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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CASSANDRA SCHMILL, Petitioner, vs. LIBERTY NORTHWEST INSURANCE CORPORATION, Respondent/Insurer, and MONTANA STATE FUND, Intervenor.	WCC No. 2001-0300 MOVING INSURERS' REPLY BRIEF TO PETITIONER'S RESPONSE TO MOTION TO STAY PROCEEDINGS

I. CONTRARY TO PETITIONER SCHMILL'S ASSERTION, 24.5346(1), A.R.M. DOES NOT PREVENT THIS COURT FROM ISSUING A STAY IN THIS CASE.

Petitioner Schmill argues that this Court's rules prevent it from issuing the stay requested by Responding Insurers. Specifically, Schmill argues that Rule 24.5346(1), A.R.M., "limits the use of stays to judgments or orders which have been appealed." Because the *Order Adopting Order of Special Master*[1] is not currently on appeal,

[1] *Order Adopting Order of Special Master*, 2007 MTWCC 27, WCC No. 2001-0300, (*Schmill* docket # 380)

Schmill contends that "the Court is without the means to grant the Responding Insurers' Motion to Stay."[2] Schmill's argument fails for at least two reasons.

First, the administrative rule, 24.5346(1), A.R.M. simply does not limit stays only to circumstances in which the requesting party has appealed a judgment or order. The rule states as follows:

> The party appealing a judgment of the workers' compensation judge may request a stay of execution of the judgment or order pending resolution of the appeal. A request for new trial and/or request for amendment to findings of fact and conclusions of law shall be deemed an automatic stay until the request is ruled upon. If the parties stipulate that no bond shall be required, or if it is shown to the satisfaction of the court that adequate security exists for payment of the judgment, the court may waive the bond requirement.

There is no language in 24.5346(1), A.R.M. whatsoever that prohibits this court from entering a stay in all circumstances except those in which the requesting party has appealed a judgment of this Court. Rather, the rule simply states that execution ***may*** be stayed in such circumstance. Schmill clearly attempts to insert into the administrative rule prohibitory language which was omitted by the drafters. Of course the rules of construction prohibit such additions.

> § 1-2-101, MCA, instructs that "[i]n the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." We utilize these same rules when interpreting rules of court.

Miller v. Eighteenth Judicial Dist. Court, 2007 MT 149, ¶ 38, 337 Mont. 488, ¶ 38, 162 P.3d 121, ¶ 38 (citations omitted). Schmill urges a rule of construction upon this Court that the Montana Supreme Court has squarely prohibited. Accordingly, 24.5346(1), A.R.M. does not deny this Court the authority to issue the interim stay requested by Responding Insurers.

Second, both the United States and Montana Supreme Courts have held that a decision to stay an action is within the sound discretion of the trial court.

> [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 American Co., 299 U. S. 248, 254, 57 S. Ct. 163, 81 L. Ed. 153 (1936).

[2] Responding Insurers further note the inherent contradiction between Schmill's position that the Court lacks authority to enter an interim stay and her underlying "common fund" claim. The Administrative Rules and Montana Rules of Civil Procedure do not recognize any "common fund" claim or procedures.

> A court has inherent power to stay proceedings in control of its docket-after balancing the competing interests.

Henry v. District Court of Seventeenth Judicial Dist. (1982), 198 Mont. 8, 13, 645 P.2d 1350, 1352 – 1353 (quoting with approval *Dellinger v. Mitchell* (D.C.Cir.1971), 442 F.2d 782). Schmill tellingly does not even address this line of authority. Schmill's interpretation of 24.5346(1), A.R.M. as denying this Court the power to stay an action is directly contradicted by authority from our state and national supreme courts. Clearly, as a Court with the power to control its own docket, this Court has the inherent power to stay this action pending resolution of other potentially dispositive issues.

II. CONTRARY TO SCHMILL'S ARGUMENTS, THIS COURT SHOULD STAY ENFORCEMENT OF ITS *ORDER ADOPTING ORDER OF SPECIAL MASTER* BECAUSE THE SCOPE OF RETROACTIVITY DETERMINED BY THAT ORDER MAY BE ALTERED BY THE *FLYNN* APPEAL.

