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**FILED**

JUN - 8 2009

OFFICE OF  
WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

<i>Robert Flynn and</i>	)	WCC No. 2000-0222
	)	
<i>Carl Miller, Individually and on</i>	)	
<i>Behalf of Others Similarly Situated,</i>	)	<b>PETITIONERS' OPENING BRIEF RE:</b>
<i>Petitioners,</i>	)	<b>"PAID IN FULL"</b>
v.	)	
	)	
<i>Montana State Fund,</i>	)	
<i>Respondent/Insurer,</i>	)	
	)	
and	)	
	)	
<i>Liberty Northwest Insurance</i>	)	
<i>Company,</i>	)	
<i>Intervenor.</i>	)	

\* \* \* \* \*

At hearing on April 22, 2009, this Court directed the parties to submit briefs concerning the definition of the term "paid in full."

**INTRODUCTION**

The case at bar concerns the entitlement of totally disabled workers who incurred costs or fees to obtain a Social Security award. More specifically, it concerns the duty of insurers to pay their fair share of the costs and fees incurred by the totally

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disabled workers to obtain a Social Security award. This duty arises when an insurer takes an offset on workers' compensation benefit payments based on the Social Security award without accounting for the expenses incurred by the worker to recover the Social Security award.

The case at bar does not concern insurers who before the underlying *Flynn* decision had the policy of paying their proportionate share of the workers fees and costs incurred to obtain Social Security awards. Insurers with such a policy would have paid their share. In so doing, such insurers would have paid the given worker everything required by law regarding the duty of contribution to the cost of obtaining social security benefits. Such payment would constitute the status of "paid in full" regarding the insurers duty of contribution.

### ARGUMENT

The term "paid in full" is neither specialized or complicated. A perusal of various dictionaries provides virtually identical definitions of the words. "Paid" is defined as "past tense and past participle of pay." "Pay" is defined as "to make payment" or "to discharge a debt." "Full" means "complete, entirely, not partial."

The Supreme Court endorses the plain meaning of words. In its decision on the appeal of this action, it noted that its *Stavenjord* decision "created no new law" as urged by appellants. Instead, "open" simply meant "not final." *Flynn II* ¶15.

The Workers' Compensation Court and the Supreme Court have determined that *Flynn I* applies retroactively to all claims that are not final or settled. The Workers' Compensation Court and the Supreme Court held that a "settled claim" is a claim in which a department-approved settlement or court-ordered compromise of benefits has been made between the claimant and insurer or a claim that has been "paid in full." For purposes of this action the mandate is clear and the logic is direct. Any insurer which completely discharged its obligation to pay its fair share of the costs and fees incurred to obtain a social security award has "paid in full" its required contribution to the common fund. If an insurer has not completely discharged this obligation then the insurer has not "paid in full" the particular claim. Any such claim therefore remains "open" and "not final". Any other result renders moot the

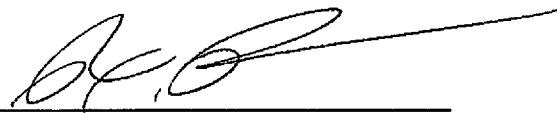
retroactivity analysis of both the Workers' Compensation Court and the Supreme Court.

It is a well-established principle of workers' compensation law that a claimant's benefits are governed by the law in effect at the time of his or her injury or occupational disease. *Buckman v. Mt. Deaconess Hosp.* (1986) 224 Mont. 318, 730 P.2d 380, 382. Court decisions are retroactive "unless all three of the *Chevron* factors are satisfied." *Flynn II*, ¶16. There is no dispute that the *Chevron* factors are not satisfied in the case at bar. Consequently, *Flynn* is the law in effect at the time of each of the pre-*Flynn* claims. Those claims cannot be deemed settled pursuant to the "paid in full" analysis unless and until the insurer pays its complete share of costs and fees incurred to obtain the Social Security award for which it received benefit.

### CONCLUSION

Each of the *Flynn/Miller* claimants has received total disability benefits which were reduced when the claimant received Social Security benefits. None of these claimants have been "paid in full" unless and until the insurer satisfies its duty to share in the cost incurred by the claimant to obtain the Social Security benefits.

Dated this 6<sup>th</sup> day of June, 2009.



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**CERTIFICATE OF SERVICE**

I hereby certify that on the 8<sup>th</sup> day of June 2009, a true and correct copy of the foregoing was served upon the following by U.S. mail, hand-delivery, Federal Express, facsimile or email:

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**Collins, Marian**

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**From:** Attorneys Inc., P.C. [attorneysinc@montana.com]  
**Sent:** Monday, June 08, 2009 4:58 PM  
**To:** Wilson, Clara; DLI WCC Court Docs  
**Cc:** Steve Jennings; Larry Jones; Cadwallader, Mark; Laurie Wallace; Bradley J. Luck; KD Feeback; Martello, Tom  
**Subject:** Flynn/Miller  
**Attachments:** 090608.Petitioner's Opening Brief Re Pd in Full.PDF

Dear Clara:

Attached for filing with the Court is Petitioners' Opening Brief Re: "Pain in Full". The original will follow via regular mail.

Sincerely,

Miva VanEngen  
Paralegal to Rex Palmer

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