IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 27

WCC No. 2001-0300

CASSANDRA SCHMILL

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer

and

MONTANA STATE FUND

Intervenor.

ORDER ADOPTING ORDER OF SPECIAL MASTER

Summary: On December 11, 2006, this Court ordered the parties to brief certain unresolved issues. On July 9, 2007, the Special Master appointed by the Court issued his "Findings and Conclusions by Special Master on Issues Presented Pursuant to December 11, 2006, Order of the Workers' Compensation Court."

Held: The "Findings and Conclusions by Special Master on Issues Presented Pursuant to December 11, 2006, Order of the Workers' Compensation Court" dated July 7, 2007, are adopted.

¶ 1 Issues in the above-entitled matter were duly briefed before Special Master Jay Dufrechou, who considered the evidence and prepared and submitted his Order for consideration by the Court. These issues are fully set forth in the Special Master's Order.[1]

¶ 2 Thereupon, the Court considered the record in the above-captioned matter, considered the Order of the Special Master, and enters the following Order.

[1] The Findings and Conclusions by Special Master on Issues Presented Pursuant to December 11, 2006, Order of the Workers' Compensation Court are attached and by this reference are made a part of this Order.

¶ 3 IT IS HEREBY ORDERED the "Findings and Conclusions by Special Master on Issues Presented Pursuant to December 11, 2006, Order of the Workers' Compensation Court" **are adopted** as follows:

> ¶ 3a The retroactive application of *Schmill* involves the period from July 1, 1987, through June 21, 2001, inclusive. Unless otherwise excluded, all claims arising out of occupational diseases which were first diagnosed as work-related during this period should be identified, reviewed, and paid under *Schmill*, subject to specific objections that arise in particular cases or with regard to categories of cases.
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> ¶ 3b Excluded from the retroactive application of *Schmill* are cases which were settled through a department-approved settlement or court-ordered compromise of benefits.
>
> ¶ 3c Excluded from the retroactive application of *Schmill* are cases in which a final judgment was entered by the WCC, and that judgment is not pending on appeal to the Montana Supreme Court, if the circumstances of the particular judgment indicate that the underlying occupational disease claim is no longer actionable. However, the Special Master reserves ruling on specific Class V issues until presentation of specific claims or until interested parties present particular classes of "judgment" situations for negotiation or ruling.
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> ¶ 3d Neither the doctrine of laches nor any particular statute of limitations limits the retroactivity of cases in the implementation period noted above.
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> ¶ 3e Claims handled by the UEF are subject to the retroactive application of *Schmill*, though the UEF may later argue that reduction in payment on particular claims is necessary pursuant to statutory mandate.

¶ 4 Any party to this dispute may have twenty days in which to request reconsideration from this Order Adopting Order of Special Master.

DATED in Helena, Montana, this 10th day of July, 2007.

(SEAL)

WORKERS' COMPENSATION COURT STATE OF MONTANA

JUDGE

c: *Counsel of Record via Website*
Jay P. Dufrechou

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MONTANA STATE FUND

Intervenor.

FINDINGS AND CONCLUSIONS BY SPECIAL MASTER ON ISSUES PRESENTED PURSUANT TO DECEMBER 11, 2006 ORDER OF THE WORKERS' COMPENSATION COURT

¶ 1 This *Order by Special Master* is made pursuant to the *Order* appointing Special Master issued by the Workers' Compensation Court (WCC) on April 23, 2007. The Special Master was directed to resolve all factual and legal issues necessary to implement the decisions of the Montana Supreme Court in *Schmill v. Liberty Northwest Insurance Corp.* (*Schmill I*)[1] and *Schmill v. Liberty Northwest Insurance Corp.* (*Schmill II*)[2].

I. Background

¶ 2 In *Schmill I*, the Montana Supreme Court found unconstitutional the apportionment provisions of § 39-72-706, MCA, of the Occupational Disease Act. That section required reduction of disability benefits for non-occupational factors, while the Workers' Compensation Act required no similar reduction. After *Schmill I*, occupational disease claimants must receive the full amount of disability

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[1] 2003 MT 80, 315 Mont. 51, 67 P.3d 290.

