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FILED

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OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF
MONTANA**

WCC No. 2005-0222

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

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer

And

LIBERTY NORTHWEST INSURANCE CORPORATION

Intervenor.

**LIBERTY NORTHWEST'S OPENING BRIEF REGARDING
RETROACTIVE APPLICATION**

Initially, two Montana Supreme Court decisions control the Court's analysis of the scope of the common fund claim in this and other cases. They are Dempsey v. Allstate Insurance Company, 2004 MT 391 and Schmill v. Liberty Northwest, 2005 MT 144. The salient holdings of those cases are set forth below.

DOCKET ITEM NO. 444

In the interests of finality, the line should be drawn between claims that are final and those that are not (the line drawn in Harper). “New legal principles, even when applied retroactively, do not apply to cases already closed.” Reynoldsville Casket Co. v. Hyde (1995), 514 U.S. 749, 758, 115 S.Ct 1745, 1751, 131 L.Ed.2d 820, 830.

Dempsey at ¶28 (in part).

We also understand, however, that what follows from civil litigation is different in kind from the consequences inherent in a criminal prosecution and conviction. On many occasions we have noted the disruption that a new rule of law can bring to existing contracts and to other legal relationships. Therefore today we reaffirm our general rule that “[w]e give retroactive effect to judicial decisions,” Kleinhesselink v. Chevron, U.S.A. (1996), 277 Mont. 158, 162, 920 P.2d 108, 111. We will, however, allow for an exception to that rule when faced with a truly compelling case for applying a new rule of law prospectively only.

Id. at ¶29.

Therefore, we conclude that, in keeping with our prior case, all civil decisions of this court apply retroactively to cases pending on direct review or not yet final, unless all three of the Chevron factors are satisfied. For reasons of finality we also conclude that the retroactive effect of a decision does not apply *ab initio*, that is, it does not apply to cases that became final or were settled prior to a decision’s issuance.

Id. at ¶31.

For the foregoing reasons we conclude that Hardy applies retroactively to require payment of stacked uninsured, underinsured motorist and medical payment insurance coverages in qualifying circumstances on open claims arising before its issuance. However, in the interests of finality, as discussed above, we limit this retroactivity to cases pending on direct review or not yet final.

Id. At ¶37.

Liberty and the State Fund, in briefing, devoted a considerable time to addressing the third Chevron factor. That factor requires us to weigh “the inequity imposed by retroactive application...” Dempsey, ¶21 (quoted Chevron, 404 U.S. at 107, 92 S.Ct. at 355, 30 L.Ed.2d at 306). Although, in this case, this weighing does not affect the issue of retroactivity (because of our conclusion regarding the second factor), we comment on the State Fund’s treatment of the third factor because it appears that the State Fund, as well as Liberty and Schmill, may not have grasped the full impact of Dempsey. Although Dempsey emphasized a presumption of retroactivity, it also stated that retroactive application does not mean that prior contrary rulings and settlements are void *ab initio*. Dempsey, ¶31. Rather, due to reasons of finality, “[T]he retroactive effect of a decision ... does not apply to cases that became

final or were settled prior to a decision's issuance." Thus, if an occupational disease claim was settled or became final prior to our ruling in Scmill I then Scmill I does not affect whatever apportionment might have been deducted from the claim's award.

Scmill at ¶17.

As the State Fund admits, many of these claims are settled, closed, or inactive. From the record before us, it cannot be determined how many of the 3,543 claims would, in the context of workers' compensation law, be considered "final or settled" under our holding in Scmill I. We leave that initial determination to the WCC.

Id at ¶19.

Cases that are pending on direct review, not yet final, closed, settled or inactive do not exist in a vacuum. For example, the rules of criminal procedure differ from those in civil procedure and what is pending, final, closed, settled or inactive under criminal law may differ from civil law. Similarly, what is pending, final, closed, settled or inactive under the Montana Workers' Compensation Act may, and in fact does, differ from tort law.

Also the entitlement to workers' compensation benefits is contractual in nature and is established by the contract of hire. Carmichael v. Workers' Compensation Court, 234 Mont. 410, 763 P.2d 112 (1988). The benefits a claimant may be entitled to are determined by the Act in effect on the date of an injury/occupational disease. Hardgrove v. Transportation Insurance Company, 2004 MT 340.