Schmill argues that, should this Court determine that it has the power to stay this action, it should not do so because the *Flynn* appeal cannot affect the definitions of "settled" or "final" to be used to determine retroactive application in this case. Schmill first argues that a stay would be inappropriate because in determining the definitions of "settled" and "final" in this case (to determine retroactive application), this Court did not rely on the definitions from its earlier *Flynn Order*[3] currently on appeal. This argument fails because whether this Court relied on its previous *Flynn Order* or not, in determining the definitions of "settled" and "final," the definitions adopted by the Montana Supreme Court in the *Flynn* appeal will be binding on the parties and Court in this case and may alter the scope of retroactivity. Indeed, due to the presumptive retroactive effect of all judicial decisions in Montana, there is little question that any definitions of "settled" and "final" adopted in the *Flynn* appeal will be applicable to this case.

It is beyond serious dispute that the definitions of "settled" and "final" are crucial to establishing the scope of retroactivity. The Montana Supreme Court has stated that "settled" and "final" claims are not subject to retroactivity.

> [I]f 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.

Schmill v. Liberty Northwest Ins. Corp., 2005 MT 144, ¶ 17, 327 Mont. 293, ¶ 17, 114 P.3d 204, ¶ 17. The Montana Supreme Court has yet to provide definitions for the terms "settled" and "final" for the purpose of determining the scope of retroactivity. Of course, the definitions of "settled" and "final," precisely for the purpose of determining the scope of retroactivity, are the questions directly before the Court in the *Flynn* appeal. Accordingly, there exists the very real possibility that the Montana Supreme

[3] *Order Determining Status of Final, Settled, Closed, and Inactive Claims*, 2006 MTWCC 31, WCC No. 2000-0222, 9/29/06 (*Flynn* Docket # 537).

Court will adopt definitions of "settled" and "final" that differ from the definitions adopted by this Court in its recent *Order Adopting Order of Special Master* in this case. In such an event, the scope of retroactivity applied here could differ drastically from that contemplated by the *Order Adopting Order of Special Master*. Quite simply, Montana law with respect to the scope of retroactivity cannot be known until the Montana Supreme Court determines the definitions of "settled" and "final." Accordingly, regardless of whether this Court relied on its *Flynn Order* in issuing its *Order Adopting Order of Special Master*, implementation and enforcement of that order should be stayed until it is known whether the retroactive application of *Schmill I* is consistent with the pronouncements of the Montana Supreme Court.

Schmill next argues that a stay is inappropriate because *Stavenjord II* has already determined the definition of a "settled" claim. Specifically, she argues that *Stavenjord II* defined "settled" claims as those settled by way of a Department approved petition or stipulated judgment, but not those "paid in full." *Petitioner's Response to Responding Insurers' Motion to Stay Proceedings*, p. 2. However, *Stavenjord II* provided no such definition. While *Stavenjord II* made reference to "settled" claims in the context of stating they were exempt from retroactivity,[4] nowhere in that decision did the Court define the term "settled." The closest it came to addressing such term is to state as follows:

> *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.

Stavenjord v. Montana State Fund, 2006 MT 257, ¶ 15, 334 Mont. 117, ¶ 15, 146 P.3d 724, ¶ 15. Clearly, "claims which are still actionable but not yet settled" begs the question, what is a settled claim? Thus, contrary to Schmill's assertion, *Stavenjord II* did not define a "settled" claim and thus does not preclude staying this action until the Montana Supreme Court addresses that question in the *Flynn* appeal.

In her final argument Schmill contradicts herself by conceding that the "paid in full" argument has the potential to affect the scope of retroactivity in this case, and then arguing that that it really can't affect such scope because this Court has already determined that none of the disputed *Schmill*-type claims have been paid in full.[5] As support for her argument Schmill quotes the *Order Adopting Order of Special Master* for

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[4] *Stavenjord v. Montana State Fund*, 2006 MT 257, ¶¶ 15 & 16, 334 Mont. 117, ¶¶ 15 & 16, 146 P.3d 724, ¶¶ 15 & 16.