[2] 2005 MT 144, 327 Mont. 293, 114 P.3d 204.

benefits to which they are entitled, without reduction based on apportionment between occupational and non-occupational factors.

¶ 3 In *Schmill II*, the parties returned to the Supreme Court on various issues, including whether the requirement that occupational disease claimants receive their full entitlement to benefits, without apportionment, applies retroactively to claims already made prior to the *Schmill I* decision. In *Schmill II*, the Supreme Court held that *Schmill I* is retroactive under Montana law as clarified in *Dempsey v. Allstate Insurance Co.*[3] The Supreme Court also held that the *Schmill* litigation created a common fund entitling Schmill's attorney to common fund attorney fees. The common fund gives rise to a "global lien against all claimants who may benefit from the decision, not just those whose benefits are paid by Liberty."[4]

¶ 4 With the creation of a global common fund, all insurers, self-insured entities, or third party administrators with responsibility for workers' compensation claims (hereafter collectively referenced as "insurers"), arguably became responsible for identifying claims subject to payment under *Schmill* and for honoring the lien for common fund attorney fees. Thus, on December 7, 2005, the WCC issued an Amended Summons and Notice of Attorney Fee Lien to over 550 insurers and self-insurers identified as having done insurance business in Montana during the relevant time period. The Special Master recognizes that some insurers have raised defenses to implementation based on the argument that they were not properly made parties to the original litigation and cannot be forced to pay common fund claims.[5] This Order does not address any such issue.

¶ 5 While the ruling on retroactivity is clear, the complexity of workers' compensation laws, the variations in factual histories of particular cases, and the realities of claims adjustment and day-to-day insurance operations, will inevitably give rise to various issues regarding implementation of the retroactive aspect of the *Schmill* decision. The task of the Special Master will be to supervise the implementation of *Schmill* as a common fund matter. This includes resolving issues presented by the parties and, from time to time, requesting reports from the insurers as to their progress in identifying claimants entitled to additional payments under *Schmill*. A large part of the initial work will involve identification of parameters that enable insurers to identify occupational disease claims subject to payment.

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[3] 2004 MT 391, 325 Mont. 207, 104 P.3d 483.

[4] *Schmill II*, ¶ 27.

[5] See, e.g., Respondent Safeco Companies Brief in Response to Petitioner's Opening Brief Regarding Retroactivity, page 3 and fn. 2-3.

II. Implementation Period: Beginning and End Dates

¶ 6 Common fund counsel and several insurers actively participating in this litigation appear to agree on the beginning and end dates of what shall be called the "implementation period" of the common fund.

¶ 7 After the issuance of *Schmill II*, a Stipulation Regarding Prospective Claims was entered into by common fund counsel, the Montana State Fund (State Fund), and Liberty Northwest Insurance Company (Liberty).[6] On February 13, 2004, the WCC approved the Stipulation as to form and content. The Stipulation provides, in pertinent part:

> For prospective implementation purposes, the parties stipulate and agree that a claimant's entitlement date shall be the date a claimant's occupational disease is first diagnosed as work-related. Therefore, all claims arising out of occupational diseases which were first diagnosed as work-related on or after June 22, 2001, the date of the Workers' Compensation Court's decision in this matter, are considered prospective claims. Common fund fees are not payable on prospective claims.

¶ 8 While not all insurers impacted by the global common fund in *Schmill* have entered into this or a similar stipulation, there appears to be no dispute raised by other insurers regarding the means for handling the "entitlement" and "prospective claim" dates in implementation of *Schmill*. These dates are consistent with occupational disease law and prior practice in common fund litigation. The Special Master thus finds that the claimant's entitlement date for purposes of implementation shall be the date the claimant's occupational disease was first diagnosed as work-related. The "end date" for the common fund implementation period shall be June 21, 2001, inclusive. The *Schmill* decisions, of course, require payment of unapportioned benefits for claims *on or after* June 22, 2001, but those claims are "prospective" and not part of the common fund.