What is pending, final, closed, settled or inactive is revealed by the insurer's actions on a claim under the Act's procedural options or requirements and the claimant's response, or lack of response, to that action on a claim-by-claim basis. The procedural options and requirements when combined with the insurer's actions and the claimant's response or lack of response have a finite number of possibilities confined within several distinct and reoccurring linear progressions, each of which becomes pending, final, closed, settled or inactive at identifiable points, again, revealed by the insurer's action and the claimant's response or lack of response. Without understanding the claims process, the Court cannot identify those cases which are pending, final, settled, or inactive and not subject to the common fund.

Pending or Final

For attorneys pending on direct review obviously means a case is in litigation, including the appeal process. When the appeal time has run or the appeal is completed, the case is no longer pending on direct review and is final. Kleinhesslink v. Chevron USA, 277 Mont. 158, 162, 920 P.2d 108 (1966).

The term final also would necessarily include the running of an applicable statute of limitations. Id; also see Preston, *infra*, at ¶37 (2-year statute of limitation in MCA 27-2-102 that would have barred claimant's petition tolled during mediation).

Workers' Compensation Claims Adjustment

There are identifiable points of pending, final, closed, settled or inactive cases in the context of denied liability, payment under §608 with a later denial and accepted liability claims. The major decisions that can be involved in the adjustment of a claim are as follow:

- Initial Liability Denied
 - Burden of Proof
 - Thirty-day notice (injury only)
 - One-year claim filing
 - Employee
 - Covered employment
 - Excluded Claims
 - Mental cause – mental effect
 - Mental cause – physical effect
 - Volunteer
 - Recreational activity exception to employment
 - Course and scope of employment
 - Causation
 - Traveling
 - Alcohol or drug usage
- §608 Payment under reservation of rights with later denial
- Initial Liability Accepted
 - Occupational disease or injury
 - AWW calculation
 - TTD rate
 - Payment or non-payment medical testing, evaluation and/or treatment
 - Primary\secondary medical services
- Maximum Medical Improvement
 - Physical restrictions
 - Impairment rating
 - Employability
 - Actual wage loss
 - PPD, PTD, rehabilitation benefit liability
 - Post-MMI medical treatment
 - Continued MMI
 - Palliative\maintenance care
- Rehabilitation Benefits
 - Disabled worker
 - Impairment rating

- Rehabilitation plan with reasonable vocational goals, reasonable re-employment opportunity and/or reasonable increase in worker's wages
- Length of plan
- Auxiliary benefits
- Settlement
 - Amount
 - Special provisions
 - Reopening

Common Defenses – Initial Denial of Liability

Common to all claims is the one-year claim filing requirement (defenses) and for **injury** claims the thirty-day notice requirement. MCA 39-407(8), 601, 603.

Also common to all claims are the requirements (defenses) of MCA 39-71-407(1)-(7) (13) (course and scope of employment, burden of proof, alcohol and drug and usage). The definitions of employee, injury and employments covered also provide defenses common to all claims. MCA 39-71-118, 119, 401.

If an insurer denies liability based on any of these defenses, then an **injury claimant** has two years within which to file a petition with the Court to contest the denial, excluding the time spent in mediation. MCA 39-71-2905(2); Preston v. Transportation Insurance, 2004 MT 339. For an occupational disease claimant, the two-year statute begins to run on the issuance after mediation of the occupational disease evaluation. Kessel v. Liberty Northwest, 2005 MTWCC 45. Hereinafter the two-year statute of limitations and the enlargement of that time created by case law is simply referred to as the two-year period or the two-year statute of limitation.

Other grounds for denied liability are set forth above.

For this group of denied liability claims, the case is closed or inactive until the two-year statute of limitations has run, when it is then final.

Res Judicata

A second type of case not subject to the common fund is any that has been litigated in which the issue in Flynn\Miller could have been litigated, but was not, and the time for appeal has run. Grenz v. Fire & Casualty of Connecticut, 2001 MT 8.

Medical Only

The third type of claim not subject to the common fund is a medical only claim. The common fund in Flynn v. State Fund, 2002 MT 279 is based on the award of Social Security disability benefits. As a matter of law, they cannot be awarded to a claimant with a non-wage loss claim.

