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WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

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DOCKET ITEM NO. 445

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

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.

WCC No. 2000-0222

**RESPONDENTS' OPENING BRIEF**

COMES NOW the above named respondents ("Respondents") and, pursuant to this Court's order of December 6, 2005, submit this brief regarding, 1) insurers, self-insured and guaranty funds in liquidation and, 2) the final, closed and/or inactive issue.

**I. INSURERS, SELF-INSUREDS AND GUARANTY FUNDS IN LIQUIDATION.**

None of the Respondents are insurers, self-insureds, or guaranty funds in liquidation. Accordingly, Respondents take no position on this issue.

**II. THE FINAL, CLOSED, AND/OR INACTIVE ISSUE.**

**A. Background**

In *Flynn v. State Compensation Ins. Fund*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397, the Montana Supreme Court held that a workers' compensation insurer is benefited to the extent that its payment obligation to a claimant is reduced by that claimant obtaining social security disability benefits through the assistance of counsel. On August 5, 2003, this Court held that the *Flynn* decision applied retroactively to the State Fund (the workers' compensation insurer in *Flynn*). Per this Court's May 4, 2005 Summons, the retroactivity period is July 1, 1974 through May 4, 2005.

"Retroactive" decisions do not apply to settled or final cases. *Dempsey v. Allstate Ins. Co.*, 2004 MT 391, ¶¶ 28, 31, 325 Mont. 207, 104 P.3d 483. In *Schmill v. Liberty Northwest Ins. Corp.*, 2005 MT 144, 327 Mont. 293, 114 P.3d 204 (June 7, 2005) (*Schmill II*), the Montana Supreme Court applied its earlier decision (*Schmill I*)

retroactively while dismissing the concerns of the insurers in that case (Liberty Northwest and the State Fund) that retroactive application of *Schmill I* would require re-evaluation of thousands of claims. The Court reasoned that “many of these claims are settled, closed or inactive,” and thus exempt from *Schmill I*’s retroactive effect. *Schmill II*, 18-19. The court explained:

[I]t appears that the State Fund, as well as Liberty and Schmill, may not have grasped the full impact of Dempsey. . . . [D]ue to reasons of finality, “the retroactive effect of a decision . . . does not apply to cases that became final or were settled prior to a decision’s issuance.”

*Schmill II*, 17 (quoting *Dempsey*, 31). In the interests of finality, the Montana Supreme Court held that the State Fund would not have to review “many of these [3543] claims” because they were closed or inactive.

Under *Dempsey* and *Schmill II*, it is clear that a judicial decision will not apply retroactively to any case that was final before the decision was issued. This Court invited briefs on the question of what classes of workers’ compensation cases are “final,” such that subsequently-decided judicial decisions will not retroactively apply to them.<sup>1</sup>

**B. A “Settled” Claim is Final When Closed Pursuant to a Department-Approved or Court-Ordered Compromise.**

The Workers Compensation Act states as follows:

[f]or purposes of this section, “settled claim” means a department-approved or court-ordered compromise of benefits between a claimant and an insurer or a claim that was paid in full. The term does not include a claim in which there has been only a lump-sum advance of benefits.

§ 39-71-107(7), MCA. The Montana Department of Labor and Industry approves compromises between claimants and insurers by approving a petition for a full and final compromise settlement jointly submitted to the Department by the claimant and insurer. Any such Department-approved settlement is a settled claim not subject to the *Flynn* decision. Likewise, a court ordered compromise of benefits between a claimant and an insurer would be accomplished by means of a court order entered into the docket of the particular case settled. Thus, any claim for which such a court order exists is also a settled claim not subject to *Flynn*.

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<sup>1</sup> By submitting this brief on the “final, closed, and/or inactive” issue, the Respondents do not concede the entitlement of claimants to any further benefits. The entitlement issue has yet to be decided by this Court, but Respondents disputed the entitlement in their Response to Summons filed with this Court on June 20, 2005.

**C. Fully Adjudicated Claims are also “Final” and thus Not Subject to Flynn.**

According to the Montana Supreme Court,

“Final judgment” means the finish of the judicial labor, pronouncement of the ultimate conclusion of the court upon the case, and a direction to the clerk to enter judgment. Until these things are done, the case is still in the process of judicial determination, and not ripe for the entry of judgment, because judgment has not yet been rendered.

*Security Trust Sav. Bank of Charles City, Iowa v. Reser (1920)*, 58 Mont. 501, 193 P. 532, 533. On its face, this definition would mean that any judgment entered by a District Court (or the Workers’ Compensation Court) would be final regardless of whether that judgment was currently on appeal to the Montana Supreme Court. However, the Montana Supreme Court has recognized that retroactivity does apply to cases *currently* on appeal. *Dempsey* at ¶ 31 (emphasis added). Thus, excepting those cases that are the subject of a current appeal, *Flynn* **does not apply retroactively** to those claims in which a final judgment has been entered by the Workers’ Compensation Court.