¶ 9 Though the filed Stipulation referenced above does not specify a beginning date of the implementation period, the decisions in *Schmill* indicate that the implementation period begins July 1, 1987, the date the 1987 amendments to workers' compensation and occupational disease laws took effect. In its June 4, 2004, decision on the question of retroactivity and other matters, the WCC found that *Schmill* is retroactive to July 1, 1987, the effective date of the statutory scheme found unconstitutional in *Schmill I*. Given the Supreme Court's affirmation of the retroactivity portion of the lower court's decision in *Schmill II*, the implementation period begins with occupational disease claims diagnosed on or after July 1, 1987. Various filings by several

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[6] *Stipulation Regarding Prospective Claims,* filed February 12, 2004.

parties acknowledge this as the appropriate "beginning date" of the implementation period.

¶ 10 Thus, these implementation proceedings are concerned with occupational disease claims with work-related diagnoses dates from July 1, 1987, through June 21, 2001, inclusive.

III. Issues Identified in December 11, 2006, Order of WCC

¶ 11 The first disputed matter for decision by the Special Master involves certain issues which the WCC asked the parties to brief by Order dated December 11, 2006. The issues identified by the WCC, based on input of interested parties, are:

¶ 11a What *Schmill* claims (with entitlement dates between July 1, 1987, and June 22, 2001) are subject to review and increase in benefits upon a retroactive application of *Schmill I*?

¶ 11b Whether the scope of retroactive application is limited by any applicable statute of limitations or laches?

¶ 11c Whether the Uninsured Employers' Fund (UEF) falls within the ambit of the Montana Supreme Court's decision in *Schmill I*?

IV. Question One: Settled and Final Claims

¶ 12 As briefed, the first question involves what cases are excluded from the *Schmill* implementation because they are final and settled, thus not within the common fund pursuant to the law of this case and other common fund decisions. We begin with relevant precedent.

A. Direction in *Schmill*.

¶ 13 In *Schmill II*, the Supreme Court relied upon *Dempsey* in holding that the *Schmill I* ruling applies retroactively. In responding to arguments by the State Fund and Liberty about "the inequity imposed by retroactive application," the Supreme Court noted as follows:

> 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

> *Schmill I* then *Schmill I* does not affect whatever apportionment might have been deducted from the claim's award.[7]

¶ 14 The Supreme Court also noted the State Fund's argument that retroactive application would affect as many as 3,543 claim files dating back to July 1, 1987, and would force the State Fund to review each of these files. Summarizing the State Fund's argument, the Court stated: "This would take many hours of labor, especially because many of the claims are closed and inactive and lack the claimants' current addresses."[8]

¶ 15 In this context, the Supreme Court then stated:

> 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.[9]

¶ 16 In an *Order Determining Status of Final, Settled, Closed, and Inactive Claims* in *Flynn v. Montana State Fund and Liberty Northwest Ins. Corp.*[10], the WCC, after reviewing the language noted above, stated the following regarding the Supreme Court's directive in *Schmill II*:

> In other words, the Montana Supreme Court noted that, while many of the claims which might be affected by the rule of law announced in *Schmill I* are "settled, closed, or inactive," the explicit direction to this Court was to determine, within the context of workers' compensation law, only those cases which would be considered "final or settled." While acknowledging that some claims are "closed" or "inactive," the Montana Supreme Court did not include these claims within its directive. This is consistent with the court's holding in *Dempsey* that the retroactive effect of a decision does not apply to cases which are final or settled prior to a decision's issuance.[11]

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[7] *Schmill II*, ¶ 17. (emphasis added).

[8] *Schmill II*, ¶ 18.

[9] *Schmill II*, ¶ 19. (emphasis added).

