

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2010 MTWCC 20

WCC No. 2000-0222

ROBERT FLYNN and CARL MILLER, Individually and on
Behalf of Others Similarly Situated

Petitioners

vs.

MONTANA STATE FUND

Respondent/Insurer

and

LIBERTY NORTHWEST INSURANCE CORPORATION

Intervenor.

APPEALED TO MONTANA SUPREME COURT – 07/29/10
CROSS-APPEALED TO MONTANA SUPREME COURT – 08/25/10
(by Montana State Fund)

***Affirmed* 2011 MT 300**

ORDER RE: PAID IN FULL

Summary: The Court requested briefing on the definition of “paid in full” as used in the definition of a settled workers’ compensation claim for purposes of determining the retroactive application of workers’ compensation judicial decisions.

Held: For purposes of determining the retroactive application of a judicial decision in the workers’ compensation field, a claim that has been “paid in full” is defined as a claim in which all benefits to which a claimant is entitled are paid prior to the issuance of a judicial decision. If any benefits are paid on the claim after the issuance of the judicial decision, the claim is no longer considered “paid in full” and is subject to retroactive application of the decision.

Topics:

Statutes and Statutory Interpretation: Retroactivity. For purposes of determining the retroactive application of a workers' compensation judicial decision, a claim that has been "paid in full" is one in which all benefits to which a claimant is entitled pursuant to the applicable statutes are paid prior to the issuance of a judicial decision. A claim is no longer "paid in full" if any benefits are paid after the issuance of a judicial decision and is subject to retroactive application of the decision.

Claims: Paid in Full. For purposes of determining the retroactive application of a workers' compensation judicial decision, a claim that has been "paid in full" is one in which all benefits to which a claimant is entitled pursuant to the applicable statutes are paid prior to the issuance of a judicial decision. A claim is no longer "paid in full" if any benefits are paid after the issuance of a judicial decision.

Common Fund Litigation: Paid in Full. For purposes of determining the retroactive application of a workers' compensation judicial decision, a claim that has been "paid in full" is one in which all benefits to which a claimant is entitled pursuant to the applicable statutes are paid prior to the issuance of a judicial decision. A claim is no longer "paid in full" if any benefits are paid after the issuance of a judicial decision.

FACTUAL AND PROCEDURAL BACKGROUND

¶1 On April 22, 2009, this Court requested briefing on the definition of "paid in full."¹ This issue arose as a result of a succession of cases setting forth the Montana Supreme Court's opinion of retroactive application of workers' compensation judicial decisions.

¹ Minute Book Hearing No. 4054 at 2, April 22, 2009, Docket Item No. 586.

¶2 In *Flynn v. State Comp. Ins. Fund (Flynn I)*² the Supreme Court held that after a claimant successfully recovers social security disability benefits, thereby allowing Montana State Fund (State Fund) or other workers' compensation insurers to offset benefits paid to the claimant, the insurer, pursuant to the common fund doctrine, must bear a proportionate share of the costs and attorney fees incurred by the claimant in pursuing social security benefits. *Flynn I* was remanded to this Court, which held that *Flynn I* applied retroactively.³

¶3 After *Flynn I* was decided, the Supreme Court decided *Schmill v. Liberty Northwest Ins. Corp. (Schmill II)*.⁴ In *Schmill II*, the Supreme Court determined that the holding in *Schmill v. Liberty Northwest Ins. Corp. (Schmill I)*⁵ applied retroactively. Relying on *Dempsey v. Allstate Ins. Co.*,⁶ the Supreme Court recognized that retroactivity does not mean that prior contrary rulings and settlements are void *ab initio*. It held that the policy of finality dictates that the retroactive effect of a decision does not apply to cases that became final or were settled prior to a decision's issuance. The Supreme Court recognized, however, that within the context of workers' compensation law, it could not determine which claims should be considered "final or settled." The Supreme Court left the initial determination of what constitutes a "final or settled" claim to this Court.⁷

¶4 In *Flynn v. Montana State Fund (Flynn II)*,⁸ the Supreme Court upheld this Court's conclusion that retroactivity of workers' compensation claims is dependent on whether a claim is "final" or "settled."⁹ It also clarified that the definition of a "settled claim" is "a department-approved or court-ordered compromise of benefits between a claimant and an insurer or a claim that was paid in full."¹⁰ What remains to be determined by this Court is the definition of "paid in full" within the workers' compensation arena. This Order resolves that issue.

² *Flynn I*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397.

³ *Flynn v. State Comp. Ins. Fund*, 2003 MTWCC 55.

⁴ *Schmill II*, 2005 MT 144, 327 Mont. 293, 114 P.3d 204.

⁵ *Schmill I*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290.

⁶ *Dempsey*, 2004 MT 391, 325 Mont. 207, 104 P.3d 483.

⁷ *Schmill II*, ¶ 19.

