

4. After filing his claim for Workers' compensation benefits, Petitioner submitted a claim for Social Security disability benefits which the Social Security Administration denied. Petitioner retained counsel and appealed this denial to an Administrative Law Judge, who, after complete trial, also denied the claim. Petitioner appealed the decision of the Administrative Law Judge to the Appeals Council which reversed the Administrative Law Judge and ordered a new trial. In 1989, after the second trial, the second Administrative Law Judge awarded Petitioner the total disability benefits which he had originally applied to receive.
5. The Regional Chief Administrative Law Judge authorized, and Petitioner paid, \$5,248.50 for his representation in connection with receiving his Social Security award, which sum is based upon the award of past due and not future Social Security benefits.
6. Petitioner's Social Security award enabled Respondent to reduce Petitioner's weekly total disability wage loss benefits. Consequently, as a result of Petitioner's litigation efforts with the Social Security Administration, funds were recovered which accrued to the substantial benefit of Respondent. More specifically, as a direct result of Petitioner's Social Security award, Respondent reduced payments to Petitioner in excess of \$17,000.00 by December 31, 1989, and in excess of an additional \$50,000.00 since December 1989.
7. While Respondent reaped the benefit of Petitioner's efforts, it was not required to intervene, risk expense, or hire an attorney throughout Petitioner's litigation proceedings with the Social Security Administration.
8. Petitioner's Social Security disability award constitutes an existing, identifiable monetary fund or benefit in which Respondent maintains an interest as a non-participating beneficiary.
9. Pursuant to the common fund doctrine, as enunciated in the line of cases including *Means* (1981), *Murer* (1997), *Hall* (2001) and *Flynn* (2002), Respondent is required to contribute, in proportion to the benefits it actually received, to the costs of the litigation, including reasonable attorney fees.

10. Respondent has received and continues to receive 50% of Petitioner's Social Security award and pursuant to the common fund doctrine must pay 50% of Petitioner's cost, including attorney fees, to obtain the Social Security award. The amount of the contribution required of Respondent was a fixed and identifiable sum at the time the Social Security Administration authorized the fee award for the Petitioner's representative.
11. A dispute exists between the parties. Petitioner contends that Respondent is required to contribute in proportion to the benefits it actually received, to the cost he incurred, including reasonable attorney fees, to obtain his Social Security award. Through counsel in open court, Respondent has stated that it does not intend to honor the *Flynn* decision as regards workers' compensation claimants who obtained an order awarding Social Security benefits prior to the date of the *Flynn* decision on December 5, 2002. Respondent's claims adjuster has also declined Petitioner's request to contribute to the costs he incurred to obtain his Social Security award.
12. Pursuant to ARM 24.5.317, Petitioner has exchanged all available medical records relating to the injury with the Respondent and will continue to do so.
13. The parties have complied with any mediation procedure required in the Workers' Compensation Act. Mediation is not required for this date of injury.
14. The following is a list of individuals who are potential witnesses for Petitioner in this matter.

<u>NAME AND ADDRESS</u>	<u>GENERAL SUBJECT MATTER OF TESTIMONY</u>
Petitioner	Costs incurred to recover his Social Security award.
Respondent's claims personnel	Petitioner's Social Security offset and Respondent's policies and procedures.
Social Security	Social Security awards and fee authorization.

Administration personnel

15. The following is a list of written documents relating to this case which may be introduced as evidence by Petitioner:
 - a. Records regarding Petitioner's social security award and associated costs of recovery as well as records of the offset taken by Respondent.
 - b. Respondent's claim file as well as any documentation concerning Respondent's policies and procedures concerning Social Security offsets.
16. Prior to the *Flynn* decision, Respondent had a policy of reducing workers' compensation benefits by taking an offset for a Social Security award without contributing to the costs of litigation incurred by a claimant to obtain the Social Security award.
17. Notwithstanding the *Flynn* decision, Respondent remains steadfast in its refusal to contribute to the costs of litigation incurred by any claimant who obtained an order awarding Social Security benefits prior to the *Flynn* decision on December 5, 2002.
18. Respondent's failure and refusal to contribute anything to the costs of litigation incurred by any claimant who obtained an order awarding Social Security Benefits prior to the *Flynn* decision on December 5, 2002, is in direct contravention to the specific holding of *Flynn* and is manifestly unreasonably.
19. Petitioner brings this action on behalf of himself and on behalf of all others similarly situated for whom Respondent has failed or refused to contribute, in proportion to the benefits it has or will receive, to the cost incurred, including reasonable attorney fees, to obtain a Social Security award.
20. Class members are described generally in this Petition and will be described further in an anticipated Motion for Class Certification and Brief

in Support.