**D. A Claim is Closed or Inactive Where There is No Change in Circumstances and the Claimant has Failed to Object for Two Years After the Benefits Were Paid in Full.**

As discussed previously, the WCA defines a “settled claim” as “a department-approved or court-ordered compromise of benefits between a claimant and an insurer or a claim that was paid in full.” § 39-71-107(7), MCA (2005) (emphasis added) (previously § 39-71-107(8) (2001)). The § 107 definition of “settled claim” “does not include a claim in which there has been only a lump-sum advance of benefits.” § 39-71-107(7)(b), MCA.

Accordingly, in addition to those claims resolved through compromise or adjudication, any claim “paid in full” is “settled.” “Paid in full” claims can only be those claims that have never been adjudicated in a court, since all adjudicated claims are captured by the “final,” “not yet final” or “pending on direct review” categories. Thus, “closed” or “inactive” claims are claims that never resulted in a petition to the Workers’ Compensation Court.

While the Montana Supreme Court has not defined the terms “closed” or “inactive,” the Court has clearly explained its reason for not applying decisions retroactively to certain types of cases.

*For reasons of finality...the retroactive effect of a decision does not apply...to cases that became final or were settled prior to a decision's issuance.*

*Dempsey* at ¶ 31 (emphasis added); *see also Schmill* at ¶ 17. Thus, the guiding principle behind the Montana Supreme Court's refusal to apply retroactive decisions to certain categories of claims is the need for finality. The interest of finality weighs heavily against unlimited retroactivity. *See, e.g., Harper*, 509 U.S. at 97, 113 S.Ct. at 2517 (explaining that retroactive judicial decisions should apply only to those "cases still open on direct review"); *Dempsey*, ¶ 28 ("In the interests of finality, the line should be drawn between claims that are final and those that are not.").

The Montana legislature has set a two-year statute of limitations for claimants to dispute an insurer's denial of benefits. § 39-71-2905, MCA. This two-year period is the only rational measure to determine finality as to non-litigated workers' compensation cases. If an insurer terminates a claimant's benefits, that claimant has two years to dispute the decision. After the expiration of the two-year period, the claim becomes "closed" or "inactive." In the interest of finality, when a claimant has accepted all payment due to him and raised no dispute since the claim presented was paid, that claimant should not later be permitted to benefit from a later judicial decision that might have affected his claim had the decision been issued while the claim was active.

### III. CONCLUSION.

Judicial decisions are not applied retroactively to all cases because of the need for finality. In the workers' compensation claim context, "final" claims include both the uncommon claim that results in a court decision or department-approved compromise as well as the more common, but also "final," claim that is settled by way of payment in full and a passage of two years with neither dispute nor changed circumstances.

WHEREFORE, Respondents respectfully request this Court to issue an order stating that, for the purposes of determining *Flynn's* retroactive applicability, the following definitions apply:

- 1). "Settled claim" means a department-approved or court-ordered compromise of benefits between a claimant and an insurer.
- 2). "A claim made final" means a claim in which a pronouncement of the Workers' Compensation Court's ultimate conclusion was made in the form of an entry of judgment and which judgment was either never appealed, or was appealed to conclusion in the Montana Supreme Court or was appealed and remanded to conclusion in the Workers' Compensation Court.

- 3). "Closed or inactive claim" is a claim in which benefits were terminated without the claimant disputing the termination by filing a petition in the Worker's Compensation Court within two years of termination.

Dated this 30<sup>th</sup> day of January, 2006.

CROWLEY, HAUGHEY, HANSON,  
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By: 

STEVEN W. JENNINGS

Attorneys for Respondents

**CERTIFICATE OF SERVICE**

I, STEVEN W. JENNINGS, one of the attorneys for the law firm of Crowley, Haughey, Hanson, Toole & Dietrich P.L.L.P., hereby certify that on the 30<sup>th</sup> day of January, 2006, I mailed a true and correct copy of the foregoing document, postage prepaid, to the following:

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January 30, 2006

Workers' Compensation Court  
PO Box 537  
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RE: *Robert Flynn and Carl Miller vs. Montana State Fund, et al.*  
WCC No. 2000-0222

Dear Clerk:

On behalf of our clients, please file the enclosed Respondents' Opening Brief, date stamp the extra copy of the cover page and return in the envelope provided.

Thank you in advance for your assistance with this matter.

Sincerely yours,

CROWLEY, HAUGHEY, HANSON,  
TOOLE & DIETRICH P.L.L.P.

*Myrna Henschel, PLS*

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