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FILED

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OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS COMPENSATION COURT OF THE STATE OF MONTANA

ROBERT FLYNN and)	
CARL MILLER,)	
)	WCC NO. 2000-0222
Petitioner,)	
)	
vs.)	CASSANDRA SCHMILL'S REPLY BRIEF
)	
MONTANA STATE FUND,)	
)	
Respondent.)	
)	
LIBERTY NW INS. CORP.,)	
)	
Intervenor,)	
_____)	

COMES NOW, CASSANDRA SCHMILL, by and through her attorney of record, and submits the following reply brief to Respondents' Opening Briefs Regarding the Definition of "Paid in Full." For the reasons stated herein, the Court should reject the definitions proposed by Respondents and adopt the reasoning set forth by Schmill in her Opening Brief.

ARGUMENT

The Respondents urge the Court to define "paid in full" as a claim in which all benefits have been paid "to the extent allowed by the law at the time," or "which existed in the statute at the time of injury," or "which were owed to date . . . where payments ceased prior to December 2, 2002." (State Fund's Brief, p. 7; Liberty NW's Brief, p. 5; Responding Insurers' Brief, pp. 1, 4-5.) Two out of the three Respondents acknowledged that "a compensable work injury could always give rise to future benefits," but nonetheless conclude, without any citation to authority, that the potential for future benefits does not preclude a determination that the claim was "paid in full." (State Fund's Brief, p. 5; Responding Insurer's Brief, p. 4.) The Respondents' definitions of "paid in full" should be rejected for several reasons.

First, despite their contention that the potential for future benefits does not prevent a

claim from being "paid in full," the Respondents' definition of "paid in full" cannot be reconciled with section 39-71-739, MCA, which authorizes payment of additional compensation when there is a change in the claimant's disability. The Respondents' definition of "paid in full" would extinguish this right to additional compensation payments based solely upon the insurer's determination that all benefits "owed" have been paid. The Court in *Mezmarich v. Republic Coal Co.* (1935), 101 M. 78, 53 P.2d 82, held that the Industrial Accident Board had no authority to declare a case "paid in full" until all compensation provided under the Act was paid. If the IAB didn't have authority to declare a claim "paid in full," an insurer certainly doesn't have such authority.

Up until now, a claimant's right to additional compensation benefits could only be knowingly extinguished by way of a petition for settlement or stipulated judgment. Nothing in the WCA authorizes the extinguishment of a right to compensation without the agreement of the claimant. The only statute of limitations in the WCA other than the notice and claim filing deadlines, have to do with UEF disputes and ongoing medical benefits. §§39-71-520 and -704(1)(f), MCA. The existence of section 39-71-739, MCA nearly unchanged in the WCA since 1929, is evidence that the WCA's omission of a specific statute of limitations for indemnity benefits was not inadvertent, but intentional. If the Respondents' definition of "paid in full" is adopted, this Court will be inserted a statute of limitations which was clearly never intended by the legislature. The WCA has never contained an express provision for, nor been interpreted as allowing for, the extinguishment of indemnity benefits based solely upon the passage of time. Certainly more than the insertion of an undefined phrase, "paid in full," in a statute addressing claims handling procedures, is necessary to extinguish a claimant's right to compensation payments which has been present in the WCA for 80 years. Section 39-71-739, MCA, and the cases which interpret it, make it clear that nothing but a petition for settlement can terminate a claimant's entitlement to benefits until full compensation provided for under the Act has been paid.

Second, if "paid in full" is a new method of "settling" claims available to insurers since 2001, when section 39-71-107, MCA, was amended to include the "paid in full" language, why are insurers just now trying to use it? Why haven't we seen insurers using this "paid in full" argument to deny demands for additional compensation brought years after any benefits have been paid? The answer is clear. This new way of "settling" claims has not been used because it does not actually "settle" a claim." At most, what the "paid in full" statute does is allow in-state adjusters to close medical only files when 60 months have elapsed without the payment of benefits and then move them to an out-of-state storage facility. This does not constitute settlement of a claim, but closure of a non-indemnity file after the right to additional compensation payments has lapsed pursuant to a specific statute of limitations stated in the WCA.

Third, even if the Respondents' "paid in full" argument was a new way of "settling" claims that the legislature inserted into the WCA in 2001, it can only apply to claims which occurred on or after the statute's effective date, July 1, 2001. (§1-2-109, MCA, states a statute is not retroactive unless expressly so declared.) The extinguishment of a right to benefits is undeniably a substantive right and thus under any retroactive analysis, section 39-

71-107, MCA (2001), can only be applied prospectively. Unfortunately for Respondents, that doesn't get them off the hook for reviewing claims dating back to July 1, 1974, which is their whole purpose behind making the "paid in full" argument in first place. So even if the Court uses the Respondents' "law in effect on the date of injury" argument, since the amendments to section 39-71-107, MCA, were not the law in effect on the date of injury for the majority of *Flynn* claims, that statutory provision would not allow a finding that any pre-July 1, 2001, claims were ever "paid in full."

Lastly, the "paid in full" argument should be seen for what it is, an attempt to nullify the retroactive application of a decision of the Montana Supreme Court which would require an insurer to go back through its records and pay proper workers' compensation benefits. As noted by the Court in *Schmill v. Liberty NW Ins. Corp.*, 2005 MT 144, ¶16, 327 Mont. 293, ¶16, 114 P.3d 204, ¶16, the purpose of applying the *Schmill* decision retroactively was to place "workers whose occupational diseases arose before our decision in *Schmill I* to receive full workers' compensation awards. It will place them on an equal footing with workers whose occupational diseases arise after *Schmill I* . . .". If the Respondents' "paid in full" definition is adopted by the Court, many workers who have paid social security attorney fees before the decision in *Flynn I* was rendered will never achieve equal footing with workers whose claim arose after *Flynn I* in contravention of the principle behind retroactive application of the law as articulated by the Court in *Schmill II*. As the Claimant, Flynn, noted in his opening brief, since the retroactive application of *Flynn I* makes it the law in effect on the date of all claims dating back to July 1, 1974, it constitutes the law in effect on the date of injury, and thus using the Respondents' own arguments, precludes a finding that any *Flynn* claims have been "paid in full."

CONCLUSION

For the reasons set forth in this brief, as well as the Opening Briefs of Cassandra Schmill and Robert Flynn, Schmill respectfully requests that the Court find that none of the *Flynn* claims have been "paid in full."

DATED this 22 of July, 2009.

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By: 
LAURIE WALLACE

Certificate of Mailing

I, Robin Stephens, do hereby certify that on the 22 day of July, 2009, I served a true and accurate copy of CASSANDRA SCHMILL'S REPLY BRIEF by U.S. mail, first class, postage prepaid to the following:

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(1951-1996)

July 22, 2009

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

RE: FLYNN/MILLER v. MONTANA STATE FUND, et al.
WCC No. 2000-0222

Dear Ms. Wilson:

Enclosed please find the Cassandra Schmill's Reply Brief in regard to the above-referenced matter.

Should you have any questions concerning this matter, please contact me directly.

Sincerely,


LAURIE WALLACE
BOTHE & LAURIDSEN, P.C.

LW/rs

Enc.

cc: Larry Jones
Bradley Luck
Rex Palmer
Steven Jennings
Tom Martello