Settled Cases

The fourth type of case not subject to the common fund is a settled case. A worker's compensation settlement is governed by MCA 39-71-741 and requires Department of Labor approval, MCA 39-71-741; in Murer v. State Fund, 283 Mont. 210, 942 P.2d 69(1997), the Montana Supreme Court held a settled claim is not subject to the common fund.

§608 Payment/Denial

The Act allows for three types of benefit payments in a claim: medical (MCA 39-71-704), wage loss (MCA 39-71-701-703), and rehabilitation benefits (MCA 39-71-1006). An insurer may make payment of any of these three classes of benefits under a reservation of rights without an admission of liability (MCA 39-71-608) and then terminate payment with or without notice (MCA 39-71-609). Whether the case is pending, settled, final, closed or inactive after termination of benefits under §609 depends on the claimant's response to a termination of benefits paid under §608. The termination is clearly a denial of benefits. If the claimant does nothing, then when the two-year period for filing a petition runs, the case is final. During the two-year period it is inactive or closed.

Accepted Liability

The same progression and identifiable points of pending, final, closed, settled or inactive occur in an accepted liability wage loss claim. The adjustment of a claim involves decisions across time related to the three categories of benefits. Obviously not all cases involve all possible decisions, but the major decisions that can be involved in the adjustment of a claim have already been set forth above.

The adjuster's decision about payment or non-payment is communicated to the claimant or his representative. The claimant either agrees with the decision, decides to take no action or disputes the decision. How is the case then best characterized under the possibilities of pending, final, closed, settled or inactive? If the insurer's action is not disputed, then the case is closed or inactive.

If two years have run since the decision and then the claimant disputes the decision, then the status of the case as regards that issue is final.

But, at some point, if a case has not been adjudicated or has not settled with Department approval, the insurer in cases where TTD is terminated and no PTD benefits are conceded, will have stopped payment of medical, wage loss and/or rehabilitation benefits, and close the file under its closure procedure. The claimant will recognize the payment of benefits has stopped and, following the analysis above, will have to decide to dispute the denial of additional benefits or not. If he does not, then the claim fits under the category of closed or inactive. He has two years from the date of the denial to file a petition in the Court. If he does not do so, then the claim becomes final.

Why Liberty believes this rather protracted discussion of claims handling is significant is to show there are many points in the linear progression of a case, which could, depending on the facts, result in the case being classified as not pending, final, settled, closed or inactive. This is especially important not only for Flynn but also Schmill, Stavengaord and Ruhd.

But as regards Flynn, the initial classification of potentially relevant cases are those (a) in which there was a Social Security disability award because of the worker's compensation injury,

(b) resulting in a Social Security offset by the insurer, (c) in which the claimant actually paid attorney fees. That class of cases is then reduced to those within the following inclusive dates: December 2, 2002 (Flynn decision) and December 1, 2000, the two-year period under MCA 35-71-2905(2) to dispute the insurer's failure to pay proportionate attorney fees. Within this subset, the only cases that could be part of a common fund are those in which the claimant actually filed a petition with the Court requesting Flynn apportionment of attorney fees. To allow claims outside of this two-year window would require the Court to ignore the two-year statute of limitations in MCA 39-71-2905(2).

Workers' Compensation law does not require a proof of loss form that then prompts the adjuster to make a payment decision. See MCA 33-15-503. Payments under the Act are prompted by the requirements of the Act and case law. For example, if six years before the Montana Supreme Court decision in Flynn an insurer took a Social Security offset from an award in which the claimant had to pay attorney fees to his attorney in getting the Social Security disability award, must the insurer now pay proportionate attorney fees? No. The insurer then had no obligation under the law to do so. The claimant then could have brought a Flynn claim, but in this hypothetical he did not dispute the insurer's actions in taking the offset and not paying proportionate attorney fees. Under the above analysis, the claim was initially inactive or closed on this issue, and after two years it was final.

That this is the proper analysis is supported considering the extensive legal history recited by the Dempsey court. Specifically, at ¶22 the Court, in discussing the ancestry of Harper, makes the following statement: "[The United States Supreme] Court announced a new rule requiring that all criminal decisions apply retroactively to all cases 'pending on direct review or not yet final' [citing Griffith v. Kentucky, 479 U.S. 314 (1987)]."

