forth above.

The adjuster's decision about payment or non-payment is communicated to the claimant or his representative. The claimant either agrees with the decision, decides to take no action or disputes the decision. How is the case then best characterized under the possibilities of pending, final, closed, settled or inactive? If the insurer's action is not disputed, then the case is closed or inactive.

If two years have run since the decision and then the claimant disputes the decision, then the status of the case as regards that issue is final.

But, at some point, if a case has not been adjudicated or has not settled with Department approval, the insurer in cases where TTD is terminated and no PTD benefits are conceded, will have stopped payment of medical, wage loss and/or rehabilitation benefits, and close the file under its closure procedure. The claimant will recognize the payment of benefits has stopped and, following the analysis above, will have to decide to dispute the denial of additional benefits or not. If he does not, then the claim fits under the category of closed or inactive. He has two years from the date of the denial to file a petition in the Court. If he does not do so, then the claim becomes final.

Why Liberty believes this rather protracted discussion of claims handling is significant is to show there are many points in the linear progression of a case, which could, depending on the facts, result in the case being classified as not pending, final, settled, closed or inactive. This is especially important not only for Flynn but also Schmill, Stavengaord and Ruhd.

But as regards Flynn, the initial classification of potentially relevant cases are those (a) in which there was a Social Security disability award because of the worker's compensation injury,

(b) resulting in a Social Security offset by the insurer, (c) in which the claimant actually paid attorney fees. That class of cases is then reduced to those within the following inclusive dates: December 2, 2002 (Flynn decision) and December 1, 2000, the two-year period under MCA 35-71-2905(2) to dispute the insurer's failure to pay proportionate attorney fees. Within this subset, the only cases that could be part of a common fund are those in which the claimant actually filed a petition with the Court requesting Flynn apportionment of attorney fees. To allow claims outside of this two-year window would require the Court to ignore the two-year statute of limitations in MCA 39-71-2905(2).

Workers' Compensation law does not require a proof of loss form that then prompts the adjuster to make a payment decision. See MCA 33-15-503. Payments under the Act are prompted by the requirements of the Act and case law. For example, if six years before the Montana Supreme Court decision in Flynn an insurer took a Social Security offset from an award in which the claimant had to pay attorney fees to his attorney in getting the Social Security disability award, must the insurer now pay proportionate attorney fees? No. The insurer then had no obligation under the law to do so. The claimant then could have brought a Flynn claim, but in this hypothetical he did not dispute the insurer's actions in taking the offset and not paying proportionate attorney fees. Under the above analysis, the claim was initially inactive or closed on this issue, and after two years it was final.

That this is the proper analysis is supported considering the extensive legal history recited by the Dempsey court. Specifically, at ¶22 the Court, in discussing the ancestry of Harper, makes the following statement: "[The United States Supreme] Court announced a new rule requiring that all criminal decisions apply retroactively to all cases 'pending on direct review or not yet final' [citing Griffith v. Kentucky, 479 U.S. 314 (1987)]."

At ¶28 the Dempsey court, in explaining the purpose behind limiting retroactive application to all cases pending on direct review or not yet final makes the following telling statement: "In the interests of finality, the line should be drawn between claims that are final and those that are not (the line drawn in Harper). 'New legal principles, even when applied retroactively, do not apply to cases already closed.'" At ¶23 the Dempsey Court states "It was only a matter of time before this approach to retroactivity in criminal cases found its way into the Court's civil juris prudence." Dempsey was not a criminal case; it was not a worker's compensation case. But we have been tasked with applying this approach to retroactivity in criminal and tort cases to workers' compensation cases.

The starting point for Liberty's analysis is not to ensure there are cases that fall under the Flynn common fund claim. Liberty's starting point is to take the options and requirements for insurers under the Act and the options for claimants in responding to insurers' decisions under the Act and insert them into the retroactivity analysis in Dempsey and Schmill.

The Dempsey Court took a retroactivity analysis initially used in criminal cases and then superimposed it on tort cases and extended that application to workers compensation cases without any explanation about how to apply its language (not pending on direct appeal, final, closed, settled and/or inactive) with the following exception that is crucial to Liberty's and, we believe, this Court's analysis.

> As the State Fund admits, many of these claims are settled, closed, or inactive. From the record before us, it cannot be determined how many of the 3,543

> claims would, **in the context of workers' compensation law,** be considered "final or settled" under our holding in Schmill I. We leave that initial determination to the WCC.

