

Bradley J. Luck
GARLINGTON, LOHN & ROBINSON, PLLP
199 West Pine • P. O. Box 7909
Missoula, MT 59807-7909
Telephone (406) 523-2500
Telefax (406) 523-2595

Attorneys for Intervenor Montana State Fund

FILED

NOV 16 2006

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CASSANDRA M. SCHMILL,

Petitioner,

v.

LIBERTY NORTHWEST INSURANCE
CORPORATION,

Respondent/Insurer

and

MONTANA STATE FUND,

Intervenor.

WCC No. 2001-0300

**MOTION FOR STAY AND
MEMORANDUM IN SUPPORT**

COMES NOW the Montana State Fund ("State Fund") and moves the Court for an Order staying all briefing and consideration of retroactivity issues pending the determination of issues raised in *Flynn v. Montana State Fund*, WCC No. 2000-022, presently on appeal before the Montana Supreme Court. In support of the Motion, the State Fund states as follows:

DOCKET ITEM NO. 330

On November 8, 2006, this Court entered its Order Delineating Issues to Be Briefed. The Court asked interested parties to brief the following primary retroactivity issue:

Whether, in light of the above holdings [*Flynn v. Montana State Fund*, 2006 MTWCC 31, and *Stavenjord v. Montana State Fund*, 2006 MT 257], any reasons exist for this Court not to use the *Flynn* definitions of “final” and “settled” in determining which cases would be considered “final” or “settled” as mandated by the Montana Supreme Court’s remand in this case.

Order Delineating Issues to Be Briefed 2, Nov. 8, 2006 (“Briefing Order”).

The State Fund intends to include in its arguments in the appeal of the *Flynn* decision of September 29, 2006, matters relating precisely to the noted issue. The State Fund contends the Workers’ Compensation Court’s *Flynn* Order failed to take into account the meaning of “claim that has been paid in full” as set out in Montana Code Annotated § 39-71-107(7), even though the Court indicated that the statute “sets forth a clear definition of what constitutes a ‘settled claim’” and that it was not “this Court’s function to rewrite what the legislature has already defined.” Order Determining Status of Final, Settled, Closed & Inactive Claims ¶ 16, Sept. 29, 2006 (“*Flynn* Order”). In addition, the State Fund will likely include argument relating to suggested interpretations of the terms “closed” and “inactive,” considered in the briefing in *Flynn* but not in the Court’s decision (based upon the Court’s interpretation of the remand order in the second Supreme Court decision in this action). *Flynn* Order ¶¶ 5-9 (interpreting *Schmill v. Liberty Nw. Ins. Corp.*, 2005 MT 144, 327 Mont. 293, 114 P.3d 204). Finally, the State Fund will likely include argument relating to the meaning and effect of the term “actionable” as used in the Supreme Court’s definition of the scope of retroactivity in the

decision in *Stavenjord v. Mont. State Fund*, 2006 MT 257, ¶ 15, __ Mont. __, ¶ 15, __P.3d __, ¶ 15 (Oct. 6, 2006), and as considered in light of the other terms noted above.

The State Fund may make other arguments relating to clarifying and fine tuning the retroactivity rules and standards. Other *Flynn* appellants are expected to make additional arguments on retroactivity. To the extent any of the arguments are deemed meritorious by the Supreme Court the search parameters for notice and implementation will be modified. Implementation activities undertaken before that time may be premature and may possibly need to be redone. The process is burdensome under any circumstance and any modification of the search parameters after the fact (especially in relation to a final determination regarding closed files) will constitute an unnecessary significant additional expense.

It appears that the precise issues to be considered in the *Flynn* appeal encompass the considerations set forth in the issue ¶ 2(a) specified by the Court. As a result, the most expedient and final determination of such issues will be through the vehicle of the *Flynn* appeal. As such, it is respectfully submitted, it would be appropriate to stay consideration of the noted issue pending the determination of the same (and more comprehensive issues) in *Flynn*. Ultimately, the briefing and consideration of the issue in this action will loosely coincide with the period the same matters are before the Supreme Court.

In relation to the other specified issues (¶¶ 3(a)-(d)), the briefing could continue. The State Fund notes, however, that it appears that ¶¶ 3(a) and 3(b) may have been resolved by prior Stipulation, Order and lien filing. In relation to ¶ 3(a), it is

noted the lien claimed by the Petitioners was limited to occupational diseases occurring on or after July 1, 1987, where an apportionment was taken on or before June 22, 2001. Amended Summons & Notice of Attorney Fee Lien, Dec. 7, 2005. In relation to ¶ 3(b), the Court entered an Order on February 13, 2004, accepting the parties' stipulated date for determining claimants' entitlement and verifying that post June 22, 2001 claims are not within the common fund. Order Regarding Claims 1, Feb. 13, 2004, and Attached Stipulation Regarding Prospective Claims 1, Feb. 12, 2004.

Issue ¶ 3(c) may be briefed at this time, but it is also arguably subject to the same consideration as ¶ 2(a) concerning retroactivity and *Flynn*. Issue ¶ 3(d) is not within the scope of this request and could certainly be briefed.

It is well-settled law that a decision to stay an action is within the sound discretion of the trial court.

[A]ccess to the courts is not without limits. The judicial resources of the state are finite and must be used efficiently. Additionally, individuals must be protected from having to spend their time, energy, and money defending themselves against claims without merit.

Grenz v. Medical Management Nw., Inc. (1991), 250 Mont. 58, 64, 817 P.2d 1151, 1155. The present claims and issues are certainly not without merit, but given the nature and status of the *Flynn* appeal, the stay makes good sense.

[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes

on its docket with economy of time and effort for itself, for counsel, and for litigants.

Landis v. North Am. Co., 299 U. S. 248, 254 (1936).

Furthermore, when a related action might eliminate the need for a decision in an action pending before the Court, a stay of the latter appears proper until the former is decided. See, e.g., *Schara v. Anaconda Co.* (1980), 187 Mont. 377, 383-84, 610 P.2d 132, 135-36 (finding district court erred in not staying proceeding to enforce restrictive covenant pending decision on condemnation action which would have mooted the action to enforce the covenant).

The present Motion is based upon the State Fund's desire to efficiently use the Court, parties' and counsels' resources and, hopefully, with the determination of issues in *Flynn*, secure finality for retroactivity review considerations.

Counsel for Liberty Northwest Insurance has been contacted and he advises he supports the present request. Counsel for Claimant was contacted and she advises she opposes the motion.

//

//

//

//

DATED this _____ day of November, 2006.

Attorneys for Intervenor Montana State Fund:

GARLINGTON, LOHN & ROBINSON, PLLP
199 W. Pine • P. O. Box 7909
Missoula, MT 59807-7909
Telephone (406) 523-2500
Telefax (406) 523-2595

By _____
Bradley J. Luck

CERTIFICATE OF MAILING

I, the undersigned, of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for Intervenor, hereby certify that on this _____ day of November, 2006, I mailed a copy of the foregoing MOTION FOR STAY AND MEMORANDUM IN SUPPORT, postage prepaid, to the following persons:

Laurie Wallace, Esq.
Bothe & Lauridsen
P.O. Box 2020
Columbia Falls, MT 59912

Larry W. Jones, Esq.
Liberty Northwest Insurance Corp.
700 S.W. Higgins Ave., Suite 108
Missoula, MT 59803
