

Rex Palmer
ATTORNEYS INC., P.C.
301 W Spruce
Missoula, MT 59802
(406) 728-4514
ATTORNEYS FOR PETITIONERS

FILED

JUL 28 2010

OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

Robert Flynn and) WCC No. 2000-0222
)
Carl Miller, Individually and on)
Behalf of Others Similarly Situated,) **AMENDED PETITION FOR HEARING**
Petitioners,)
vs.)
)
Montana State Fund,)
Respondent/Insurer,)
and)
)
Liberty Northwest Insurance)
Company,)
Intervenor.)
)

* * * * *

As set forth in ARM 24.5.301 Petitioner alleges:

1. Named Petitioners Robert Flynn ("Flynn") and Carl Miller ("Miller") suffered injuries arising out of and in the course of their employment. Miller was injured on June 19, 1985, in Lewis and Clark County, Montana, when a chunk of crushed car parts fell from his truck and injured his lower extremities. Flynn suffered an occupational disease to his arms/hands while performing repetitive activities. Miller's injury and Flynn's occupational disease resulted in disability and wage loss.

DOCKET ITEM NO. 622

2. At the time of Miller's injury, and at the time Flynn's occupational disease arose and progressed, their respective employers were enrolled under Compensation Plan III of the Workers' Compensation Act and their insurer was State Compensation Insurance Fund ("State Fund").
3. State Fund accepted Petitioners' claims and has paid both medical benefits and total disability wage loss benefits.
4. Petitioners both submitted claims for Social Security disability benefits which the Social Security Administration denied. Petitioners retained counsel and appealed this denial to an Administrative Law Judge, and ultimately prevailed by receiving an award of Social Security Disability benefits. Miller did not prevail at the first trial because the Administrative Law Judge, after complete trial, also denied the claim. Miller appealed the decision of the Administrative Law Judge to the Appeals Council which reversed the Administrative Law Judge and ordered a new trial. In 1989, after the second trial, the second Administrative Law Judge awarded Miller the total disability benefits which he had originally applied to receive. The Regional Chief Administrative Law Judge authorized, and Miller paid, \$5,248.50 for his representation in connection with receiving his Social Security award, which sum is based upon the award of past due and not future Social Security benefits.
5. The Social Security awards obtained by Flynn and Miller enabled State Fund to reduce Petitioners' weekly total disability wage loss benefits. Consequently, as a result of Petitioners' litigation efforts with the Social Security Administration, funds were recovered which accrued to the substantial benefit of State Fund.

For example, as a direct result of Miller's Social Security award, State Fund reduced payments to Miller in excess of \$17,000.00 by December 31, 1989, and in excess of an additional \$50,000.00 since December 1989.

6. While State Fund reaped the benefit of Petitioners' efforts, it was not required to intervene, risk expense, or hire an attorney throughout Petitioners' litigation proceedings with the Social Security Administration.

7. Petitioners' Social Security disability award created an existing, identifiable monetary fund or benefit in which State Fund reaped an interest as a non-participating beneficiary.
8. Pursuant to the common fund doctrine, as enunciated in the line of cases including *Means* (1981), *Murer* (1997), *Hall* (2001) and *Flynn* (2002), State Fund was required to contribute, in proportion to the benefits it actually received, to the costs of the litigation, including reasonable attorney fees.
9. State Fund has received 50% of Petitioners' Social Security award and pursuant to the common fund doctrine was required to pay 50% of Petitioners' cost, including attorney fees, to obtain the Social Security award. The amount of the contribution required of State Fund was a fixed and identifiable sum at the time the Social Security Administration authorized the fee award for the Petitioner's representative. The State Fund's obligations are defined by a Court approved settlement and are not the subject of this Petition.
10. As the result of the decision by the Montana Supreme Court in *Flynn v. State Fund*, 312 Mont. 410, 60 P.3d 397 (2002) ("*Flynn I*"), workers' compensation claimants who were similarly situated to Flynn and Miller ("Similarly Situated Claimants") became entitled to receive from their respective insurers a repayment of previously offset total disability benefits in the amount of 50% of their costs, including attorney fees, which each Similarly Situated Claimant incurred to obtain their Social Security award. Pursuant to the common fund doctrine, *Flynn I* and the above captioned action created and preserved an existing identifiable monetary fund or benefit in which Similarly Situated Claimants reaped an interest as non-participating beneficiaries.
11. Likewise, as the result of the *Flynn I* decision, all other providers of workers' compensation coverage in Montana ("Insurers"), including providers under Compensation Plan I, Plan II and Plan III of the Workers' Compensation Act, became obligated to identify and repay all Similarly Situated Claimants the previously offset total disability benefits in the amount of 50% of the cost, including attorney fees, which each Similarly Situated Claimant incurred to obtain their Social Security award. Pursuant to the common fund doctrine, the

Insurers are subject to the jurisdiction of this Court. This does not include State Fund because State Fund's obligations are defined by a Court approved settlement.