[10] 2006 MTWCC 31. (appealed 10/18/06).

[11] *Flynn,* 2006 MTWCC 31, ¶ 5.

B. The WCC's Order Determining Status of Final, Settled, Closed, and Inactive Claims in *Flynn v. Montana State Fund and Liberty Northwest Ins. Corp.*

¶ 17 In the *Flynn v. Montana State Fund* case, the WCC addressed the issues surrounding exclusion from common fund implementation of cases designated "final," "settled," "closed," or "inactive." In that case, several insurers argued that claims designated "closed" or "inactive" by an insurer should be excluded from retroactive application of the *Flynn* decision.

¶ 18 In rejecting this argument, the WCC focused on the direction given by the Supreme Court in *Schmill II*, noting:

> In fact, the words 'closed' and 'inactive' are pointedly ***not*** included within the court's directive in *Schmill II*. Rather *Schmill II* uses only the words 'final or settled.' The Supreme Court having drawn these parameters, it is not for this Court to arbitrarily expand them to include language that is simply not present.[12]

¶ 19 With regard to what constitutes a "settled" claim, the WCC referenced § 39-71-107(7), MCA (2005), a statute mandating prompt claims handling of workers' compensation claims by claims examiners located in Montana. Various practices are mandated or proscribed. For instance, subsection (3) of the statute requires that "[s]ettled claim files stored outside of the claims examiner's office must be made available within 48 hours of a request for the file." Subsection (7)(a) provides: "For purposes of this section, 'settled claim' means a department-approved or court-ordered compromise of benefits between a claimant and an insurer or a claim that was paid in full."

¶ 20 The WCC relied upon this section in finding, in *Flynn*, that both department-approved and court-ordered settlements were "settled claims" for common fund retroactivity purposes. Petitioners in that case had argued that court-ordered settlements were not "settled claims" for common fund purposes.

¶ 21 The WCC found that § 39-71-107(7), MCA, sets forth a clear definition of what constitutes a "settled claim." The WCC stated:

> Therefore, the Court concludes that the language of § 39-71-107(7)(a), MCA (2005), defining a 'settled claim,' as 'a department-approved or court-ordered compromise of benefits between a claimant and an insurer or a claim that was paid in full,' shall be the definition of a 'settled claim' for purposes of this case.[13]

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[12] *Flynn*, ¶ 7.

[13] *Flynn*, ¶ 16.

¶ 22 As common fund counsel in the present matter points out, the actual Order of the WCC in the *Flynn* proceeding, with regard to "settled claims," states: "A SETTLED CLAIM is a claim in which a department-approved settlement or court-ordered compromise of benefits has been made between the claimant and the insurer."[14] The language from § 39-71-107(7)(a) defining a "claim that was paid in full" as a "settled claim" is **not** included in the actual order.

¶ 23 Regarding what constitutes a "final claim," the WCC rejected the request by insurers to use the two-year limitation period of § 39-71-2905, MCA, to limit retroactivity to a two-year period. The WCC noted that a denial of benefits must occur to trigger § 39-71-2905, MCA, which does not occur in a situation where a claimant has never requested benefits not yet available under a statutory scheme.

¶ 24 The Order of the WCC in *Flynn* regarding a final claim was: "A FINAL CLAIM is a claim in which a final judgment has been entered by the Workers' Compensation Court only if the claim is not currently pending on appeal."

C. Guidance from *Stavenjord v. Montana State Fund (Stavenjord I)*[15] and *Stavenjord v. Montana State Fund (Stavenjord II)*[16]

¶ 25 Following *Schmill II,* and after the WCC's Order in *Flynn*, the Montana Supreme Court issued a decision on retroactivity and other matters in the *Stavenjord* litigation. *Stavenjord* involves similar issues to *Schmill.* In *Stavenjord I*, the Supreme Court held that section 39-72-405, MCA, of the Occupational Disease Act denied equal protection to occupational disease claimants by not making available to them the permanent partial disability benefits available under the Workers' Compensation Act. In *Stavenjord II*, the Supreme Court held that *Stavenjord I* applies retroactively to "open" claims arising on or after June 30, 1987, the effective date of the 1987 Workers' Compensation and Occupational Disease Acts used by the Court in that case.