21. Respondent has failed and refused to uniformly apply the holding of *Flynn*; and, in fact, has a conflict with Petitioner and all those similarly situated.
22. The frequency and persistence of the behavior complained of in this petition is so widespread that joinder of all members of the aggrieved class is impracticable. The actual number of class members is in the sole possession of Respondent.
23. Questions of law and fact which are presented by this action are common to all members of the class or of each sub-class which will be described further in an anticipated Motion for Class Certification and Brief in Support.
24. Petitioner's claims herein are typical of the claims of the class as follows: 1) the entitlement to have Respondent contribute, in proportion to the benefits it has or will receive, to the cost incurred, including reasonable attorney fees, to obtain a Social Security award; and 2) the right to a declaration that Respondent's failure to so contribute, in direct contravention to the holding in *Flynn* is unreasonable, and thereby triggers the statutory entitlement as it exists from time to time for unreasonable refusal to pay benefits required by law.
25. Petitioner has retained counsel experienced in workers' compensation law to represent him and the class members, and will fairly and adequately protect the interests of the class.
26. Respondent has acted or failed to act on grounds generally applicable to every class member thereby making appropriate an adjudication and award with respect to the class as a whole. In addition, class members seek injunctive and declaratory relief, which would affect all class members rights.
27. The questions of law and fact common to the class members predominate over any questions affecting only individual members and a

class action is superior to any other available method for fair and efficient adjudication of the controversy.

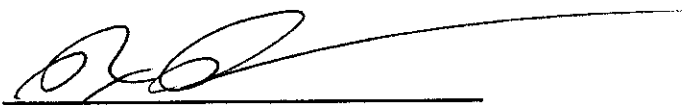
28. The State of Montana, through its Department of Labor and through its Insurance Commissioner, has declined or failed to enforce the law of Montana which required that Respondent contribute, in proportion to the benefits it has or will receive, to the cost incurred, including reasonable attorney fees, to obtain a Social Security award.
29. Petitioner and class members are entitled to injunctive relief enjoining Respondent from reducing the payment of workers' compensation benefits by taking a Social Security offset without adjusting the offset by contributing, in proportion to the benefit it has or will receive, to the cost incurred, including reasonable attorney fees, to obtain a Social Security award.

WHEREFORE, Petitioner respectfully prays that this Petition be set for hearing and that the following relief be granted:

1. An order enjoining Respondent from reducing the payment of workers' compensation benefits by taking a Social Security offset without adjusting the offset by contributing, in proportion to the benefit it has or will receive, to the cost incurred, including reasonable attorney fees, to obtain a Social Security award;
2. A declaration that following the *Flynn* decision, Respondent's continued failure and refusal to contribute anything to the costs of litigation incurred by any claimant who obtained a Social Security award which benefitted Respondent by triggering a reduction in workers' compensation benefits is unreasonable;
3. An order establishing a common fund and/or class which includes all claimants who have incurred cost to obtain a Social Security award and for whom Respondent has taken a Social Security offset without contributing in proportion to the benefits it has or will receive, to the cost incurred, including reasonable attorney fees, to obtain the Social Security award;

4. An order awarding Petitioner and all others similarly situated the difference between the Social Security offset which Respondent took and what it is entitled to take with proper consideration to the cost of recovering the Social Security award;
5. An order assessing attorneys fees and costs for Petitioner and all others similarly situated who are entitled to recover attorneys fees and costs herein; and
6. An order assessing a penalty against Respondent in favor of Petitioner and all others similarly situated.

Dated this 24th day of March 2003.



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