[5] The "paid in full" argument is the Responding Insurers' argument that "settled" claims should include claims "paid in full" as required by § 39-71-107(7)(a), MCA, and as stated by this Court in its *Flynn Order*. See *Order Determining Status of Final, Settled, Closed, and Inactive Claims*, 2006 MTWCC 31, WCC No. 2000-0222, 9/29/06 (*Flynn* Docket # 537), ¶ 16 ("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.").

the proposition that claims can never be paid in full because even if all benefits have been paid, a timely filed claim may be resurrected if a claimant's condition deteriorates, thus entitling him to additional benefits. This argument ignores the "paid in full" argument that Responding Insurers made in *Flynn* (as well as this case) and have pursued on appeal. In *Flynn*, Responding Insurers have not argued that a claim paid in full may never be resurrected in the event a claimant's condition deteriorates. Rather, Responding Insurers argue that, for the purposes of common fund retroactivity, a claim should be considered paid in full two years after the date of benefits were terminated.

> [Responding Insurers]... [do] not advocat[e] the mechanical application of a statute of limitations to completely bar a claim presented to them or the WCC. Rather, the [Responding Insurers] submit that, ***for purposes of the retroactivity analysis***, a two-year period for disputing the termination of benefits is a reasonable and just amount of time to provide finality and simultaneously afford claimants an opportunity to dispute the termination of benefits.
>
> A two-year period between final payment and the claim's designation as "paid in full" is fully consistent with Montana policy. In enacting § 39-71-2905(2), the Montana legislature selected a two-year statute of limitations for claimants to dispute an insurer's denial of benefits. § 39-71-2905, MCA. Of course, a dispute over denial of benefits is nearly synonymous with a dispute over denial of continuing benefits (i.e., a termination of benefits as having been "paid in full"). As a result, § 39-71-2905(2) is highly instructive as a guide to what is a reasonable balance between a claimant's right to dispute termination of benefits and finality in non-litigated workers' compensation cases. If an insurer terminates a claimant's benefits, that claimant has two years to dispute the decision. After the expiration of the two year period, the claim must be considered "settled" and paid in full. In the interest of finality, when a claimant has accepted all payments and raised no dispute as to entitlement to further benefits, that claimant should not later be permitted to disregard this Court's policy of finality and seek to benefit from a later judicial decision. Otherwise, the policy of finality is lost.

Opening Brief of Appellants, *Flynn v. State Fund*, Cause No. DA-06-00734, 2/15/07, pp. 15 – 16. Should the Supreme Court rule in favor of Responding Insurers and the policy of finality, and adopt the two-year period advocated by Responding Insurers, *Schmill*-type claims in which no benefits have been paid for two years would be excluded from retroactivity regardless of whether their claims are resurrected at some later date. Thus, contrary to Schmill's assertion, the "paid in full" argument may indeed alter the scope of retroactivity currently contemplated by the *Order Adopting Order of Special Master*.

III. A STAY IN THIS CASE IS APPROPRIATE BECAUSE ENFORCEMENT OF THE *ORDER ADOPTING ORDER OF SPECIAL MASTER* PRIOR TO A DECISION IN *FLYNN* WOULD PLACE A POTENTIALLY UNNECESSARY BURDEN ON RESPONDING INSURERS.

As shown above, varying definitions of the terms "settled" and "final" terms will dramatically affect the scope of retroactivity and thus, the complexity of any file review and the amount of benefits that insurers may eventually be required to pay. For example, if "settled" claims do not include claims paid in full, then in order to identify claims subject to *Schmill* retroactivity, insurers would have to review all files which do not contain a Department or Court approved settlement. As the vast majority of claims are paid without such settlements, such a definition would potentially require insurers to review tens of thousands of files and possibly pay benefits to a far larger group of *Schmill*-type claimants. However, if the *Flynn* appeal results in a holding that "settled" claims include those paid in full, then insurers would be required to review only those files in which claimants are currently being paid benefits[6]. Clearly, such a file review would be drastically less expensive and burdensome than a review of virtually all records going back to July 1, 1987 (the date of the beginning of the retroactive period in *Schmill*).