¶ 26 As relevant here, the *Stavenjord II* Court stated its ruling as follows:

> Therefore, we conclude that the WCC erred in ordering only partial retroactive application of *Stavenjord I* to cases arising on or after June 3, 1999. Rather, *Stavenjord I* shall apply retroactively to those claims arising on or after June 30, 1987, which remain **"open"** as herein defined. **Occupational disease-related claims**

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[14] *Flynn,* ¶ 26.

[15] 2003 MT 67, 314 Mont. 466, 67 P.3d 229.

[16] 2006 MT 257, 334 Mont. 117, 146 P.3d 724.

for PPD benefits previously finalized and closed by either court order, or settlement and release, may not be reopened for consideration under *Stavenjord I* or this Opinion.[17]

¶ 27 In *Stavenjord II*, the Supreme Court also offered the following definition of "open" claims:

> Here, State Fund has not cleared *Chevron's* hurdle, and therefore *Stavenjord I* applies to any and all *open* claims arising on or after June 30, 1987, the date on which the offending statute, § 39-72-405(2), MCA (1997), took effect. For these purposes, **"open claims" will encompass those which are still actionable, in negotiation but not yet settled, now in litigation, or pending on direct appeal.**[18]

¶ 28 From *Stavenjord II*, we thus have guidance that (1) retroactivity does not resurrect claims that were closed by court order or settlement; and (2) retroactivity requires compensation on claims that are "open," defined as "those which are still actionable, in negotiation but not yet settled, now in litigation, or pending on direct appeal."

D. Agreement Regarding Certain Claims by Parties Filing Briefs

¶ 29 In the opening brief on the first issue now before the Special Master, common fund counsel describes five "classes" of claims which are potentially impacted by the *Schmill* decision. These classes seem useful for focusing argument, agreements, and rulings during the implementation proceedings. The classes are:

> I. Claims in which TTD [temporary total disability] benefits are being paid and were either apportioned in the past, or are still being apportioned.
>
> II. Claims in which TTD benefits were paid at an apportioned rate, the claimant returned to work with no wage loss, [and] no additional benefits were paid other than medical benefits.
>
> III. Claims in which TTD benefits were paid at an apportioned rate, the claimant was found to be PTD [permanently totally disabled] and benefits were paid at an apportioned rate, PTD benefits are either continuing to be paid, or stopped automatically because the claimant reached retirement age.

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[17] *Stavenjord II*, ¶ 16. (emphasis added).

[18] *Stavenjord II*, ¶ 15. (emphasis added).

IV. Claims in which TTD and/or PTD benefits were paid at an apportioned rate and the claim was settled by way of a petition for settlement approved by DLI [Department of Labor and Industry] or a stipulated judgment. (OD settlements could only be paid out in a lump sum, not bi-weekly. §§ 39-72-405 and 39-72-711, MCA.)

V. Judgments.

¶ 30 Common fund counsel concedes, and the Special Master finds, that Class IV claims are "settled" and are not part of the common fund implementation of *Schmill*. These are claims that were settled through procedures of the Department of Labor and Industry or by Stipulated Judgment in the WCC. This is consistent with the Order of the WCC in *Flynn*.

¶ 31 Insurers filing briefs on these issues concede that certain classes of claims are open and will be subject to identification, review and payment (though specific disputes may arise in individual cases for presently unforeseen reasons). These are Class I claims (those in which TTD benefits are being paid and were either apportioned in the past or are still being apportioned) and what State Fund designates as Class III(a) claims (those in which the claimant was found to be permanently totally disabled and those benefits were paid at an apportioned rate, and continue to be paid either at an apportioned or full rate.) The Special Master finds that Class I and Class III(a) claims are subject to *Schmill* retroactivity.

