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WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

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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-INSURED 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. Introduction.

In *Flynn v. State Compensation Insurance Fund*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397, the Montana Supreme Court held that when a workers' compensation claimant obtains social security disability benefits through the efforts of counsel, the workers compensation insurer is benefitted to the extent that it may reduce the claimant's TTD or PTD benefits under §§ 39-71-701(5) and 702(4), MCA, and thus, under the common fund doctrine, must reimburse the claimant for one-half of his attorneys fees incurred in obtaining the social security disability benefits. On August 5, 2003, this Court held that the *Flynn* decision applied retroactively to the State Fund (the workers' compensation insurer in *Flynn*). *Decision and Order Regarding Retroactivity and Attorneys Fees*, 2003 MTWCC 55, WCC No. 2000-0222 (document # 63). As announced in this Courts *Summons* of May 4, 2005, the period of retroactive applicability is July 1, 1974 through May 4, 2005. *Summons* (document # 132).

On November 5, 2004, relying on *Ruhd v. Liberty Northwest Ins. Corp.*, 2004 MT 236, 322 Mont. 478, 97 P.3d 561, this Court determined that the common fund created in *Flynn* applied during the retroactive period to all claimants benefitted by the *Flynn* decision irrespective of which insurer was liable for such the claimants workers' compensation benefits. *Decision and Order Regarding Disclosure of Claimant Information*, 2004 MTWCC 75, WCC Nos. 2000-0222 and 2003-0771 (documents #'s 99 and 21). The attorney for Mr. Flynn and Mr. Miller (joined as a Petitioner in the *Flynn* proceedings) has, pursuant to the common fund doctrine, filed an attorneys fee lien in the amount of 25% of all payments due each claimant under the *Flynn* decision. *Amended Notice of Attorney's Lien*, 12/29/03 (document # 73).

Under Montana law regarding the retroactivity of judicial decisions in civil cases, decisions that are held to apply retroactively do not apply to cases that were settled, made final, closed or inactive during the period of retroactivity. *Dempsey v. Allstate Ins. Co.*, 2004, MT 391, ¶¶ 28 and 31, 325 Mont. 207, ¶¶ 28 and 31, 104 P.3d 483, ¶¶ 28 and 31 ("... 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."); see also *Schmill v. Liberty Northwest Ins. Corp.*, 2005 MT 144, ¶ 19, 327 Mont. 293, ¶ 19, 114 P.3d 204, ¶ 19 (*Schmill II*) (stating that "closed" or "inactive" claims are not subject to retroactivity). Understanding that *Flynn* is not to be

applied retroactively to such cases, this Court has invited the parties to brief the meaning of those terms.¹

B. “Settled” Claims.

As stated above, retroactive decisions of the Montana Supreme Court do not apply to claims that were settled prior to the date of the decision. *Dempsey* at, ¶¶ 28 and 31. Therefore, *Flynn* does not apply to claims that were settled before the date the *Flynn* opinion was issued (December 5, 2002). With respect to “settled” claims the Workers Compensation Act states as follows:

For 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 of benefits between claimants and insurers by means of executing a petition for a full and final compromise settlement jointly submitted to the Department by the claimant and insurer. Thus, any claim for which such a petition has been executed 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 would be a “settled” claim not subject to *Flynn*.

C. Claims Made “Final.”

As with “settled” claims, retroactive decisions of the Montana Supreme Court do not apply to claims that were made “final” prior to the date of the decision. *Dempsey*, 104 P.3d at, ¶¶ 28 and 31. Therefore, *Flynn* does not apply to claims that were finalized prior to December 5, 2002. Montana case law defines “final judgment” as follows:

“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 process of judicial determination, and not ripe for the entry of judgment, because judgment has not yet been rendered.

¹ 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.

Security Trust Sav. Bank of Charles City, Iowa v. Reser (1920), 58 Mont. 501, 193 P. 532, 533. Of course, under this definition a judgment entered by a District Court (or the Workers' Compensation Court) would produce a "final judgment" regardless of whether that judgment was currently on appeal to the Montana Supreme Court. However, recognizing this definition of a "final judgment," and seeking to retroactively apply its decisions to cases currently on appeal, the Montana Supreme Court has also stated that retroactivity applies to cases "not yet final" as well as cases "pending on direct review." *Dempsey* at ¶ 31. Thus, excepting those cases that are the subject of a current appeal, *Flynn* does not apply to those claims in which a final judgment has been entered by the Workers' Compensation Court.

D. "Closed" or "Inactive" Claims.

In *Schmill II* the Montana Supreme Court stated that retroactivity did not apply to claims that were "closed" or "inactive." *Schmill II* at ¶ 19 (stating that retroactivity did not apply to closed, or inactive claims). No case law has been found which defines the terms "closed" or "inactive." However, the case law does tell us what "closed" or "inactive" claims are not. Clearly, such claims have never been adjudicated in a court. If they had they would be either "final," "not yet final" or "pending on direct review." Thus, in discussing "closed" or "inactive" claims, for the purpose of determining *Flynn's* retroactivity, we are discussing 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 policy which informs the Montana's retroactivity law is abundantly clear.

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 finality. Accordingly, any definition of "closed" or "inactive" claims must account for the policy of finality.

In the lexicon of workers' compensation insurers a "closed" or "inactive" claim is one in which no further benefits are due the claimant and the insurer anticipates no further liability for such. In other words, workers' compensation insurers consider a claim "closed" or "inactive" when the claim has been paid in full. Interestingly, this definition perfectly matches the Montana Legislature's definition of a "settled claim."

