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THE WORKERS' COMPENSATION COURT IN THE STATE OF MONTANA

ROBERT FLYNN,

Petitioner,

v.

STATE COMPENSATION INSURANCE FUND,

Respondent.

WCC No. 2000-0222

STATE FUND'S ANSWER BRIEF REGARDING RETROACTIVITY

COMES NOW the Respondent/Insurer, the State Compensation Insurance Fund ("State Fund"), and hereby files its Answer Brief Regarding Retroactivity. The State Fund's Answer Brief is in response to an attempt by the Petitioner, Robert Flynn ("Flynn"), to retroactively apply the Montana Supreme Court's decision in *Flynn v. State Compen. Ins. Fund*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397. For the reasons stated herein, the State

Fund asserts that *Flynn* only applies prospectively.

INTRODUCTION

The parties and the Court are currently in the process of determining what fees are owed to whom as a result of the Montana Supreme Court's recent decision in the above-referenced matter. In pursuit thereof, the Court held a hearing on March 4, 2003, wherein it instructed Flynn to file documents outlining the scope of his claimed attorney lien and further instructed the State Fund to respond to Flynn's lien claim. Flynn filed his explanation concerning the scope of his claimed lien on March 18, 2003, and asserted that his lien applied to all insurers who offsetted any claimant's SSD award without accounting for the costs the claimant incurred in obtaining the SSD award. Flynn also asserted that his lien covered the time frame of July 1, 1974 (which was the date the 50% social security offset was enacted) through December 5, 2002 (which was the date of the *Flynn* decision). *See* Statement of Scope of Attorney's Lien 1-2 (Mar. 18, 2003). In this Answer Brief, the State Fund takes issue with Flynn's contention that *Flynn* applies retroactively. Instead, it is the State Fund's position that *Flynn* should have prospective application only.

ARGUMENT

Courts treat the retroactive application of statutes differently than they treat the retroactive application of judicial decisions. In Montana, statutes affecting substantive rights are applied prospectively, unless the statute expressly provides otherwise. *See* Mont. Code Ann. § 1-2-109 (2001). Statutes which only affect procedural matters are applied retroactively. *See e.g. State Compen. Ins. Fund v. Sky Country, Inc.* (1989), 239 Mont. 376, 780 P.2d 1135. However, judicial decisions are given different treatment.

In general, judicial decisions apply retroactively. *See e.g. Kleinhesselink v. Chevron, USA* (1996), 277 Mont. 158, 920 P.2d 108, 111. However, a United States Supreme Court decision created three exceptions to the general rule that judicial decisions apply retroactively. *See Chevron Oil v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971), *overruled, Harper v. Virginia Dept. of Taxn.*, 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993). In determining whether a judicial decision has prospective application only, courts must examine three factors:

1. Whether the decision establishes a new principle of law either by overruling established precedent on which litigants have relied or by deciding an issue of first impression whose resolution was not clearly

foreshadowed;

2. Whether retroactive application will further or retard the rule's operation after considering the history, purpose and effect of the rule in question; and

3. Whether a substantial inequity will result by applying the judicial decision retroactively.

Chevron Oil, 404 U.S. at 106-107.

The "non-retroactivity test" set forth in *Chevron Oil* was widely adopted in states across the country, including Montana. *See LaRoque v. State* (1978), 178 Mont. 315, 319, 583 P.2d 1059, 1061. However, in the early 1990s, the federal courts abandoned the *Chevron Oil* test and adopted a blanket rule that gave retroactive application to judicial decisions. *See e.g. Harper*, 509 U.S. at 94-98; *James Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991).

In light of *Harper* and *James Beam*, this Court questioned the validity of the *Chevron Oil* test in Montana. *See Klimek v. State Compen. Ins. Fund*, WCC No. 9602-7492, at 14-15 (dec. Oct. 11, 1996). This Court's concern was heightened by the fact that three cases from the Montana Supreme Court – which were published shortly before the *Klimek* opinion – completely failed to mention the *Chevron Oil* test. However, two recent decisions from the Montana Supreme Court verify that the *Chevron Oil* test is still used to determine if a judicial decision applies retroactively.

I. MONTANA LAW STILL UTILIZES THE TEST SET FORTH IN *CHEVRON OIL* TO DETERMINE WHETHER A JUDICIAL DECISION APPLIES PROSPECTIVELY ONLY.

This Court has already acknowledged that the federal court's use of a blanket rule of retroactivity with respect to matters of federal law is not binding on state courts with respect to matters of state law. *See Klimek*, at 15 (citations omitted). In fact, this Court has noted that several states have adhered to *Chevron Oil* as the better rule with respect to retroactivity. *See Klimek*, at 15 (citations omitted).