At ¶28 the Dempsey court, in explaining the purpose behind limiting retroactive application to all cases pending on direct review or not yet final makes the following telling statement: "In the interests of finality, the line should be drawn between claims that are final and those that are not (the line drawn in Harper). 'New legal principles, even when applied retroactively, do not apply to cases already closed.'" At ¶23 the Dempsey Court states "It was only a matter of time before this approach to retroactivity in criminal cases found its way into the Court's civil juris prudence." Dempsey was not a criminal case; it was not a worker's compensation case. But we have been tasked with applying this approach to retroactivity in criminal and tort cases to workers' compensation cases.

The starting point for Liberty's analysis is not to ensure there are cases that fall under the Flynn common fund claim. Liberty's starting point is to take the options and requirements for insurers under the Act and the options for claimants in responding to insurers' decisions under the Act and insert them into the retroactivity analysis in Dempsey and Schmill.

The Dempsey Court took a retroactivity analysis initially used in criminal cases and then superimposed it on tort cases and extended that application to workers compensation cases without any explanation about how to apply its language (not pending on direct appeal, final, closed, settled and/or inactive) with the following exception that is crucial to Liberty's and, we believe, this Court's analysis.

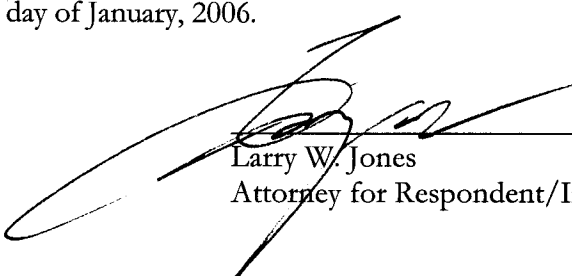
As the State Fund admits, many of these claims are settled, closed, or inactive. From the record before us, it cannot be determined how many of the 3,543

claims would, **in the context of workers' compensation law**, be considered "final or settled" under our holding in Schmill I. We leave that initial determination to the WCC.

Schmill at ¶19 (emphasis added).

The Schmill II Court left completely open whether any of the Schmill I type claims may or may not fall within the holding in Schmill II. The Court left open the possibility that none would fall into a potential common fund. That is, it is an open question for this Court whether the Dempsey Court analysis when applied to the Workers' Compensation Act results in placing any cases in a common fund under the holding in Flynn. The Flynn Court did not hold a common fund was created. Its holding appears at ¶18 and is as follows: "To the extent it [Workers' Compensation Court] declined to apply the common fund doctrine, the judgment of the Workers' Compensation Court is reversed." That doctrine is to be applied in the context of Dempsey retroactively. The Flynn Court made absolutely no holding regarding retroactive application or the method of identifying cases that could fall into a common fund.

DATED this 30th day of January, 2006.

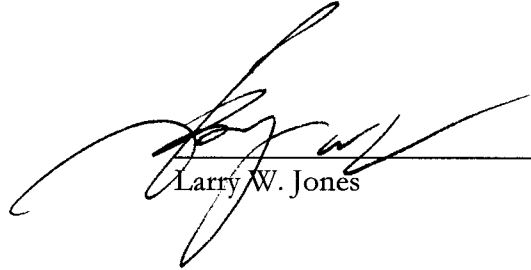


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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day January, 2006, I personally served the original of the foregoing LIBERTY NORTHWEST'S OPENING BRIEF REGARDING RETROACTIVE APPLICATION, on the Workers' Compensation Court, on the following:

Ms. Patricia J. Kessner
Clerk of Court
Workers' Compensation Court
PO Box 537
Helena, MT 59624-0537

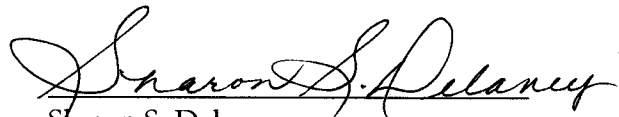

Larry W. Jones

I hereby certify that on the 30th day January, 2006, I served copies of the foregoing LIBERTY NORTHWEST'S OPENING BRIEF REGARDING RETROACTIVE APPLICATION, by first-class mail, postage prepaid, to the following:

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