

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 2001-0300

CASSANDRA SCHMILL

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

and

MONTANA STATE FUND,

Intervenor.

ORDER DENYING LIBERTY'S MOTION TO STAY PROCEEDINGS

¶ 1 Liberty Northwest Insurance Corporation (Liberty) has moved this Court for a stay of proceedings in this matter pending resolution of the dispute in *Flynn and Miller v. Montana State Fund*¹ (*Flynn/Miller*) interpreting the term "paid in full." Schmill opposes Liberty's motion. Prior to ruling on Liberty's motion, this Court, *sua sponte*, raised the concern as to whether this Court could exercise jurisdiction over Liberty's motion because notices of appeal of this Court's July 29, 2008, Order were filed with the Montana Supreme Court by insurers other than Liberty. Before ruling on the merits of Liberty's motion, I required both Schmill and Liberty to submit briefs addressing my concerns regarding jurisdiction.² In their respective briefs, both Schmill and Liberty agree that this Court has jurisdiction to decide Liberty's motion. Although they frame their arguments differently, both parties agree that the pending appeal will have no impact on the issue presented by Liberty's motion and therefore this Court is not divested of jurisdiction to rule on the motion. "[A] notice of appeal divests the trial court of jurisdiction over the order or judgment from

¹ WCC No. 2000-0222.

² Minute Book Hearing No. 4063. (Docket Item No. 462.)

which the appeal is taken and ‘any matter embraced therein’³ Since the matter before the Court is not embraced within the pending appeal, I agree with the parties that this Court has jurisdiction to rule on Liberty’s motion.

¶ 2 In Liberty’s brief in support of its motion to stay, Liberty argues that “until the term ‘paid in full’ has been interpreted and defined by this Court in *Flynn/Miller*, exactly what remediation effort in *Schmill* is necessary or appropriate is unknown.”⁴ Liberty contends that any remediation efforts in *Schmill* will require the Court to define retroactive application, and that the definition of “paid in full” in *Flynn/Miller* will control for purposes of the present case.⁵ *Schmill* responds that “[s]ince the Court has already ruled on the ‘paid in full’ dispute in this case, there is no basis upon which the Court can issue the stay requested by Liberty.”⁶ Subject to the exceptions noted below, I find *Schmill*’s argument to be well-taken.

¶ 3 In the Special Master’s Findings and Conclusions, adopted by this Court by Order dated July 10, 2007, the Special Master addressed the following classes of claimants potentially impacted by the *Schmill* decision:

- I. Claims in which temporary total disability benefits are being paid and were either apportioned in the past, or are still being apportioned.
- II. Claims in which temporary total disability 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(a). Claims 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.
- III(b). Claims in which the claimant was found to be permanently totally disabled, such benefits were paid, but those benefits stopped automatically because the claimant reached retirement age.
- IV. Claims in which temporary total disability and/or permanent total disability benefits were paid at an apportioned rate and the claim was settled by way

³ *Alpine Buffalo, Elk and Llama Ranch, Inc. v. Andersen*, 2001 MT 307, ¶ 23, 307 Mont. 509, 38 P.3d 815. (Citing *McCormick v. McCormick*, 168 Mont. 136, 138, 541 P.2d 765, 766 (1975).

⁴ [Liberty’s] Motion to Stay Proceedings and Supporting Brief at 2. (Docket Item No. 460.)

⁵ *Id.*

⁶ Petitioner’s Response to Liberty NW’s Motion to Stay Proceedings at 2. (Docket Item No. 461.)

of a petition for settlement approved by the Department of Labor and Industry or a stipulated judgment.

V. Judgments.⁷

¶ 4 With respect to Class I and Class III(a) claims, Liberty conceded⁸ that these claims are open and will be subject to identification, review, and payment.⁹ With respect to Class IV claims, common fund counsel conceded that these claims are settled and are not part of the common fund implementation of *Schmill*. With respect to Class II and III(b) claims, the Special Master rejected the insurers' argument that these claims were "paid in full," and concluded that they fell within the retroactive application of *Schmill*. With respect to Class V claims, the Special Master noted that it was impossible to establish parameters to govern all circumstances that could arise in implementation of *Schmill*. The Special Master therefore encouraged the parties "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."¹⁰

¶ 5 Irrespective of what the ruling of the "paid in full" issue may be in *Flynn/Miller*, the rulings set forth in the Special Master's Findings and Conclusions, and adopted by this Court, are *res judicata* as they pertain to Liberty. Therefore, regarding Classes I, II, III(a), and III(b), Liberty's motion to stay proceedings is denied. Since common fund counsel conceded that Class IV claims are excluded from retroactive application of *Schmill* a stay is not necessary. Liberty's motion is moot as it pertains to Class IV claims.

¶ 6 Regarding Class V claims, the Special Master recognized that it was impossible to establish parameters to govern all circumstances that could arise in implementation. He therefore encouraged the parties to negotiate a stipulation to resolve the implementation proceedings regarding the types of judgments at issue. In the absence of a stipulation, the Special Master set forth a process for resolution of these claims. It is conceivable that this process may identify some Class V claims which may be impacted by the "paid in full" decision in *Flynn/Miller*. However, it is equally conceivable that the process may identify some Class V claims which would not be impacted. Before such claims are identified, however, it would be premature to issue a stay. I therefore am denying Liberty's motion

⁷ See Findings and Conclusions by Special Master on Issues Presented Pursuant to December 11, 2006 Order of the Workers' Compensation Court (Findings and Conclusions by Special Master), ¶¶ 29-32. (Docket Item No. 380.)

⁸ Liberty adopted Montana State Fund's brief in which it conceded these claims were subject to review, etc. Docket Item No. 358.

⁹ Findings and Conclusions by Special Master, ¶ 31.

¹⁰ *Id.* ¶ 51.

to stay pending completion of the process set forth in the Special Master's Findings and Conclusions. If, however, Class V claims which may require resolution of the *Flynn/Miller* "paid in full" issue are identified in this process, Liberty has leave to re-present its motion to stay regarding these claims.

ORDER

¶ 7 Liberty's motion to stay proceedings is **DENIED** regarding Class I, II, III(a), and III(b) claims.

¶ 8 Liberty's motion to stay proceedings regarding Class IV claims is **MOOT** in light of common fund counsel's concession that Class IV claims are excluded from retroactive application of *Schmill*.

¶ 9 Liberty's motion to stay proceedings is **DENIED** regarding Class V claims pending completion of the process set forth in the Special Master's Findings and Conclusions. If, however, Class V claims which may require resolution of the *Flynn/Miller* "paid in full" issue are identified in this process, Liberty has leave to re-present its motion to stay regarding these claims.

DATED in Helena, Montana, this 13th day of October, 2009.

(SEAL)

JAMES JEREMIAH SHEA
JUDGE

c: Parties of Record Via Website
Jay P. Dufrechou

Submitted: June 12, 2009