¶ 32 Thus, in the Class scheme used by the parties filing briefs, the present dispute centers on Class II claims (TTD benefits were paid at an apportioned rate, the claimant returned to work with no wage loss, and no additional benefits were paid other than medical benefits) and Class III(b) claims (the claimant was found to be PTD, such benefits were paid, but those benefits stopped automatically because the claimant reached retirement age).

¶ 33 There is also potential disagreement regarding what claims resulting in judgments (Class V) are closed to retroactive application.

E. Special Master Ruling on Class II and Class III(b) Claims

¶ 34 The Special Master finds that Class II and Class III(b) claims must be identified and paid under the retroactivity ruling in *Schmill II* as part of the common fund and pursuant to these implementation proceedings. In reaching this conclusion, the Special Master begins with the directive from *Schmill II* as emphasized by the WCC in *Flynn*: the exclusion from retroactivity is only for "final or settled" claims. The Special Master also draws upon the more recent ruling by the Supreme Court in *Stavenjord*, which confirms that the exclusion from retroactivity is for final or settled claims, *and* that claims are *included* if they are "open," defined as "still actionable."

¶ 35 Class II and Class III(b) claims do not involve judgments, so they cannot be considered "final."

¶ 36 Insurers filing briefs on this issue argue that Class II and Class III(b) claims must be considered "settled" and outside the retroactivity scope of the *Schmill* decisions. This argument is primarily based on the contention that these claims are "paid in full." Relying on the WCC order in *Flynn* noted above, the insurers argue that the statutory language of § 39-71-107(7)(a), MCA, includes "a claim that was paid in full" within the definition of "settled claims" and that the WCC adopted the statutory language in full as the definition of "settled claim" for common fund retroactivity purposes.

¶ 37 On the other hand, common fund counsel points out that § 39-71-107(7)(a), MCA, states clearly that the proffered definition of "settled claim" is "[f]or purposes of this section," meaning § 39-71-107, MCA. Thus, the inclusion of "a claim that was paid in full" as a "settled claim" for purposes of section 39-71-107, MCA, indicates, for instance, that an insurer is permitted to store outside the Montana claims examiner's office not only those claims that have been resolved by department-approved order or court-ordered compromise, but also those claims that are "paid in full."

¶ 38 Some insurers respond that even if § 39-71-107(7)(a), MCA, does not by its own terms define "settled claim" for all workers' compensation purposes, the WCC adopted the full language of the section as the common fund definition. As noted above, common fund counsel points out that the "paid in full" language is *not* included in the actual Order of the WCC in *Flynn*.

¶ 39 While mindful that the body of the WCC *Flynn* opinion quotes the full language of § 39-71-107(7)(a), MCA, as the definition of "settled claim," the Special Master concludes that the actual Order of the WCC is controlling. That Order does not include within the definition of "settled claim" a claim that has been "paid in full."

¶ 40 Further, the Special Master concludes that the *Stavenjord II* decision, issued after the WCC's *Flynn* Order, indicates that "paid in full" claims should not be deemed "settled." As the WCC recognized in *Flynn*, and as is well known to practitioners in the workers' compensation system, "as long as a claimant has timely notified his or her employer of the claimed injury or disease and has timely filed a claim for compensation, there is no statutory time limit for the claimant to seek benefits."[19] In the workers' compensation system, a claim could be considered "paid in full" by the insurer at some point because no additional benefits are then due or demanded. That does not mean that additional benefits

[19] *Flynn*, ¶ 22.

may not be demanded, and due, at a later date. Nor does it mean that the claim is not "open" and "actionable" under the law.