By proceeding with this case, under the definitions as set forth in the *Order Adopting Order of Special Master*, insurers could be required to do an expensive, burdensome and massive file review which will prove unnecessary in the event that the *Flynn* Court defines settled claims as those paid in full.[7] Of course, in this event the insurers will have precious little opportunity to recover the costs of such an unnecessary search. Likewise, if insurers are required to pay benefits based on the *Schmill* definition of "settled," what opportunity will there be to recover such benefits if the event that retroactivity is held to not apply to claims paid in full? Will insurers be required to initiate actions against each and every claimant if they wish to recoup erroneously paid benefits? What compensation will insurers receive for the damage to their reputations when they pay benefits that were not anticipated by the claimant and then demand such benefits back?

The same scenario is also a very real possibility with respect to "final" claims. In the *Flynn Order* this Court held that "final" claims were "claim[s] in which a final judgment has been entered by the Worker's Compensation Court only if the claim is not currently pending on appeal." *Order Determining Status of Final, Settled, Closed, and Inactive Claims*, 2006 MTWCC 31, WCC No. 2000-0222, 9/29/06 (*Flynn* Docket # 537), ¶ 28. However, in this case, the Court has held that a final claim is "judgment that 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

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[6] Or, if the *Flynn* Court adopts the two-year look–back period advocated by Responding Insurers, they would only need to review files in which benefits were terminated less than two years prior to the date of *Schmill I*.

[7] Responding Insurers note that Schmill presumes that a duty exists on the part of insurers that were not parties to the underlying case to search out and pay benefits to claimants that have not even requested those benefits. Schmill does not identify any legal authority for this fundamental change to the way in which our legal system operates.

actionable." *Order Adopting Order of Special Master*, 2007 MTWCC 27, WCC No. 2001-0300, Findings and Conclusions, (*Schmill* docket # 380), ¶ 56c. Which definition will the Supreme Court chose? If insurers are required to proceed under this Court's *Schmill* definition, they will not be able to bypass files in which a final judgment has been entered. Rather, they will have to review the procedural history and legal arguments of each case to determine "if the circumstances of the particular judgment indicate that the underlying occupational disease claim is no longer actionable." Clearly, if the Supreme Court choses the more narrow definition set forth in the *Flynn Order*, then such a file review will have proved unnecessary.

Responding Insurers face serious hardship and inequity in being compelled to proceed under the *Order Adopting Order of Special Master*. Thus, in order to avoid such a hardship an interim stay in this case is appropriate, particularly when it should coincide with the briefing and resolution of other dispositive gateway and common fund implementation issues.

WHEREFORE, Responding Insurers respectfully request this Court to issue an order staying enforcement or implementation of the *Order Adopting Order of Special Master*.

Dated this 28th day of September 2007.

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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 28th day of September 2007:

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September 28, 2007

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VIA FACSIMILE AND US MAIL

RE: *Cassandra Schmill v. Liberty NW Ins. Co. & MT State Fund*
WCC No. 2001-0300

Dear Clerk:

Attached please find the Moving Insurers' Reply Brief to Petitioner's Response to Motion to Stay Proceedings. The original and one copy will follow by mail. After filing the original, please conform the copy and return in the envelope provided.

Thank you in advance for your assistance with this matter.

Sincerely yours,

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RE: **Schmill v. Liberty NW/Montana State Fund**

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DOCUMENTS TRANSMITTED: SCHMILL – Moving Insurers' Reply Brief to Petitioner's Response to Motion to Stay Proceedings.

COMMENTS: Please file the attached document. If you have any questions, please contact me at 406.252-3441. Thank you!

File No. 21-701-001