..."settled claim" means a...claim that was paid in full.

§ 39-71-107(7), MCA. Thus, whether termed “closed,” “inactive” or “settled,” a claim that was paid in full is a “settled” claim and thus not subject to retroactivity. Recall that “closed” or “inactive” claims have never been litigated. Thus, there has never been a judicial determination as to whether such claims were “paid in full.” Rather, the insurer has determined, and paid, a certain amount of benefits, and the claimant has accepted such benefits without disputing their amount or termination in Court. Therefore, one definition of a “closed” or “inactive” claim would be a claim in which no further benefits are being paid and the claimant has not disputed the termination of such benefits. However, this definition would not take into account a claimant’s right to dispute the termination of benefits during the statutory period of limitations.

A petition for hearing before the workers' compensation judge must be filed within 2 years after benefits are denied.

¶ 39-71-2905, MCA. Accordingly, another definition of a “closed or inactive” claim is a claim in which benefits have been terminated and the claimant has not disputed such termination for a period of two years beginning from the date he was notified of termination or the date the last benefits were paid, whichever was later.

This definition is in keeping with the definition of “final judgment.” Recall that a “final judgment” means the finish of the judicial labor. Clearly, a claim that was not prosecuted within the statute of limitations period is a claim in which the judicial labor is finished because, as a matter of law, it cannot be begun. Likewise, the above definition furthers the goal of finality by precluding the reopening of claims that were never disputed within the two-year statute of limitations. Moreover, it does so in an equitable manner by incorporating the statute of limitations and thereby providing a two-year period following termination of benefits before a claim may be considered “closed” or “inactive.” Of course, if in the case of a particular claimant, this two-year period ended after December 5, 2002, then it would not be a “closed” or “inactive” claim for the purposes of applying *Flynn* retroactively.

The next obvious question is, what happens to the claims whose two-year period expired before December 5, 2002? The answer is simple, for reasons of finality, *Flynn* would not be applied retroactively to those claims. In *Schmill II*, the Court clearly and affirmatively decided to refuse to apply the benefit of retroactivity to “many” of State Fund’s 3,543 “closed” or “inactive” claims that might otherwise had the benefit of the *Schmill I* decision. Whatever its definition of “closed” and “inactive” may have been, the *Schmill II* Court could not have helped but realize that, in the interest of finality, it was refusing to apply the benefit of *Schmill I* to “many” claimants. Thus, to achieve finality, the Montana Supreme Court’s has announced its preference to deny of the benefit of retroactivity to “many” claimants.

In addition, there is simply no other workable alternative definition of “closed” or “inactive” claims. To apply *Flynn* retroactively, all the way back to July 1, 1974, to

claims which are "closed" or "inactive" under the above definition, would be to completely ignore the category of "closed" or "inactive" claims. Thus, to apply *Flynn* retroactively, all the way back to July 1, 1974, to claims which are "closed" or "inactive" under the above definition would be to ignore *Schmill II's* holding that such claims are not subject to retroactivity. It would also completely ignore the policy of finality which is the Montana Supreme Court's guiding principle in refusing to apply retroactivity to "final," "settled," "closed," or "inactive" cases. Likewise, any application of retroactivity beyond the two-year statute of limitations period would set a completely arbitrary and unsupportable date as the cut-off for retroactivity.

For the reasons shown, a "closed" or "inactive" claim, to which *Flynn* is not to be applied retroactively, is a claim in which benefits were terminated at least two years prior to December 5, 2002, and the claimant did not dispute such termination, by filing a petition in the Worker's Compensation Court, during such two-year period.

E. Regardless of the Definition of "Settled," "Final," "Closed," or "Inactive," *Flynn* is not to be Applied Retroactively to Any Claim not Currently Pending Before the Workers' Compensation Court, or the Montana Supreme Court.

Respondents note that the question of the definitions of "final," "settled," "closed" and "inactive," misses the point of Montana case law regarding the application of retroactivity. Indeed, it inverts the rule of retroactivity. Retroactivity is not applied to all cases except those that are "final" or "settled" cases or "closed or inactive claims." Rather, retroactivity is applied only to those cases "pending on direct review or not yet final."

Therefore, we conclude that, in keeping with our prior cases, all civil decisions of this court apply retroactively to cases pending on direct review or not yet final... .


Dempsey at ¶ 31. Of course these cases are simply cases that are currently working their way through the courts. In announcing that retroactivity has no applicability to "final" or "settled" cases or "closed" and "inactive" claims the Montana Supreme Court simply provides examples of the types of cases that are not "pending on direct review or not yet final." Therefore, the enumeration of those categories of cases and claims does not imply or infer that retroactivity applies to a broader category of cases and claims than those "pending on direct review or not yet final." Indeed, such an implication or inference would be at odds with *Dempsey's* limitation of retroactivity to only those cases "pending on direct review or not yet final." Accordingly, to determine *Flynn's* applicability it is unnecessary to determine the meaning of "final," "settled," "closed" and "inactive." Rather, all that is required is to identify those cases that feature claimants similarly situated with Mr. Flynn and whose claims are "pending on direct review or not yet final" or, in other words, currently working their way through the courts.

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 30th day of January, 2006.

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

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 30th 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
Helena, MT 59624-0537

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

Myrna Henschel, Certified PLS
Legal Secretary to Steven W. Jennings

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Enclosures
c (w/encl.): Mr. Rex Palmer