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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, v. *Montana State Fund*, Respondent/Insurer, and *Liberty Northwest Insurance Company*, Intervenor.	)	WCC No. 2000-0222 ***PETITIONERS' OPENING BRIEF RE: "FINAL AND SETTLED."***

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The Supreme Court has directed this Court to determine what procedural requirements may limit the retrospective application of a newly

announced rule of law. See *Schmill* (2005).[1]

> 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.* We leave that initial determination to the WCC.

The Supreme Court acknowledges the unique nature of workers' compensation claims by specifying that the determination be "in the context of workers' compensation law." Workers' compensation is a creation of statute and is therefore controlled by statute. Further, individual workers' compensation claims are governed by the specific statutory scheme existing at the time the injury occurs. *Buckman* (1986).[2]

The case at bar implicates claims dating back to July 1, 1974.[3] Consequently, this Court's determination of what claims will be considered "final or settled" requires review of workers' compensation legislation spanning sixteen legislative sessions over the course of nearly three decades. Fortunately, the statutory provisions concerning finality of claims are both uniform and clear.

The case at bar concerns the entitlement of totally disabled workers who incurred costs or fees to obtain a Social Security award for which the

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[1] *Schmill v. Liberty Northwest Ins. Corp.*, 2005 MT 144 ¶ 19, 327 Mont. 293 ¶ 19, 114 P.3d 2004 ¶ 19.

[2] *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

[3] See this Court's NOTICE OF CLAIM OF ATTORNEY LIEN dated and filed Feb. 12, 2004.

entity providing workers' compensation coverage wrongfully took an offset or had a policy of taking an offset without accounting for the cost incurred by the claimant to recover the award. The Court's correction of this wrong applies retrospectively to all claims, both injury and occupational disease, that were not "final or settled" at the time of the applicable Court decision.

For all relevant years the Occupational Disease Act has allowed settlements with the proviso that "[h]owever, no such settlements are binding on the parties until approved by the division [Employment Relations Division of the Department of Labor]." See § 39-72-711 (2) MCA. Likewise, settlement of injury claims requires Department approval. See § 39-71-741 MCA. Thus, a plain reading of the statute demonstrates the clear legislative intent that claims cannot be settled without a Department order granting approval of a petition for settlement.

While Department approval is necessary to finally settle a claim, it is not always sufficient. For example, for claims arising before 1987, all Department orders allowing full and final compromise settlements are subject to review by the workers' compensation judge. See § 39-71-2909 MCA (1985). Likewise, for claims arising before 1987, the judge has authority to review, diminish or increase settlement awards for up to 4 years after the settlement has been approved by the Department. This review is triggered by a change in disability of the claimant and does not extend to any settlement delineated as a "full and final compromise settlement." See § 39-71-2909 MCA.

The 4 year limitation does not apply to any settlement reached through mutual mistake. See *Kienas* (1981).[4] The Court can review any settlement reached by mutual mistake, even after 4 years.

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[4] *Kienas v St. Comp. Ins. Fund* _____ Mont. _____, 624 P. 2d 1, 38 St. Rep. 320 (1981).

Suffice it to say that the Workers' Compensation Act is carefully crafted to assure that timely filed claims are not extinguished by mistake, gile or the mere passage of time. Even claims resolved by litigation are not final. Instead, they may be reopened upon a showing that claimant's disability has changed. See § 39-71-2909 MCA (2003).[5] This allows both the claimant and the insurer to request review of benefits previously awarded by the judge. In case of alleged fraud by a claimant, a petition to review the award must be filed within 2 years after the insurer discovers the fraud. There is no time limitation for reopening a judicial award of benefits where disability has changed. This is consistent with the result for unlitigated claims. See § 39-71-739 MCA (2003). This intentionally open ended program is well suited to the humanitarian purposes of the Act.

Claimants face a 1 year statute of limitation to initially present a claim. See § 39-71-601 MCA. Once a claim is filed, however, there is no statute of limitation with respect to benefits which may become due in the ensuing months or years.[6]

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[5] Similar provisions date back over the entire relevant time, beginning in 1974.

[6] This Court has noted that: "...once a claim is filed there is no statute of limitations with respect to benefits. A claimant may seek benefits years and even decades after her injury or disease. She may do so as long as she has filed a timely claim for compensation and timely notified her employer of her injury or disease. §§ 39-71-601 and 603, MCA (1987–present); § 39-72-403, MCA (1987–present). In 1997 the legislature adopted a provision requiring that any "petition for hearing before the workers' compensation judge must be filed within 2 years after benefits are denied." § 39-71-2905(2), MCA. However, that statute has limited application since the two-year limitations period does not begin running until there is a denial of the benefits sought... *"Stavenjord v Montana State Fund*, 2004 MT WCC 62 ¶ 20 (Aug 27, 2004).

With rare exceptions not applicable here, timely filed workers' compensation claims cannot become final unless settled. Claims cannot be settled without the express approval of the Montana Department of Labor.

The settlement process requires affirmative action by claimant, insurer and Department. Claimant and insurer must submit a petition seeking Department approval of the proposed settlement. Settlement occurs only if the Department enters an order approving the petition.

While settlement is necessary to conclude a claim, it may not be sufficient. For example, a settlement should not be binding where the parties or the Department of Labor proceed under a mistake of law concerning a pending case which the Workers' Compensation Court has wrongly decided. In the case at bar, on May 18, 2001, the Workers' Compensation Court wrongly ruled that insurers had no obligation to participate in the expense incurred by a claimant to obtain Social Security benefits. It can be reasonably assumed that the Department (if not claimants) relies upon the decisions of the Workers' Compensation Court. If the Court had ruled correctly, both the Department and claimants would have required payment of the insurers share of the expenses incurred by a claimant to obtain Social Security benefits. The determination of this benefit is a simple mathematical calculation. There is no reason to believe that either the Department or an informed claimant would forgo this benefit except for the erroneous ruling of the Worker's Compensation Court. Justice requires that any settlement entered after May 18, 2001 be reopened to allow insurers to pay their share of the expense that benefitted them.

Petitioner's respectfully request that this Court enter an order that in the context of workers' compensation law and for purposes of this common fund litigation, claims not filed within the time allowed by the applicable statutes of limitation are final, as are all settled claims, except that:

1. No settled claim may be considered final unless settled with the express approval of the Department of Labor.
2. Claims arising before 1987 may not be considered final until 4 years after the settlement has been approved by the Department.
3. Claims resolved by Court Order may not be considered final in the absence of a Department approved settlement.
4. Claims settled after May 18, 2001, (i.e., the date the Workers' Compensation Court wrongly ruled that insurers had no obligation to participate in the expense incurred by a claimant to obtain Social Security benefits) may not be considered final for purposes of this common fund litigation.

DATED in Missoula, Montana, this 30th day of January, 2006.

Rex Palmer
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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of January, 2006, a true and correct copy of the foregoing was served upon the following by U.S. mail, hand-delivery, Federal Express, facsimile or email:

Brad Luck
Garlington, Lohn & Robinson
PO Box 7909
Missoula, MT 59807

{X} U.S. Mail
{ } Hand Delivered
{ } Federal Express
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January 30, 2006

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

Re: *Flynn/Miller v. State Fund*

Dear Patricia:

Enclosed please find original PETITIONERS' OPENING BRIEF RE: "FINAL AND SETTLED" dated January 30, 2006.

If you have any questions or concerns, please do not hesitate to contact this office.

Sincerely,
ATTORNEYS INC., P.C.

Rex Palmer/nml

Rex Palmer
RP:nml

Enclosure

cc: Brad Luck
Tom Martello