In *Klimek*, this Court opined that the Montana Supreme Court had abandoned the *Chevron Oil* test in favor of the blanket rule of retroactivity because three 1996 cases had

addressed retroactivity but none of them even paid lip service to *Chevron Oil*. *See Klimek*, at 16 (citing *Kleinhesselink*, 920 P.2d 108; *Chaney v. U.S. Fidelity & Guar.* (1996), 276 Mont. 513, 917 P.2d 912, 914; *Porter v. Galarneau* (1996), 275 Mont. 174, 911 P.2d 1143). Therefore, at the time of the *Klimek* decision, case law seemed to be moving away from the *Chevron Oil* test. However, the Montana Supreme Court has addressed retroactivity on at least two occasions since *Klimek*. *See Seubert v. Seubert*, 2000 MT 241, 301 Mont. 399, 13 P.3d 365; *Benson v. Heritage Inn, Inc.*, 1998 MT 330, 292 Mont. 268, 971 P.2d 1227. Both *Seubert* and *Benson* discussed and applied the *Chevron Oil* test. Additionally, Judge Molloy has applied the *Chevron Oil* test in a federal court case involving an issue of Montana law. *See Burton v. Mountain W. Farm Bureau Mut. Ins. Co.*, ___F. Supp. 2d ___, 2003 WL 1740461 at *8 (D. Mont. Mar. 31, 2003.)

Recently, this Court acknowledged that despite its analysis in *Klimek*, the *Chevron Oil* test may be alive and well in Montana. *See Miller v. Liberty Mut. Fire Ins. Co.*, 2003 MTWCC 6, ¶ 24 (dec. Feb. 7, 2003). This Court's acknowledgment is consistent with the most recent cases from the Montana Supreme Court and the United States District Court for the District of Montana. In fact, it appears that *Kleinhesselink*, *Chaney* and *Porter* are the only three cases that have failed to address the *Chevron Oil* test as part of a retroactivity analysis. Therefore, the *Chevron Oil* test is still recognized by Montana law. Accordingly, it is necessary to examine *Flynn* pursuant to *Chevron Oil* in order to determine whether *Flynn* applies retroactively.

II. THE *CHEVRON OIL* TEST NECESSITATES A CONCLUSION THAT *FLYNN* APPLIES PROSPECTIVELY ONLY.

In 1998, the Montana Supreme Court reiterated that courts must consider the three factors set forth in *Chevron Oil* in order to determine whether a judicial decision avoids retroactive application:

1. Whether the ruling to be applied retroactively establishes a new principle of law "by overruling precedent or by deciding an issue of first impression whose result was not clearly foreshadowed";

2. Whether retroactive application will further or retard the rule's operation; and

3. Whether retroactive application will result in a substantial

inequity.

Benson, ¶ 24 (quoting *Riley v. Warm Springs State Hosp.* (1987), 229 Mont. 518, 748 P.2d 455, 457). Notably, if any of the three factors are satisfied, then retroactive application of a judicial decision is improper. *See Poppleton v. Rollins, Inc.* (1987), 226 Mont. 267, 271, 735 P.2d 286, 289. As set forth below, *Flynn* avoids retroactive application because all three *Chevron Oil* factors weigh against retroactivity.

A. *Flynn* Should Not Be Applied Retroactively Because the Decision Established a New Principle of Law by Deciding an Issue of First Impression Whose Result Was Not Clearly Foreshadowed.

A judicial decision will avoid retroactive application if it establishes a new principle of law by deciding an issue of first impression whose result was not clearly foreshadowed. *See Benson*, ¶ 24. The result in *Flynn* was not foreshadowed. Prior to *Flynn*, no workers' compensation claimant had ever been awarded attorney fees in connection with his or her SSD litigation. To the contrary, the Montana Supreme Court had denied a claimant's request to apportion the costs arising out of the SSD litigation between the claimant and the workers' compensation insurer. *See Stahl v. Ramsey Constr. Co.* (1991), 248 Mont. 271, 275, 811 P.2d 546, 548. However, according to the Montana Supreme Court, *Stahl* was not directly applicable to *Flynn* because *Stahl* presented a different theory of relief than *Flynn*, who was the first claimant to seek recovery of SSD costs under the common fund doctrine. *See Flynn*, ¶ 14.

