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OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

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
CORPORATION,

Intervenor.

WCC No. 2000-0222

STATE FUND'S OPENING BRIEF RE:
DEFINITION OF "PAID IN FULL"

DOCKET ITEM NO. 591

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EMAIL

Montana State Fund ("State Fund") submits its brief in accordance with this Court's April 22, 2009, Order requesting briefing on "the definition of 'paid in full' as used in the Montana Supreme Court's ruling" in *Flynn v. State Compensation Insurance Fund*, 2008 MT 394, 347 Mont. 146, 197 P.3d 1007 ("*Flynn II*"). Minute Order 2, Apr. 22, 2009.

I. INTRODUCTION

The Supreme Court's adoption of the expanded definition of "settled" to include claims "paid in full" was not a casual or inadvertent holding. It occurred in the very case designated by this Court and recognized on appeal as the hallmark decision for retroactivity in common fund actions. It occurred in the very case where the Supreme Court was specifically asked to clarify a whole host of phrases dealing with retroactivity from several previous decisions. In fact, the State Fund's opening statement on appeal indicated:

The present appeal involves a necessary clarification of recent retroactivity holdings in workers' compensation cases The clarifications necessitated here will apply to all workers' compensation decisions.

Flynn II, Appellant Montana State Fund's Opening Br. 2, Feb. 14, 2007 ("*Flynn II*, Opening Br."). The language and approach of the *Flynn II* decision makes it clear that the Court was analyzing every aspect of the parameters of retroactivity regarding workers' compensation decisions and the application of the two categories of claims that are exempt from retroactivity—final and settled.

In adopting the "paid in full" add-on to traditionally settled claims, the Supreme Court was reacting to the plea of the parties to consider the differences between the general tort system and workers' compensation claims as it relates to open claims:

This Court labored to fashion a single retroactivity rule applicable to the tort and workers' compensation systems. The goal was admirable. It appears, though, the fundamental differences between the systems has made application of identical retroactivity standards unworkable

The present appeal, then, provides an opportunity to consider necessary fine-tuning of the terminology and standards for retroactivity specific to workers' compensation cases. . . .

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Flynn II, Opening Br. 5. In fashioning an expanded definition of settled claims specifically for workers' compensation purposes, the Supreme Court adopted language from the Workers' Compensation Act ("WCA") because it furthered "the expression of legislative will" and provided "consistency between the retroactivity of judicial decisions" regarding and applying the WCA. *Flynn II*, ¶ 25.

Rejecting the arguments of Flynn,¹ the Supreme Court clearly enunciated the requested retroactivity clarification specific to workers' compensation cases. It held that new decisions in workers' compensation law would not be retroactive to claims settled with Department of Labor and Industry or this Court's approval **or** those additional claims paid in full. In creating an exclusion from retroactivity, this disjunctive definition necessarily focuses upon those claims in which benefits were fully paid to the extent allowed by the law in existence at the time. This inescapable conclusion will put some meat on the bones of this new definition and provide necessary consistency and finality to the retroactivity concerns in common fund cases.

Finally, any discussion of the meaning of "paid in full" must recognize the timing and context of our discussions. The Supreme Court has directed that "paid in full" claims are exempted from later decisions, i.e., if a claim is paid in full, retroactivity does not apply to it. Therefore, the only way "paid in full" has any meaning is if it is considered **before** the later decision changing benefits occurs.

II. RECAP OF FLYNN II'S MODIFICATION OF THE WCC'S FLYNN ORDER

Flynn II reaffirmed the Supreme Court's retroactivity principles set forth in *Dempsey v. Allstate Insurance Co.*, 2004 MT 391, 325 Mont. 207, 104 P.3d 483, and *Schmill v. Liberty Northwest Insurance Corp.*, 2005 MT 144, 327 Mont. 293, 114 P.3d 204 ("*Schmill II*"), stating that a new judicial decision applies to all cases not "final" or "settled." *Flynn II*, ¶ 22. Following *Flynn II*, the two types of excluded cases are defined as follows: "final" means any claim on which a final judgment has been entered by the Workers' Compensation Court ("WCC") and which is not pending on appeal. *Flynn II*, ¶ 9. "Settled" means a department-approved or court-ordered compromise of benefits

¹ As he did in the post-remand hearing, Flynn argued before the Supreme Court that the "paid in full" language was "meaningless verbiage" because "[n]obody claims that an insurer should pay for a second time any benefits which it already paid before establishment of the common fund. The non-issue will never affect any claimant or insurer, it merely begs the question." *Flynn II*, Resp't's Resp. Br. 18, May 21, 2007. This total misconception of the substantive addition to the definition of settled has no merit and was specifically rejected by the Supreme Court when it reiterated the two-part definition of "settled" claims. ("To clarify, a 'settled' claim is . . ." *Flynn II*, ¶ 26.)

between a claimant and an insurer or a claim that was paid in full. *Flynn II*, ¶ 26.

