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FILED

AUG 24 2009

OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

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.

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

Liberty is responding to Schmill's Reply Brief and to Flynn/Miller's Reply Brief. Liberty could limit its reply to a piece of parchment no bigger than your hand if the rules governing pleadings permitted.

Nowhere do Schmill or Flynn/Miller address the issue in *Dempsey* "That the retroactive effect of a decision does not apply *ab initio*" ¶31. All their arguments, however articulated, stand for a single proposition which is that the numerous Montana Supreme Court decisions expanding

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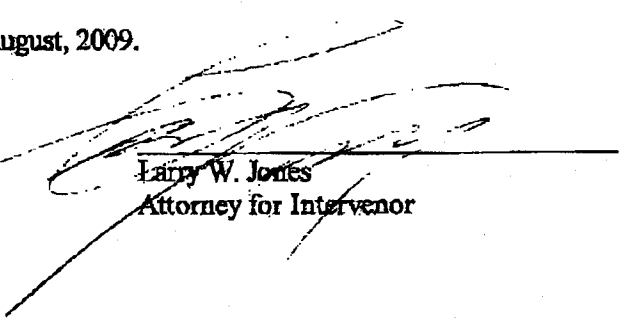
workers' compensation insurer liability apply *ab initio* to all cases even though settled by having been paid in full.

Secondly, Flynn/Miller's claim that equating paid in full to what you are owed under the contract denies a claimant equal protection ignores the fact that claimants pre and post *Flynn I* are not equally situated. Pre *Flynn I* claimants are different than post *Flynn I* claimants in that they never took the effort to make the claim advanced in *Flynn I*. That is, they chose to accept and acknowledge the liability owed them by a workers' compensation carrier; they were paid in full and by their acquiescence effectively settled their claim. Post *Flynn I* the claimants have a different contractual entitlement from pre *Flynn I* claimants.

Lastly, Schmill's argument at p. 2 that the insurer's arguments are equivalent to treating the passage of time a statute of limitations skips over the fact that time has nothing to do with the insurers' arguments. Liberty's argument is valid if the claim was paid in full one day before *Flynn I* or two years before *Flynn I*. And this leads into Schmill's argument at pp. 2-3 that Liberty's paid in full argument only applies to claims with a date after the July 2001 amendment to § 39-71-107, MCA. In *Flynn I* the 2000 claim had a date of June 23, 1993. *Flynn II* is the law of the case and must apply to cases before July 1, 2001. What happened in *Flynn II* is that the Supreme Court had to define what a settled case was under its retroactive application analysis and looked to Section 107 for guidance in developing its own case law. *Flynn II* is not so much an interpretation of Section 107 as much as it's a short hand for the Court's adoption of its language to express its continuing development of its case law governing the retroactive application of its cases:

For the reasons stated above, Liberty requests that its position be adopted regarding paid in full.

DATED this 24th day of August, 2009.



Larry W. Jones
Attorney for Intervenor

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day August, 2009, I served the original of the foregoing
REPLY 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:

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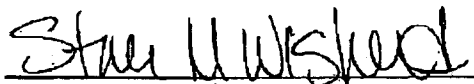
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Staci M. Wisherd, Secretary