Considering the holding of *Stahl* on a very similar issue, the holding in *Flynn* was neither expected nor foreshadowed. Foreshadowing the holding in *Flynn* was further complicated by the fact that the decision was based on equitable principles as opposed to legal principles. As the dissents in *Flynn* noted, the common fund doctrine should have had no application to a situation like Flynn's. *See Flynn*, ¶¶ 27-35. Indeed, this Court denied Flynn's initial request for common fund fees, holding that the common fund doctrine was inapplicable to Flynn's claim. *See Flynn v. State Compen. Ins. Fund*, 2001 MTWCC 24 (dec. May 18, 2001). However, the Montana Supreme Court held that "equity demanded" that all parties receiving a benefit from Flynn's SSD award pay their share of the costs incurred in establishing the award. *Flynn*, ¶ 15. In addressing the retroactivity issue and reiterating the unanticipated and unforeseen holding of *Flynn*, this Court stated:

> THE COURT: Well, I don't think this decision [*Flynn*] was reasonably foreseeable, to be honest with you. There were two descents [sic: dissents] on

it, but it's breaking brand new ground.

Flynn v. State Compen. Ins. Fund, WCC No. 2000-0222, Transc. of Proc. 26:8-11 (Mar. 4, 2003).

Undoubtedly, *Flynn* decided an issue of first impression whose result was not clearly foreshadowed. The State Fund could not locate any authority from other jurisdictions which reached a result similar to *Flynn*, making foreshadowing the *Flynn* decision even more difficult. Therefore, the first factor of the *Chevron Oil* test is satisfied, making retroactive application of *Flynn* improper. Accordingly, this Court should deny Flynn's request to apply the decision back to July 1, 1974.[1]

B. *Flynn* Should Not Be Applied Retroactively Because Retroactive Application Will Not Further the Rule's Operation.

A judicial decision will avoid retroactive application if retroactive application will not further the rule's operation. *See Benson*, ¶ 24. In analyzing retroactivity, it is clear that the first and third factors receive the most scrutiny and the second factor is sometimes overlooked completely. *See Montana Bank of Roundup v. Musselshell County Bd. of Commrs.* (1991), 248 Mont. 199, 810 P.2d 1192. However, in evaluating the second factor, it is appropriate to consider the history, purpose and effect of the rule in question. *See LaRouque*, 583 P.2d at 1061. In addressing the second factor, this Court has stated:

> With respect to factor two, retroactive application of the Broeker decision will further its operation. As noted in the previous paragraph, Broeker involved a garden variety statutory interpretation. The insurer in Broeker and, apparently, in this case, interpreted the statute incorrectly. To deny retroactive application would reward those insurers for their misinterpretation. Indeed, denying retrospective application would allow insurers to postpone the effect of a valid, clear statute simply by misinterpreting it.

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[1] The 50% offset statute for PTD claimants who simultaneously receive SSD benefits is codified at Montana Code Annotated § 39-71-702 and was first effective for all claims occurring on or after July 1, 1974. *See also* Montana Code Annotated § 39-71-701 (applying a 50% offset for TTD claimants who simultaneously receive SSD benefits).

Miller, ¶ 27.

Here, unlike *Miller*, *Flynn* did not involve a "garden variety" statutory interpretation issue that allowed insurers to unjustly reap benefits by misinterpreting a statute. Instead, *Flynn* relied on equitable principles to establish a new rule of law that seems contradictory to the holding in *Stahl* on the same issue but under a different argument. Further, a prospective application will not weaken the policy for pro-rating the costs of obtaining an SSD award among all those who benefit from the SSD benefits because the apportionment will occur for all claims occurring after the implementation date of *Flynn*. Because a prospective application will not weaken the rule in any respect or retard its operation, the second factor of the *Chevron Oil* test is satisfied, making retroactive application of *Flynn* improper.

C. *Flynn* Should Not Be Applied Retroactively Because Retroactive Application Will Result in a Substantial Inequity.

A judicial decision will avoid retroactive application if retroactive application will result in a substantial inequity. *See Benson*, ¶ 24. In one of its retroactivity cases, the United States Supreme Court suggested that in examining the inequitable consequences of a retroactive application, the exclusive focus should be on the persons or entities who would be adversely affected by retroactivity rather than on the persons or entities who would be harmed by non-retroactive application. *See Florida v. Long*, 487 U.S. 223, 108 S. Ct. 2354, 2359, 101 L. Ed. 2d 206 (1988). Because Montana still recognizes the *Chevron Oil* test originally laid down by the United States Supreme Court, language from *Long* provides helpful guidance.

As *Long* instructs, the analysis under this factor should focus on the inequity the State Fund will experience if *Flynn* is applied retroactively; the focus should not be on the inequities that might result to certain claimants if *Flynn* is applied prospectively only. Here, applying *Flynn* retroactively would allow all similarly situated claimants for the past twenty-nine years to reopen portions of their claims. The State Fund would have to identify all of those claimants, locate their files, and then undertake the administrative burden of manually reviewing each file to calculate the pro-rata share that may be owed to each claimant.