¶ 41 In *Stavenjord II*, the Supreme Court indicated that retroactivity applies to "open claims," defined as including claims which are "still actionable." In the workers' compensation/occupational disease system, even if all benefits claimed to date have been paid in a particular case, the underlying claim remains actionable, generally speaking, if circumstances later exist to justify additional benefits. It is not uncommon in the workers' compensation system for a claimant to reach a plateau in which all benefits due have been paid, and yet the claimant's condition later deteriorates, requiring commencement or recommencement of total disability benefits, an increase in an impairment award, entitlement to additional permanent partial disability benefits, or payment of new medical benefits. In the workers' compensation system, if a "settled claim" were deemed to include a claim "paid in full" at any given time, then "open" or "actionable" claims could be considered "settled," an obvious contradiction in terms, in conflict with the direction of *Stavenjord II* with regard to common fund retroactivity.

¶ 42 Even if the "paid in full" language were included in the definition of "settled claim" for purposes of implementation of the Supreme Court's rulings in *Schmill*, the Special Master concludes that Class II and Class III(b) claims in *Schmill* are not "paid in full."

¶ 43 Turning first to Class II claims, these claims involve an occupational disease claimant whose temporary total disability benefits ceased when she or he returned to work with no wage loss and no additional benefits were paid other than medical benefits. It is possible, and not uncommon, for a claimant whose temporary total disability benefits ceased upon return to work to become once more entitled to temporary total disability benefits due to relapse into disability. In addition, entitlement to medical benefits typically continues in such cases. Class II claims cannot be considered "paid in full."

¶ 44 In the situation of claimants whose permanent total disability benefits have ceased because they reached retirement age (Class III(b)), medical benefits relating to the occupational disease typically remain payable when reasonable and necessary. Where these claims are not "paid in full," they are not "settled," even if the "paid in full" language is included in the definition of "settled claim." In addition, these claims remain "open" and "actionable" under the *Stavenjord II* definitions should circumstances arise to mandate entitlement to additional benefits.

¶ 45 Finally, in the context of workers' compensation/occupational disease claims as described above, where claims typically remain "open" and "actionable" unless settled or closed by final judgment, the Special Master notes that describing Class II and III(b) claims as "paid and full" may be no different than

describing those claims as "closed" or "inactive." Excluding "closed" or "inactive" cases from the common fund was rejected by the WCC in *Flynn*. The "paid in full" status of Class II or Class III(b) claims may justify moving the insurance file to a location outside the Montana claims examiner's office under § 39-71-107, MCA, but does not justify removing the case from the retroactive application of *Schmill*. Such files must be located and reviewed.

F. Judgments

¶ 46 Although it would initially appear relatively easy to exclude from retroactive application those cases resulting in "final judgments," the actual context of workers' compensation claims indicates that the existence of a final judgment on some issues in a case may not preclude the payment of retroactive benefits under *Schmill*.

¶ 47 Common fund counsel argues that a "final judgment" for purposes of exclusion from retroactivity should be limited to judgments which resolved the entire occupational disease claim. Counsel argues that "final judgment" for exclusion from retroactivity should not include, for example, cases in which a dispute over medical benefits went to judgment or in which judgment was entered against the insurer establishing liability for occupational disease benefits.

¶ 48 Without the context of any particular disputed application of the "final judgment" exclusion, it is impossible to establish parameters to govern all circumstances that could arise in implementation of *Schmill*. Generally speaking, if the circumstances of a particular judgment indicate that the underlying occupational disease claim is no longer actionable, then the case is likely removed from retroactive application of *Schmill*. For instance, if liability on an occupational disease claim was denied by the insurer and that position was upheld by the WCC or the Supreme Court in a final judgment, then clearly the case is final and not part of these proceedings.

¶ 49 However, the mere existence of a final judgment in an occupational disease proceeding cannot automatically remove the case from retroactive application. For instance, if a judgment was rendered in favor of a claimant on a particular issue not involving apportionment, then that judgment does not likely prevent payment of *Schmill* benefits.

