Larry W. Jones
Law Offices of Larry W. Jones
Employees of Liberty Mutual Group
2291 West Broadway, Suite 3
Missoula, MT 59808
(406) 543-2420
(800) 548-0731 (FAX)
Attorney for Intervenor

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 2000-0222

ROBERT FLYNN,

and

CARL MILLER,

Petitioners,

v.

MONTANA STATE FUND,

Respondent,

and

LIBERTY NORTHWEST INSURANCE CORP.,

Intervenor.

ANSWER BRIEF OF LIBERTY NORTHWEST INSURANCE CORP. (INTERVENOR) RE: PAID IN FULL

Petitioners' in their Opening Brief Re: "Paid in Full" at p. 2 show the fallacy of their argument, begging the question, when they argued thusly: "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." Then, under the "Conclusion" section they close by stating "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."

Fax

Petitioners' state the major premise of their argument at p. 2 and then simply repeats it as a conclusion at p. 3. That is not an argument.

We know from *Dempsey* "That the retroactive effect of a decision does not apply *ab initio*" and therefore does not apply to a case settled prior to a decision's issuance. ¶31.

We know from *Flynn II* that whether a case has been settled must be determined "In the context of workers' compensation law . . . ." ¶8.

And thirdly the basis for Workers' Compensation is a contract for hire and the workers' compensation statutes that govern a claim are those in effect on the date of an injury/ OD. *Buckman*, 224 Mont. at 321, 730 P.2d at 381-382, (1986).

Lastly, and fourthly, even workers' compensation law is subject to the principle of finality. *State Fund v. Chapman*, 267 Mont. 489-490, 885 P.2d 411, (1994).

Petitioners' only acknowledge one of these principles in their reference to *Buckman* and the governing law. Their argument reduces to a claim that there is no finality in Workers' Compensation law because all prior payments of workers' compensation benefits are subject to revision, i.e., increase if a later court decision increases workers' compensation carriers' liability. That is all they claim.

Buckman is not an open door through which claimants can serially pass as court decisions increase workers' compensation insurers' liability. *Buckman* is not the carousel decision that proffers the brass ring time after time as court decisions increase workers' compensation insurers' liability. It is a case of definition and therefore limitation. On the date of an injury/ OD the claimant snaps the picture of the workers' compensation statutes then in effect and its entitlements are defined and limited by those statutes. That is the context of Workers' Compensation law; it tells us what payment is owed and how to measure whether the payment was paid in full; it is the standard by which finality is brought to workers' compensation cases. It is the principle by which a settled case is not void *ab initio*, it is the principle that honors the contractual duties and obligations of a claimant and employer on the date of injury/ OD.

Liberty will now turn to Schmill's brief, Opening Brief of Cassandra Schmill Re "Paid in Full." What is she doing here?

> "¶31 mootness is a threshold issue which we must resolve before addressing the substantive merits of a dispute. [Citation omitted.] 'A matter is moot when due to an event or happening the issue has ceased to exist and no longer presents and actual controversy. . . . A question is moot when a court cannot grant effective relief.' [Citation omitted.] Commentators have described mootness as the 'doctrine of standing set in a time frame: the requisite personal interest that must exist at the commencement of the litigation (standing) must continue through its existence (mootness).' Henry Monhehan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1384 (1973). Thus a justiciable controversy in which the parties have a personal stake must exist at the beginning of the litigation and at

> every point thereafter, unless an exception of the doctrine of mootness applies."

Havre Daily News, LLC v. City of Havre, 2006 MT 215.

For Schmill to have standing in this case she must claim and prove she has not been paid in full under the holding in *Flynn/ Miller* or that she is **entitled to receive personally additional benefits** under *Schmill I or Schmill II* depending on how the issue in the instant case is decided. This she has not done and she cannot do. On this basis alone Schmill's arguments should be summarily dismissed. Alternatively, Schmill argues that the issue in the case has already been decided that none of the *Schmill* claims have been paid in full and cites to Order of Special Master. 380, ¶43. This Court nor its special master can reverse or overrule a Montana Supreme Court decision. The Supreme Court's decision in *Flynn/ Miller* has thrown open for, what may mercifully be, the final resolution of the issue of the retroactive application of Montana Supreme Court decisions in workers' compensation case. Anything done in *Schmill* on remand from *Schmill II* by this Court is subject to the most recent holding in *Flynn/ Miller*.

Next at, p. 2 Schmill argues "The same reasoning should be applied to *Flynn* claims. Because non-settled claims continue to expose the insurer to liability for benefits, they cannot be considered 'paid in full.'" This is simply Schmill's claim that there is no limit to the retroactive application of Supreme Court decisions in a workers' compensation case. We know from *Flynn/ Miller II* that a case paid in full is settled and settled cases are not subject to the retroactive application of a Supreme Court decision.

Also at p. 2 in support of her argument Schmill cites to § 39-71-739, MCA, for the proposition, as expressed at p. 4, that the statute "extends that entitlement [to disability benefits] indefinitely until the maximum amount of compensation has been paid, no *Flynn* claims have been 'paid in full.'" What Schmill skips over is the fact that the trigger in the statute for additional benefits is an "aggravation, diminution, or termination of disability . . . ." *Flynn/ Miller* benefits are not disability benefits; they are the payment of attorney fees for a successful prosecution of a social security disability determination on which a workers' compensation insurer later relies in reducing its workers' compensation liability. *Flynn/ Miller* has nothing to do with disabilities or changes in disabilities under the Act or disability benefits payable under § 39-71-739, MCA.