The Supreme Court in *Flynn II* carefully evaluated this Court's definition of "settled." It considered the fact that this Court's discussion of the issues included the phrase "paid in full" and accepted the rationale for including it within the definition of "settled," but omitted that phrase in the language of its final Order. The Supreme Court accepted State Fund's argument and held that the Montana Legislature's definition of settled claims in Montana Code Annotated § 39-71-107(7)(a) (2005), which includes "paid in full," was appropriate, notwithstanding *Flynn's* attempt to limit its application. *Flynn II*, ¶ 25. (Using the legislature's definition provides consistency between retroactivity rules, court decisions and the WCA.)

The Supreme Court thereby acknowledged that retroactivity in the workers' compensation context has some unique ramifications. The Court had two options to choose from in reviewing this Court's definition of "settled" and deliberately chose an expanded definition that included "paid in full." Because the Court added "paid in full" back into the definition of "settled," the phrase means something different from and in addition to "a compromise between a claimant and insurer" What then, does it mean?

II. THE MEANING OF "PAID IN FULL" AS AN EXCEPTION TO RETROACTIVITY

A newly created or expanded judicial benefit does not apply retroactively to settled claims. In ordinary litigation, this principle is not difficult to define. In the workers' compensation arena, however, under *Flynn II*, "settled" encompasses two things—compromises, and claims "paid in full." Compromise settlements are the ordinary definition of "settled," and a compromise clearly embodies the finality that all retroactivity decisions purport to honor. *Dempsey*, ¶ 28. "Paid in full," as included in the same sentence in the Act, must similarly capture finality but on grounds other than compromises. Therefore, it must mean finished in some way other than settled through compromise (and other than through entry of judgment, which is captured in the definition above of "final"). The only thing it can mean is paid in full according to the claimant's entitlement under the statutes in effect at the time of payment, prior to any judicial decision changing benefits. This was the interpretation suggested by the State Fund to the Supreme Court in supporting the use of the expanded statutory definition. The Supreme Court's adoption of the suggested statutory standard provides implicit support for the obvious definition of "paid in full."

a. Background on the uniqueness of workers' compensation situation.

The addition of the phrase "paid in full" to the definition of "settled" in the workers' compensation context reflects the unusual attributes of a compensation claim. The

Supreme Court has previously been reluctant to create a special rule for retroactivity for compensation claims, even though these claims are different from the standard tort retroactivity scenario because many compensation claims are never truly inactive. The Court's statement in *Stavenjord v. Montana State Fund*, 2006 MT 257, 334 Mont. 117, 146 P.3d 724 ("*Stavenjord II*"), that ". . . 'open claims' will encompass those which are still actionable, in negotiation but not yet settled, now in litigation, or pending on direct appeal," reflects the Supreme Court's insensitivity to the uniqueness of the workers' compensation context. *Stavenjord II*, ¶ 15. "Still actionable," in workers' compensation, could theoretically be forever, because a compensable work injury could always give rise to future benefits.

However, the important difference between a compensation claim and an ordinary tort is successfully captured in the phrase "paid in full," and the addition of that phrase to "settled" in the compensation context provides a way for this Court to fashion a rule that acknowledges these significant differences. That is, any normal non-workers' compensation claim is exempt from retroactivity when it is closed and final, not on review, not in active litigation, not on appeal. "Paid in full" is not used in the normal context; paid or unpaid is irrelevant to the analysis. The standard tort-related analysis is whether there is a pending suit—either the statute of limitations has not run on a potential claim, or there is some open judicial proceeding. Payment in full is therefore never a consideration in the analysis of an ordinary tort retroactivity question. Because the Supreme Court has sanctioned "paid in full" as an express exclusion to retroactivity in workers' compensation claims, it must reflect something unique about the nature of these claims.

A second important background point about retroactivity in the workers' compensation context is the special focus our law places upon benefits payable at the time of the injury. It is well-settled that the law in effect at the time of a work-related injury governs the determination of workers' compensation benefits and the respective rights of the insurer and employer. *Buckman v. Mont. Deaconess Hosp.* (1986), 224 Mont. 318, 321, 730 P.2d 380, 382. *Flynn v. State Comp. Ins. Fund*, 2002 MT 279, ¶ 20, 312 Mont. 410, 60 P.3d 397 ("*Flynn I*"). Though this principle does not in itself trump retroactivity analysis, the fundamental workers' compensation practice provides a helpful background for the analysis of "paid in full."

