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OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

THE WORKERS' COMPENSATION COURT IN THE STATE OF MONTANA

CARL MILLER, individually and on
behalf of others similarly situated,

Petitioner,

v.

MONTANA STATE FUND,

Respondent/Insurer.

WCC No. 2003-0771

**STATE FUND'S REPLY BRIEF
IN SUPPORT OF MOTION
FOR STAY**

COMES NOW the Respondent/Insurer, Montana State Fund ("State Fund"), through counsel, and hereby files its Reply Brief in Support of Motion for Stay. For the reasons stated herein and in its initial Motion for Stay, the State Fund respectfully requests that this Court grant its motion by holding the present matter in abeyance pending resolution of the common fund and retroactivity issues which are currently before the Court in *Flynn v. State Compen. Ins. Fund*, 2001 MTWCC 24 (on remand from *Flynn v. State Compen. Ins. Fund*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397).

INTRODUCTION

On December 5, 2002, the Montana Supreme Court issued its opinion in *Flynn* and held that Mr. Flynn was entitled to have the State Fund pay a pro-rata share of his social security disability (“SSD”) litigation expenses. *See Flynn*, ¶ 18. The Montana Supreme Court remanded the case for further proceedings consistent with its holding, and Mr. Flynn is now attempting to recover common fund fees based on a retroactive application of the decision. *See Flynn*, ¶ 26; *Flynn v. State Compen. Ins. Fund*, 2001 MTWCC 24; State. of Scope of Atty.’s Lien 2 (Mar. 18, 2003).

On March 24, 2003, the Petitioner, Carl Miller (“Miller”), filed a Petition asserting claims which are “on all fours” with Mr. Flynn’s claims, except that Miller has specifically included a claim for common fund fees on behalf of himself and all others similarly situated. *See Pet. For Hrg.* ¶¶ 9, 19.¹ On April 15, 2003, the State Fund filed a Motion for Stay and requested that Miller’s Petition be held in abeyance until the issues concerning common fund fees and retroactivity are judicially determined in *Flynn*. *See Mot. for Stay 1-2* (Apr. 15, 2003). Miller has opposed the motion, questioning whether the Court has the authority to stay proceedings or hold matters in abeyance, and claiming that a stay is an improper attempt by the State Fund to delay making payment. *See Pet.’s Br. Opposition Mot. for Stay 1-2* (April 28, 2003). As explained below, this Court has the authority to stay proceedings and hold matters in abeyance, and the State Fund asserts that this is a proper case for the Court to exercise such authority.

DISCUSSION

I. THIS COURT HAS THE AUTHORITY TO GRANT A STAY AND HOLD MATTERS IN ABEYANCE.

Contrary to Miller’s contention, this Court has the authority to grant stays and hold matters in abeyance. Although no rule expressly sets forth the Court’s authority to grant pre-judgment stays, case law recognizes the Court’s broad discretion and authority over these procedural matters. For example, in a case involving the concurrent filing of

¹According to his Petition for Hearing, Miller was injured in 1985 and the State Fund accepted his claim and conceded that he was permanently and totally disabled as a result of his injury. Miller then successfully litigated his entitlement to SSD benefits. The State Fund properly offset those benefits from Miller’s PTD entitlement. Pursuant to the Montana Supreme Court’s holding in *Flynn*, Miller asserts he is entitled to have the State Fund pay a pro-rata share of his SSD litigation expenses. *See Pet. For Hrg.* ¶¶ 1-9.

criminal fraud charges against a workers' compensation claimant, this Court concluded:

The 1995 legislature enacted a specific provision authorizing the Workers' Compensation Court to grant a stay of proceedings if a criminal action alleging fraud has been commenced against a claimant. That provision, adopted as section 1 of Senate Bill 375, was not effective until July 1, 1995. SB 375, Section 29. Claimant argues that it cannot be applied in this case since his petition was filed prior to the effective date of the statute.

The Workers' Compensation Court need not look to the 1995 legislation for authority to stay or continue a case. It has inherent authority to set the time of trial, and to set a different date than that originally fixed.

Schilling v. State Compen. Ins. Fund, WCC 9503-7262, Order Granting Motion to Stay (July 26, 1995) (emphasis added).

The procedural rules of this Court are consistent with the *Schilling* holding. See, e.g. Admin. R. Mont. 24.5.310 (generally discussing the Court's power to set the times and places of trials); Admin. R. Mont. 24.5.312 (explaining that if it is in the best interests of the Court, then the Court can set trial for any time and at any place). Likewise, the Court has broad discretion to hold matters in abeyance. See, e.g. *Romero v. State Comp. Mut. Ins. Fund*, WCC No. 9208-6561, Order Placing Matter in Abeyance (Mar. 9, 1993); *Mercanet v. St. John's Nursing Home*, WCC 8607-3710, Findings of Fact, Conclusions of Law and Judgment (November 1987) (noting that the Court had previously granted the petitioner's request to hold the petition in abeyance until a decision as to the original petition was resolved). Further, Montana's statutes confer broad authority on this Court to provide for the orderly conduct of proceedings and to make decisions concerning any matters affecting the benefits payable under the Workers' Compensation Act or the Occupational Disease Act. See Mont. Code Ann. §§ 39-71-2901-2905.

The State Fund notes that this Court has recently exercised its broad authority to grant a stay. See *Flynn v. Montana State Fund*, 2001 MTWCC 24, Order Staying Retroactive Application of Decision (May 5, 2003). Therefore, *Flynn* and the legal precedent cited above establish that this Court has the ability to grant the State Fund's motion and hold this matter in abeyance pending resolution of the issues in *Flynn*.

A. In the Interests of Judicial Economy and to Avoid Unnecessary Litigation, this Court Should Grant the State Fund's Motion for Stay.

As noted, Miller claims the State Fund's motion is merely an attempt to delay reimbursing Miller for a proportionate share of his SSD litigation expenses. However, Miller's Petition is duplicative of the *Flynn* litigation and is unnecessary because the holdings from *Flynn* will resolve all issues set forth in Miller's Petition. By filing a Petition on behalf of Miller, Miller's attorney – who also represents Flynn – is attempting to circumvent the obvious deficiencies in his *Flynn* pleadings regarding his potential entitlement to common fund fees. However, the deficiencies cannot be cured by filing a subsequent Petition, especially since *Flynn* serves as the precedent for the potential entitlement to common fund fees for the pro-rata payment of SSD litigation expenses. Miller cannot re-create the common fund, and if *Flynn* applies prospectively only, Miller has no cognizable claim. Therefore, to avoid unnecessary and duplicative litigation and for purposes of judicial economy and efficiency, the State Fund requests this Court to grant its Motion for Stay.

CONCLUSION

This Court has broad authority to issue stays and hold matters in abeyance. Holding the present litigation in abeyance pending resolution of *Flynn* avoids unnecessary litigation and conserves judicial resources. Therefore, the State Fund respectfully requests that this Court grant its motion and hold this matter in abeyance pending a resolution of *Flynn*.

RESPECTFULLY SUBMITTED this 23 day of May, 2003.

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CERTIFICATE OF MAILING

I, the undersigned, a representative of the law firm of GARLINGTON, LOHN & ROBINSON, PLLP, hereby certify that on the 23 day of May, 2003, I mailed a true and correct copy of the foregoing STATE FUND'S REPLY BRIEF IN SUPPORT OF MOTION FOR STAY, postage prepaid, to the following:

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