¶ 50 In Workers' Compensation/Occupational Disease proceedings, many, if not most, "final judgments" do not dispose of all possible future issues between the parties. Unless the judgment upholds a general denial of liability on the underlying claim, the underlying claim remains actionable. For example, if apportioned temporary total disability benefits were paid for a period of time, but judgment was entered against the claimant on some other disputed issue (e.g., the reasonableness of particular medical treatment), then such judgment would not render the case as a whole outside the scope of retroactive application.

¶ 51 The parties with most interest in the implementation proceedings are encouraged to negotiate a stipulation regarding the types of judgments that may be at issue and the impact of those categories of judgments on cases involved in the implementation proceeding. Absent such stipulation, the parties are encouraged to seek agreement on classifications of judgments for presentation to the Special Master for ruling. In the alternative, "judgment" cases can be handled on a case-by-case basis.

V. Question Two: Whether the scope of retroactive application is limited by any applicable statute of limitations or laches?

¶ 52 None of the insurers arguing the present issues contends that the doctrine of laches or any particular statute of limitations bars retroactive application to claims within the *Schmill* implementation period.

¶ 53 For purposes of this implementation proceeding, the Special Master finds that neither the doctrine of laches nor any particular statute of limitations limits retroactive application during the implementation period noted above. Generally speaking, prior to *Schmill*, § 39-72-706, MCA, prevented claimants from having legal grounds on which to claim unapportioned benefits. Where the legal right to claim unapportioned benefits did not exist, it is difficult to imagine how claimants could be deemed to have inappropriately sat on their rights. Further, as discussed above, once the requirements of notice and claim-filing are met, claims in the occupational disease context typically remain actionable without time limit.

VI. Question Three: Whether the UEF falls within the ambit of the Montana Supreme Court's decision in *Schmill I*?

¶ 54 Under § 39-71-503(1)(a), MCA, the UEF is required to pay an injured employee "the same benefits the employee would have received if the employer had been properly enrolled under compensation plan No. 1, 2, or 3...." In briefing the question whether the UEF must comply with *Schmill,* the UEF points out its unique status as a safety net for payment of benefits to injured workers of uninsured employers, but identifies no basis in statute or common law to exclude the UEF from the retroactive application of *Schmill.* Thus, the Special Master finds that the UEF must identify claimants entitled to additional benefits under *Schmill* and must pay appropriate benefits.

¶ 55 Issues regarding reduction in payment of particular *Schmill* benefits may arise if the UEF has insufficient funds to pay *Schmill* benefits and to meet other obligations.[20] However, at present, there is no such issue before the Special Master.

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[20] See §39-71-503 (MCA), et seq.

VII. Findings and Conclusions

¶ 56 In accordance with the foregoing, the Special Master finds and concludes:

¶ 56a The retroactive application of *Schmill* involves the period from July 1, 1987, through June 21, 2001, inclusive. Unless otherwise excluded, all claims arising out of occupational diseases which were first diagnosed as work-related during this period should be identified, reviewed, and paid under *Schmill*, subject to specific objections that arise in particular cases or with regard to categories of cases.

¶ 56b Excluded from the retroactive application of *Schmill* are cases which were settled through a department-approved settlement or court-ordered compromise of benefits.

¶ 56c Excluded from the retroactive application of *Schmill* are cases in which a final judgment was entered by the WCC, and that judgment is not pending on appeal to the Montana Supreme Court, if the circumstances of the particular judgment indicate that the underlying occupational disease claim is no longer actionable. However, the Special Master reserves ruling on specific Class V issues until presentation of specific claims or until interested parties present particular classes of "judgment" situations for negotiation or ruling.

¶ 56d Neither the doctrine of laches nor any particular statute of limitations limits the retroactivity of cases in the implementation period noted above.

¶ 56e Claims handled by the UEF are subject to the retroactive application of *Schmill*, though the UEF may later argue that reduction in payment on particular claims is necessary pursuant to statutory mandate.

DATED in Helena, Montana, this 9th day of July, 2007.

Jay P. Dufrechou
Special Master