⁸ *Flynn II*, 2008 MT 394, 347 Mont. 146, 197 P.3d 1007.

⁹ *Flynn II*, ¶ 19-21.

¹⁰ *Flynn II*, ¶ 26.

DISCUSSION

¶5 The arguments and positions of the parties who briefed this issue are as follows:

Flynn's Position

¶6 Petitioners Robert Flynn and Carl Miller, individually and on behalf of others similarly situated (Flynn), argue that “paid in full” should be defined as follows: “Any insurer which completely discharged its obligation to pay its fair share of the costs and fees incurred to obtain a social security award has ‘paid in full’ its required contribution to the common fund. If an insurer has not completely discharged this obligation then the insurer has not ‘paid in full’ the particular claim.”¹¹ Put another way, Flynn argues that no claim that may be subject to retroactive application of *Flynn I*, can be considered “paid in full” until the amounts due pursuant to *Flynn I* have been paid.

¶7 Flynn’s circular reasoning fails to recognize the Supreme Court’s admonition in *Dempsey*, reiterated in *Schmill II*, that retroactivity does not mean that prior contrary rulings and settlements are void *ab initio*. If the Court were to apply Flynn’s definition of “paid in full,” a claim that had been paid under the existing law years before the issuance of *Flynn I* would be subject to payment of *Flynn I* benefits for no other reason than because the ruling or settlement that resolved that claim was contrary to the *Flynn I* decision. This would be in direct contravention of the Supreme Court’s directive that retroactivity does **not** mean that prior contrary rulings and settlements are void *ab initio*.

Schmill's Position

¶8 Participating in an amicus capacity, Cassandra Schmill (Schmill) argues that any settled claim that is not a department-approved or court-ordered compromise of benefits continues to expose the insurer to liability for benefits and therefore cannot be considered “paid in full.” Schmill contends that no *Flynn* claims have been “paid in full” until and unless all eligible compensation benefits have been paid. Schmill submits this would include “all possible impairment benefits (100%), all medical benefits, all TTD/PPD/PTD benefits both as to duration and rate, all widows/beneficiaries benefits, [and] all rehabilitation benefits”¹² Schmill offers as an example a claimant whose condition may change and thereby become eligible for further benefits pursuant to § 39-71-739, MCA.¹³

¹¹ Petitioners’ Opening Brief Re: “Paid in Full” at 2, Docket Item No. 592.

¹² Opening Brief of Cassandra Schmill Re “Paid in Full” at 3-4, Docket Item No. 588.

¹³ *Id.* at 2-3.

¶9 Schmill is correct that settled claims which are not either department-approved or court-ordered compromises of benefits may continue to expose the insurer to additional liability for benefits. However, the mere existence of **potential** benefits does not mean that a claim cannot be considered “paid in full.” Using Schmill’s example, a claimant may have received all of the benefits to which he was entitled before the issuance of *Flynn I*, and his claim would be considered “paid in full.” If that claimant’s condition does not change, and he never receives additional benefits, his claim would remain “paid in full.” On the other hand, if that claimant’s condition changes, and he receives further benefits pursuant to § 39-71-739, MCA, after the issuance of *Flynn I*, the claim would no longer be “paid in full,” and the claim would be subject to retroactive application of *Flynn I*.¹⁴ It is the **actual** payment of benefits, as opposed to the **potential** payment of benefits, that renders a claim no longer “paid in full,” and subject to retroactive application of *Flynn I*.

State Fund’s Position

¶10 Respondent State Fund argues that the definition of “paid in full” can only mean “paid in full according to the claimant’s entitlement under the statutes in effect at the time of payment, prior to any judicial decision changing benefits.”¹⁵ State Fund argues that a retroactive decision should not apply to those claims that can be said to be entirely closed on the day the judicial decision is issued.¹⁶

¶11 State Fund is correct that a judicial decision does not apply retroactively to those claims that are closed prior to the decision’s issuance. However, if a claimant receives benefits of any kind after the judicial decision is issued, then the claim cannot have been **entirely** closed prior to the decision’s issuance. Returning to Schmill’s example, a claim may have been paid in full prior to *Flynn I*, in which case *Flynn I* would not apply retroactively to that claim. However, if the claimant becomes entitled to additional benefits because of a changed condition after *Flynn I*, then the claim was not “paid in full” before *Flynn I*’s issuance. Therefore, the claim would be subject to retroactive application of *Flynn I*.

¹⁴ The entitlement to benefits pursuant to § 39-71-739, MCA, is only one example used for illustration purposes. There are obviously a number of other scenarios in which a claim may have been paid in full prior to the issuance of *Flynn I* and might yet become subject to the retroactive application of *Flynn I* because of an entitlement to benefits after the issuance of *Flynn I*.

¹⁵ State Fund’s Opening Brief Re: Definition of “Paid in Full” at 4, Docket Item No. 591.