Workers' compensation benefits change frequently, following legislative revisions, and the only practical approach to applying benefit changes is that a claimant is entitled to the substantive benefits that were in place at the time of the injury. This is consistent with saying that a claimant is paid in full according to the benefits that were available at the time of injury. This strict and time-honored concept is logically applicable to the newly formulated definition related to retroactivity of judicial decisions. In the present context, it is consistent with the proposition that where a judicially-

directed change or increase in benefits occurs, the claimant cannot ask for a retroactive increase of benefits previously paid, because he was paid in full according to the statute and law in effect at the time. The consistency accomplished by applying the accepted standard to the consideration of the scope of "paid in full" is logical and persuasive.

b. What "paid in full" means.

The plain, everyday meaning of "paid in full" is not complicated. In the context of a bill, for example, "paid in full" means the amount owing is \$0 and the transaction is over. The obviously analogous meaning of "paid in full" in the workers' compensation context is that a claimant was entitled to certain benefits under the statutes in place, he received those benefits in full, and his (or that portion of his) claim was resolved. There is nothing more to be paid and the claim is closed.

The clearest example is someone who is injured, reaches stability and is entitled to permanent partial disability when he returns to work. The considerations of Montana Code Annotated § 39-71-703 are applied and the benefits to which he was entitled are paid in full. That portion of his claim is settled at that point. Under the established retroactivity analysis, any new judicially created benefit relating to permanent partial disability would not apply to his settled claim because he was entitled to a set amount, the amount was paid in full, and the transaction is over. The same would be true of any other benefits paid in full according to the law at the time.

This definition of "paid in full" is completely consistent with the Supreme Court's established retroactivity analysis while simultaneously acknowledging the peculiarities of the workers' compensation system. A retroactive decision does not apply to those cases that can be said to be entirely closed on the day the new opinion is issued. *Schmill II*, ¶ 28 ("We conclude that our decision in *Schmill I* is retroactive to all cases not yet final or settled *at the time of its issuance*." (emphasis added)). The new judicial decision does not erase all prior law. Cases that proceeded to judgment, settlement, or full payment under the law that existed at the time are untouched. *Dempsey*, ¶ 31 ("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*." (emphasis added)). See also *Stavenjord*, ¶ 16. That means the Court will not reopen prior claims, such as the example above, in which an injured person received the benefits to which he was entitled and then returned to work. He was paid in full according to the law at the time, prior to any judicial decision changing his entitlement. This creates the system stability and acknowledgment of legislative will recognized by the Supreme Court in approving the expanded definition by borrowing a statute from the WCA.

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The law in place at the time the benefits accrued must be the law that is applied, because otherwise, "paid in full" claims are not an exception to the rule of retroactivity. That is, they must have been paid in full according to the statutes in place prior to any judicial decision changing the law; otherwise, the judicial decision has retroactive effect, and the Supreme Court has exempted "paid in full" claims from retroactive decisions.

III. CONCLUSION

Prior to *Flynn II*, substantial clarification was necessary regarding retroactivity of judicial decisions modifying workers' compensation benefits. The Supreme Court finally and logically acknowledged the fine tuning necessary to consider exceptions to retroactivity in the workers' compensation context. It has now thoughtfully adopted a rule excluding settled cases with the express proviso that the class of claims exempted from retroactivity shall include those "paid in full" in specific addition to those fully adjudicated and those with traditional settlements approved by the Department or this Court.

Adopting the suggested rule that "paid in full" means benefits paid to the extent allowed by the law at the time, the Court will mirror accepted benefit standards regarding legislative changes to entitlement and foster both the consistency and finality sought and needed in retroactivity analysis.

DATED this 8th day of June, 2009.

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By


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CERTIFICATE OF SERVICE

I, the undersigned, of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for Respondent, certify that on this 8 day of June, 2009, I emailed and mailed a copy of the foregoing STATE FUND'S OPENING BRIEF RE: DEFINITION OF "PAID IN FULL," postage prepaid, to the following:

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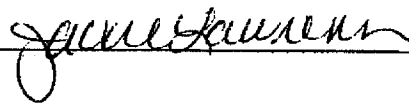
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Subject: Flynn; WCC No. 2000-0222
Attachments: PDF copy State Fund's Opening Brief Re Definition of Paid in Full.PDF

Clara -

Attached for filing with the Court is State Fund's Opening Brief Re: Definition of "Paid in Full" in the above matter. The original will follow via regular mail.

If you have any questions, please do not hesitate to contact us.

Thank you,

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