Merely locating the older files would pose an enormous administrative burden on the State Fund. As a former method of records retention, the State Fund microfilmed and later microfiched its claim files. *See* Aff. Marvin Kraft ¶¶ 1-3 (May 1, 2003). The use of microfilm was generally discontinued in 1977 and the use of microfiche was discontinued

in 1995.[2] *See* Aff. Kraft ¶ 3. The state's Records Retention division maintains the original microfilm and microfiche. *See* Aff. Kraft ¶ 4. To review these files, the Records Retention division would have to make a copy of the microfilm or microfiche, or print out a paper copy of the file. *See* Aff. Kraft ¶ 4. Although copying the microfilm or microfiche is initially quicker, it would still require State Fund personnel to manually review the microfilm or microfiche, locate the claim, and then individually print each page of the claim file. *See* Aff. Kraft ¶ 4.

Determining what pro-rata share is owed to each claimant imposes additional costs and burdens on the State Fund. For example, it is presumed that some attorneys waived their fees in connection with the Social Security litigation due to the fees the attorney collected in connection with their handling of the claimant's old law claims. If the claimant did not incur any costs in obtaining his or her SSD benefits, then nothing is owed. Thus, the State Fund would have to individually verify that each claimant's attorney took a fee on the claimant's Social Security benefits. Because some claimants had separate lawyers handling their SSD claim and their workers' compensation claim, the State Fund would have to locate the specific attorney who handled the SSD claim to verify the costs and fees associated with the SSD litigation before paying its pro-rata share. *See* Aff. Cris McCoy ¶¶ 1-4 (May 1, 2003).

To complicate matters, the attorneys' fees in SSD cases are based on a percentage of the retroactive benefits that are awarded, and the fees are subject to a cap. *See* Aff. McCoy ¶ 3. However, there is no consistency in the amount of the attorneys' fee award. *See* Aff. McCoy ¶ 3. Therefore, as part of the verification process, the State Fund would have to make a separate inquiry - presumably to the SSA - because the paperwork the State Fund receives from the SSA does not include an explanation of the attorneys' fee award. *See* Aff. McCoy ¶ 3.

As noted above, the State Fund would be subjected to significant administrative costs and burdens if it had to identify, locate and evaluate each claimant's file that may be affected by *Flynn*. These administrative costs are separate and apart from costs the State Fund will incur if it has to pay a pro-rata share of each claimant's SSD litigation. Although the State Fund does not yet have any figures for SSD offsets dating back to 1974, the number of claimants and the amount of resulting fees are both expected to be significant. The cost of paying the common fund attorneys' fees would be passed on to current insureds in the form

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[2] Records since 1995 are retained in a digital format. *See* Aff. Root ¶ 3.

of increased premium. *See* Aff. Richard Root ¶¶ 1-4 (May 1, 2003). The former insureds would not pay the additional costs associated with reducing their claim liability, even though their employees would be the ones benefitting from the retroactive application. Accordingly, the inequities associated with a retroactive application of *Flynn* are substantial enough to meet the requirements of the third factor of the *Chevron Oil* test. Therefore, *Flynn* should apply prospectively only.

CONCLUSION

Although the federal courts have abandoned the *Chevron Oil* test in favor of a blanket rule of retroactivity, many states – including Montana – continue to analyze retroactivity pursuant to the three factors set forth in *Chevron Oil*.

In order for a judicial decision to operate prospectively only, one of the three factors of the *Chevron Oil* test must be met. Here, all three factors are met. The first factor is satisfied because *Flynn* established a new principle of law whose decision was not clearly foreshadowed. The second factor is satisfied because a prospective application will not weaken the pro-rata rule of *Flynn*, nor will it retard the rule's operation. The third factor is satisfied because the State Fund will experience a substantial inequity in terms of administrative costs and burdens if *Flynn* is applied retroactively. Therefore, retroactive application of *Flynn* is improper. Accordingly, this Court should deny Flynn's attempt to retroactively assert his lien on all claims occurring on or after July 1, 1974.

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DATED this 1 day of May, 2003.

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CERTIFICATE OF MAILING

The undersigned, a representative of the law firm of GARLINGTON, LOHN & ROBINSON, PLLP, hereby certifies that on the 2nd day of May, 2003, she mailed a true and correct copy of the foregoing *State Fund's Answer Brief Regarding Retroactivity*, postage prepaid, to the following:

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