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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 ANSWERING
BRIEF REGARDING RETROACTIVITY**

Flynn in his Petitioner's Opening Brief (herein Brief) at pp. 2-3 gets it half right. The Supreme Court decision that prompted this common fund case concerns the entitlement of a totally disabled worker who incurred costs or fees to obtain a Social Security award for which the insurer providing coverage took an offset to payment of part of the fees by the insurer; these was nothing wrongful about the insurer's conduct because it was pursuant to statute.

DOCKET ITEM NO. 488

Flynn's discussion at p. 3 of the Court's authority prior to July 1, 1987 to review, diminish or increase awards under MCA §39-71-2909 (1985) is irrelevant. That provision is triggered only if the disability of a claimant is changed within the limitations set forth in the statute. Taking the social security offset has absolutely no relationship to a change in disability in the context of this case. The offset is taken if the social security award is based on the work related injury for which the insurer paid total disability benefits. MCA 39-71-701, 702.

Flynn's argument p. 4 based on MCA 39-71-2909 (2003) is just as irrelevant for the same reason. The insurer's right to take a social security offset is not based or even affected by change or "aggravation, diminution or termination of disability"

Also at p. 4, Flynn's argument that there is no statute of limitations simply ignores the legislature's enactment in 1997 of MCA 39-71-2907 (2) requiring the filing of a Petition within 2 years after benefits are denied. 1997 Mont. Laws Section 7, Ch. 276. Flynn in footnote 6 notes the above statute of limitation but mistakenly claims it does not apply because it is limited to denied claims. Denial includes non payment of attorney fees when the social security offset was taken.

Most interestingly, Flynn does not discuss what a final claim or an active claim is even though those are concepts equally applicable as the concept of settled. For example, in a 1975 permanent total disability claim in which social security benefits were awarded for the injury and a social security offset was taken with no payment of attorney fees by the insurer, can anyone seriously dispute it has been inactive as regards payment of attorney fees for 30 years?

Along this line, Liberty incorporates by reference the State Fund's argument regarding laches at p. 9 of its initial brief.

Liberty also incorporates by reference the State Fund's Respondent's Reply to Petitioner's Brief Regarding Retroactivity filed February 24, 2006.

DATED this 1st day of March, 2006.



Larry W. Jones
Attorney for Liberty Northwest

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day March, 2006, I personally served the original of the foregoing LIBERTY NORTHWEST'S ANSWERING BRIEF REGARDING RETROACTIVITY, on the Workers' Compensation Court, on the following:

Ms. Patricia J. Kessner
Clerk of Court
Workers' Compensation Court
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