Schmill at ¶19 (emphasis added).

The Schmill II Court left completely open whether any of the Schmill I type claims may or may not fall within the holding in Schmill II. The Court left open the possibility that none would fall into a potential common fund. That is, it is an open question for this Court whether the Dempsey Court analysis when applied to the Workers' Compensation Act results in placing any cases in a common fund under the holding in Flynn. The Flynn Court did not hold a common fund was created. Its holding appears at ¶18 and is as follows: "To the extent it [Workers' Compensation Court] declined to apply the common fund doctrine, the judgment of the Workers' Compensation Court is reversed." That doctrine is to be applied in the context of Dempsey retroactively. The Flynn Court made absolutely no holding regarding retroactive application or the method of identifying cases that could fall into a common fund.

DATED this 30th day of January, 2006.

Larry W. Jones
Attorney for Respondent/Insurer

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day January, 2006, I personally served the original of the foregoing LIBERTY NORTHWEST'S OPENING BRIEF REGARDING RETROACTIVE APPLICATION, on the Workers' Compensation Court, on the following:

Ms. Patricia J. Kessner
Clerk of Court
Workers' Compensation Court
PO Box 537
Helena, MT 59624-0537

Larry W. Jones

I hereby certify that on the 30th day January, 2006, I served copies of the foregoing LIBERTY NORTHWEST'S OPENING BRIEF REGARDING RETROACTIVE APPLICATION, by first-class mail, postage prepaid, to the following:

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Montana State Fund
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Sharon S. Delaney

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Employees of the Liberty Mutual Group
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WCC No. 2005-0222

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And
CARL MILLER, Individually and on Behalf of Others Similarly Situated

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer

And

LIBERTY NORTHWEST INSURANCE CORPORATION

Intervenor.

LIBERTY NORTHWEST'S ANSWERING BRIEF REGARDING RETROACTIVITY

Flynn in his Petitioner's Opening Brief (herein Brief) at pp. 2-3 gets it half right. The Supreme Court decision that prompted this common fund case concerns the entitlement of a totally disabled worker who incurred costs or fees to obtain a Social Security award for which the insurer providing coverage took an offset to payment of part of the fees by the insurer; these was nothing wrongful about the insurer's conduct because it was pursuant to statute.

Flynn's discussion at p. 3 of the Court's authority prior to July 1, 1987 to review, diminish or increase awards under MCA §39-71-2909 (1985) is irrelevant. That provision is triggered only if the disability of a claimant is changed within the limitations set forth in the statute. Taking the social security offset has absolutely no relationship to a change in disability in the context of this case. The offset is taken if the social security award is based on the work related injury for which the insurer paid total disability benefits. MCA 39-71-701, 702.

Flynn's argument p. 4 based on MCA 39-71-2909 (2003) is just as irrelevant for the same reason. The insurer's right to take a social security offset is not based or even affected by change or "aggravation, diminution or termination of disability . . . ."

Also at p. 4, Flynn's argument that there is no statute of limitations simply ignores the legislature's enactment in 1997 of MCA 39-71-2907 (2) requiring the filing of a Petition within 2 years after benefits are denied. 1997 Mont. Laws Section 7, Ch. 276. Flynn in footnote 6 notes the above statute of limitation but mistakenly claims it does not apply because it is limited to denied claims. Denial includes non payment of attorney fees when the social security offset was taken.

Most interestingly, Flynn does not discuss what a final claim or an active claim is even though those are concepts equally applicable as the concept of settled. For example, in a 1975 permanent total disability claim in which social security benefits were awarded for the injury and a social security offset was taken with no payment of attorney fees by the insurer, can anyone seriously dispute it has been inactive as regards payment of attorney fees for 30 years?

Along this line, Liberty incorporates by reference the State Fund's argument regarding laches at p. 9 of its initial brief.

Liberty also incorporates by reference the State Fund's Respondent's Reply to Petitioner's Brief Regarding Retroactivity filed February 24, 2006.

DATED this 1st day of March, 2006.

Larry W. Jones
Attorney for Liberty Northwest

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day March, 2006, I personally served the original of the foregoing LIBERTY NORTHWEST'S ANSWERING BRIEF REGARDING RETROACTIVITY, on the Workers' Compensation Court, on the following:

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