¹⁶ *Id.* at 6.

Liberty's Position

¶12 Intervenor Liberty Northwest Insurance Corporation (Liberty) argues that “paid in full” means payment of benefits measured by statutory entitlement to the benefits as the entitlement existed under the statutes in effect on a claimant’s date of injury or occupational disease. Liberty offers the following example to illustrate its position:

[I]f a TTD claimant with a date of injury of 7/1/1991 was paid all the TTD he was owed pre-MMI less a SSDI offset, then under the statute in effect on his date of injury, § 39-71-701, MCA (1991), he was paid in full. § 39-71-116(23), MCA (1991). The statute tells us the **type** of benefit owed (TTD pre-MMI) and is the standard to measure **how much** of the benefit must be paid to satisfy the statutory entitlement. In the context of workers’ compensation law, in which the court instructed this analysis had to be made, the statutes in effect on the date of injury set the contractual rights of the parties – i.e., how much is owed and when it is paid in full.¹⁷

¶13 Liberty’s example is correct to a certain extent. However, Liberty appears to contend that whether a claim is “paid in full” is determined by whether the specific benefit that may be impacted by the retroactive application of a court decision has been paid in full prior to the decision’s issuance. Liberty’s focus on one type of benefit in determining “paid in full” is too narrow. In *Flynn II*, the Montana Supreme Court held that a settled claim was defined pursuant to § 39-71-107(7)(a), MCA, as, “a department-approved or court-ordered compromise of benefits between a claimant and an insurer or a **claim** that was paid in full.”¹⁸ A workers’ compensation claim may, and often does, encompass more than one type of benefit. As discussed above at ¶ 11, if a claimant receives benefits **of any kind** after a new decision is issued, then by definition **the claim** cannot be considered “paid in full” before the decision was issued.

Common Fund Insurers’ Position

¶14 Common Fund Insurers contend that a claim is “paid in full” if benefit payments terminated without dispute prior to the issuance of *Flynn I*.¹⁹ Common Fund Insurers contend:

¹⁷ Opening Brief of Liberty Northwest Insurance Corp. (Intervenor) Re: Paid In Full at 5 (emphasis in original), Docket Item No. 590.

¹⁸ *Flynn II*, ¶ 26 (emphasis added; internal quotation marks omitted).

¹⁹ Common Fund Insurers’ Opening Brief on Claims “Paid in Full” at 1, Docket Item No. 589.

While a relapse into disability or other changed factual circumstances may give rise to a future claim for additional benefits, such hypothetical contingencies provide no reason to jettison the policy of finality consistently recognized by our Supreme Court in common fund cases, or to ignore the legislative and judicial definition of “settled claim” as one “paid in full.” Hypothetical contingencies do not mean that claims were actionable “prior to the issuance” of *Flynn I* – the critical temporal juncture for purposes of the retroactivity analysis. And hypothetical changed circumstances should not be used as a justification to order all insurers in the State to conduct a comprehensive file review of every Montana workers['] compensation claim file in order to identify and retroactively adjust claims that were settled by payment in full years or even decades earlier.²⁰

¶15 Common Fund Insurers argue, “If all benefits were paid under the law as it existed prior to *Flynn I* – as evidenced by the undisputed termination of benefit payments – then the claim was settled and is not subject to retroactive adjustment.”²¹ Common Fund Insurers concede that the following claims are considered open and subject to retroactivity:

- (a) Claims where the claimant was still receiving benefits at the time *Flynn I* was decided;
- (b) Claims where the parties were still negotiating the amount of indemnity benefits to be paid;
- (c) Claims where settlement negotiations had broken down and the claim was subject to litigation or an appeal at the time *Flynn I* was decided.²²

¶16 Common Fund Insurers’ argument is correct insofar as it goes. However, Common Fund Insurers do not recognize a fourth group of claims which are subject to retroactive adjustment: this group includes claimants whose benefits may have terminated prior to the issuance of *Flynn I*, but received further benefits on their claim after the issuance of *Flynn I*. Those claims cannot be considered “paid in full” at the time *Flynn I* was issued and are therefore subject to retroactive application of *Flynn I*.

²⁰ *Id.* at 4.

²¹ *Id.*

²² *Id.* at 5.

Conclusion and Order

¶17 For purposes of determining the retroactive application of a judicial decision in the workers' compensation field, a claim that has been "paid in full," is defined as follows:

A claim in which all benefits to which a claimant is entitled pursuant to the statutes applicable to that claim, are paid prior to the issuance of a judicial decision. If any benefits are paid on the claim after the issuance of a judicial decision, the claim can no longer be considered "paid in full" and is subject to retroactive application of the judicial decision.

IT IS SO ORDERED.

DATED in Helena, Montana, this 1st day of July, 2010.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Parties of Record Via Website
Submitted: August 24, 2009