Finally at pp. 5-6, Schmill purports to offer an analysis that would lead to a category of cases that were paid in full. They are medical only claims in which medical benefits have not been used for a consecutive 60-month period and therefore medical benefits have been paid in full; that claim is not subject to the retroactive application of a Montana Supreme Court decision. The converse, as Schmill to her credit clearly states under her theory, is that "A claim in which indemnity benefits have been paid can never be 'paid in full.'" P. 5. The rationale is based on her argument regarding § 39-71-739, MCA.

Schmill's argument, as a first step, creates a class of cases of possible, theoretical disability benefit claimants - - that class of claimants whose disability may increase in the future and who may or may not be entitled to additional disability benefits under § 39-71-739, MCA. Note a PTD claimant may in fact have an increase in a disability but of course would not be entitled to increase the PTD benefits.

Her second step is to argue that because of this possible, theoretical class of claimants we must ignore all existing cases in which there is no increased disability and no factual, existing entitlement to additional benefits. Her third step is then to claim that the social security attorney fees claimed under *Flynn/ Miller* are disability (wage loss) benefits owed under the Workers' Compensation Act under § 39-71-739, MCA.

What are the consequences or, stated differently what hypotheticals, follow when indemnity benefits can never be paid in full under Schmill's argument?

1. Assume a claimant with a 1996 injury/ OD received all disability benefits he was then entitled to, reaches MMI and then dies from non-work related causes. Under Schmill's theory he has not been paid in full and his claim remains open.

2. Assume a claimant with a 1996 injury/ OD received all disability benefits he was then entitled to, reaches MMI and thereafter has another injury or OD involving the same body part. Under Schmill's theory the first claim has not been paid in full and remains open even though under this hypothetical there are in fact no disability benefits to which he is entitled under the first claim.

3. Assume a claimant with a 1996 injury/ OD received all disability benefits he was then entitled to, reaches MMI, returns to work and thereafter has a non-occupational injury to the same body part that totally disables him from employment. Under Schmill's theory he has not been paid in full and his claim remains open.

4. Assume a claimant with a 1966 injury/ OD after MMI is found to be PTD under the Act and his disability increases thereafter. Under Schmill's theory his claim has not been paid in full and remains open.

Schmill's arguments are remarkable also for the total absence of any citation to the *Buckman* case in support of her position. *Buckman* is the raison d'etre, the sine qua non and the alpha and omega of Workers' Compensation law. The injured worker's entitlement to benefits is determined by the statutes in effect on his date of injury/ OD. When in doubt or in need of guidance go back to the fundamentals - - statues in effect, contractual obligations, finality. The workers' compensation system is supposed to be self-administering. § 39-71-105(4), MCA. Perhaps if we are reminded of how unnecessary complexity is insidious and much to be guarded against, those fundamentals will return us to a simpler workers' compensation system where a single claim form should suffice.

> **Piscator.** Sir, I hope you will not judge my earnestness to be impatience: and for my simplicity, if by that you mean a harmlessness, or that simplicity which was usually found in the primitive Christians, who were, as most Anglers are, quiet men, and followers of peace; men that were so simply wise, as not to sell their consciences to buy riches, and with them vexation and a fear to die; if you mean such simple men as lived in those times when there were fewer lawyers; when men might have had a lordship safely conveyed to them in piece of parchment no bigger than your hand, though several sheets will not do it safely in this wiser age; I say, Sir, if you

> take us Anglers to be such simple men as I have spoke of, then myself and those of my profession will be glad to be so understood:
>
> . . . .

The Complete Angler, Izaak Walton.

For the reasons stated above and in the previously filed brief, Liberty requests the Court to adopt its interpretation of paid in full.

DATED this 23rd day of July, 2009.

Larry W. Jones
Attorney for Intervenor

CERTIFICATE OF SERVICE

I hereby certify that on the 23 day July, 2009, I served the original of the foregoing ANSWER BRIEF OF LIBERTY NORTHWEST INSURANCE CORP. (INTERVENOR) RE: PAID IN FULL, on the following:

Ms. Clara Wilson
Clerk of Court
Workers' Compensation Court
PO Box 537
Helena, MT 59624-0537

E-mail: dliwccfilings@mt.gov

VIA: ☒ U.S. Mail ☐ Hand-Delivery ☐ Fax ☒ Email

And a copy of the same to the following:

Mr. Steven W. Jennings
500 Transwestern Plaza II-490 North 31st
P.O. Box 2529
Billings, MT 59103-2529

E-mail: sjennings@crowleyfleck.com

Mr. Rex L. Palmer
Attorneys Inc., P.C.
301 W. Spruce
Missoula, MT 59802

E-mail: attorneysinc@montana.com

Mr. Bradley J. Luck
Garlington Lohn Robinson
PO Box 7909
Missoula, MT 59807

E-mail: bjluck@garlington.com

VIA: ☒ U.S. Mail ☐ Hand-Delivery ☐ Fax ☒ Email

Staci M. Wisherd, Secretary