12. The Insurers have, from time to time, failed to take reasonable steps to identify and repay total disability benefits to Similarly Situated Claimants in an amount over which no reasonable dispute existed following and as a result of *Flynn I* and the above captioned action.
13. The Insurers reaped the benefits of the expense incurred by Similarly Situated Claimants to receive Social Security benefits yet the Insurers were not required to intervene, risk expense, or hire an attorney throughout litigation proceedings with the Social Security Administration.
14. A dispute exists in that some Insurers have failed or refused to acknowledge their obligation and have failed or refused to identify and repay all Similarly Situated Claimants the previously offset total disability benefits in the amount of 50% of the cost, including attorney fees, which each Similarly Situated Claimant incurred to obtain their Social Security award.
15. Pursuant to ARM 24.5.317, Petitioners have exchanged all available medical records relating to their conditions with the State Fund and will continue to do so.
16. The parties have complied with any mediation procedure required in the Workers' Compensation Act. This Court has ruled that no additional mediation is required for this common fund proceeding.
17. The following is a list of individuals who are potential witnesses for Petitioner in this matter.

<u>NAME AND ADDRESS</u>	<u>GENERAL SUBJECT MATTER OF TESTIMONY</u>
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Similarly Situated Claimants	Costs incurred to recover Social Security awards.
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Respondent's claims
personnel and records
custodians

Petitioner's Social Security offset and Respondent's
policies and procedures.

Social Security
Administration personnel

Social Security awards and fee authorization.

18. The following is a list of written documents relating to this case which may be introduced as evidence by Petitioners:
 - a. Records regarding social security awards and associated costs of recovery as well as records of the offset taken by Insurers.
 - b. Insurers claim files as well as any documentation concerning Insurers policies and procedures concerning Social Security offsets.
19. Prior to the *Flynn I* decision, Insurers had a policy of reducing workers' compensation benefits by taking an offset for a Social Security award without contributing to the costs of litigation incurred by a claimant to obtain the Social Security award.
20. Notwithstanding the *Flynn I* decision, Insurers remains steadfast in their refusal to contribute to the costs of litigation incurred by any claimant who obtained an order awarding Social Security benefits prior to the *Flynn I* decision on December 5, 2002.
21. Insurers' failure and refusal to contribute anything to the costs of litigation incurred by any claimant who obtained an order awarding Social Security Benefits prior to the *Flynn I* decision on December 5, 2002, is in direct contravention to the specific holding of *Flynn I* and is manifestly unreasonably.
22. Petitioners bring this *in rem* action on behalf of all Similarly Situated Claimants for whom Insurers have failed or refused to contribute, in proportion

to the benefits they have or will receive, to the cost incurred, including reasonable attorney fees, to obtain a Social Security award and to enforce the attorney's lien which exists as a matter of law and the lien which is of record in this action.

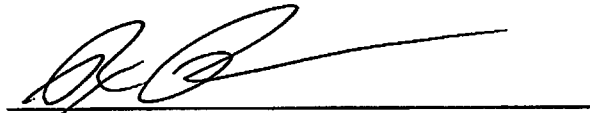
23. Insurers have failed and refused and continue to fail and refuse to uniformly apply the holding of *Flynn I*; and, in fact, have a conflict with Similarly Situated Claimants.

WHEREFORE, Petitioners respectfully prays that this Petition be set for hearing and that the following relief be granted:

1. A declaration that following the *Flynn I* decision, Insurers' continued failure and refusal to contribute anything to the costs of litigation incurred by any claimant who obtained a Social Security award which benefitted Insurers by triggering a reduction in workers' compensation total disability benefits is unreasonable;
2. An order recognizing a common fund which includes all claimants who have incurred cost to obtain a Social Security award and for whom Insurers have taken a Social Security offset, thereby reducing claimants' total disability benefits, without contributing in proportion to the benefits they have or will receive, to the cost incurred, including reasonable attorney fees, to obtain the Social Security award;
3. An order awarding all Similarly Situated Claimants the difference between the Social Security offset which Insurers took from Claimants' total disability benefits and what Insurers were entitled to take with proper consideration to the cost of recovering the Social Security award;
4. An order assessing attorneys fees and costs for all Similarly Situated Claimants who are entitled to recover total disability benefits as identified herein; and
5. An order assessing a penalty against Insurers in favor of all Similarly Situated Claimants who are entitled to recover total disability benefits as identified

herein.

DATED this 28th day of July, 2010.

A handwritten signature in black ink, appearing to be 'Rex Palmer', written over a horizontal line.

Rex Palmer
ATTORNEYS INC., P.C.
301 W Spruce
Missoula, MT 59802
(406) 728-4514
ATTORNEYS FOR PETITIONERS

Collins, Marian

From: Attorneys Inc., P.C. [attorneysinc@montana.com]
Sent: Wednesday, July 28, 2010 3:44 PM
To: DLI WCC Court Docs
Subject: Flynn/Miller
Attachments: 100728.Amended Petition for Hearing.pdf

To Whom it May Concern:

Attached is a copy of Amended Petition for Hearing dated July 28, 2010. The original will follow by mail.

Sincerely,

Miva VanEngen
Paralegal to Rex Palmer

Attachment

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ATTORNEYS INC., P.C.
301 W Spruce
Missoula, MT 59802
(406) 728-4514 (phone)
(406) 728-5601 (fax)
attorneysinc@montana.com
www.montana.com/attorney

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