

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

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

<i>Robert Flynn</i> and)	WCC No. 2000-0222
)	
<i>Carl Miller</i> , Individually and on)	
Behalf of Others Similarly)	PETITIONERS' BRIEF IN OPPOSITION
Situated,)	TO AIG INSURERS MOTION TO
Petitioners,)	DISMISS
v.)	
)	
<i>Montana State Fund</i> ,)	
Respondent/Insurer,)	
and)	
)	
<i>Liberty Northwest Insurance</i>)	
<i>Company</i> ,)	
Intervenor.)	

* * * * *

Fifteen insurers ("AIG Insurers") have submitted their motion to dismiss. Docket #719. Petitioners object to dismissal and submit this brief in opposition to the motion.

AIG Insurers seek dismissal based on an affidavit which fails to comply with both the form and substance prescribed by the Court. The form and substance prescribed by the Court are not optional. A non-conforming affidavit does not satisfy the criteria to establish the basis for dismissal or to trigger discovery.

The non-conforming affidavit is not a basis for dismissal nor does it trigger discovery.

On December 6, 2005, this Court introduced a process by which an insurer could, by affidavit, seek to initiate dismissal from common fund matters. Docket #390, attached as Exhibit "A". This process has worked well for dozens of insurers. The Court's common fund website demonstrates the particulars of numerous affidavits followed by stipulated dismissal or by discovery and subsequent stipulated dismissal.

The process introduced by the Court requires the insurer to submit an affidavit in specified form which provides five separate elements of substantive information to initiate potential dismissal. See Ex. A. The five elements are as follows:

1. Name of affiant;
2. A statement of affiant's position with the named insurer;
3. A statement of affiant's authority to speak on behalf of and bind the named insurer;
4. A statement under oath that the affiant has reviewed the named insurer's records and that based upon the affiant's review, the named insurer should be dismissed based upon any or all of the four specific reasons:
 - The named insurer never wrote workers' compensation insurance in Montana;
 - The named insurer does not have any Montana claims;
 - The named insurer has no claimants meeting the Court's criteria as set forth in the summons;
 - The named insurer was or is in the liquidation during the period in question set forth in the amended summons.
5. A statement of the named insurer's understanding of what will happen if there is no discovery within ninety days and if Petitioners do not object at some time after ninety days.

The affidavit at issue fails to comply with the form and substance prescribed by the Court. See Affidavit, docket #714, attached as Exhibit "B".

First, the affidavit identifies only one insurer not fifteen. Consequently, the affidavit fails to make any claim whatever concerning fourteen of the

fifteen insurers seeking dismissal. It fails to identify the affiant's position with fourteen of the insurers seeking dismissal (element 2) and it fails to provide a statement of the affiant's authority to speak on behalf of and bind fourteen of the insurers seeking dismissal (element 3). Likewise, the affidavit fails to provide a statement that the affiant reviewed records of even one insurer (element 4). Not even one. Perhaps most important, the affiant fails to mention any of the four specific reasons for dismissal required in the form affidavit, (element 4). The opposite is true. The affidavit actually confirms that the insurer:

- wrote workers' compensation insurance in Montana,
- had Montana claims¹, and
- has at least two claimants entitled to Flynn/Miller benefits.

Finally, the affidavit fails to provide a statement of its understanding of what will happen if there is no discovery within ninety days and if Petitioner's do not object some time after ninety days, (element 5). Not a word about element 5. This is important. Without this, Petitioners and the Court would have no reason to expect that any insurer would ever in the wildest stretch of imagination expect dismissal by filing an affidavit so singularly non-compliant with the Court's required form. Much less fourteen insurers not even named in the affidavit.

As noted above, none of the above five elements are optional.

The affidavit process introduced by the Court in 2005 has a specific purpose. The process expedites dismissal of certain insurers. The expedited process only applies if the insurer strictly complies with the form and substance of the affidavit required by the Court. If an insurer strictly complies with the form and substance of the affidavit required by the Court, then the affidavit triggers an initial discovery deadline and permits an insurer to seek dismissal outside the process required by the Court's regular rules for resolving disputes. If an insurer fails to strictly comply with the form and substance of the affidavit required by the Court then it fails to trigger an initial

¹The discovery responses of AIG Property Casualty state that it had 7145 workers' compensation claims in Montana, that 1593 were total disability claims and that it has taken social security offset on some of these claims.

discovery deadline and the insurer is not entitled to dismissal outside the Court's regular rules. Here the affidavit fails utterly to comply with either the form or substance prescribed by the Court. Instead, the affidavit proves that the insurer owes money which it has not paid.

Here, AIG Insurer's motion to dismiss should be denied. The motion relies on a special affidavit process which AIG Insurers have failed to satisfy.

AIG Insurers can either proceed under the Court's regular rules and file a new motion to dismiss if they believe they should be dismissed while simultaneously admitting they owe money. Alternately, AIG Insurers can file a new affidavit or affidavits if they believe that they can satisfy the form and substance of the Court's special affidavit process.

DATED this 20th day of January, 2015



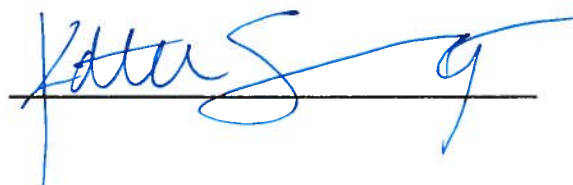
Rex Palmer
ATTORNEYS INC., P.C.
301 W Spruce
Missoula, MT 59802
(406) 728-4514
ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that on the 20th Day of January 2015, a true and correct copy of the foregoing was served upon the following by U.S. mail, hand-delivery, Federal Express, facsimile or email:

Steven W. Jennings
Crowley Fleck PLLP
PO Box 2529
Billings, MT 59103-2529

{ }	CM/ECF
{X}	U.S. Mail
{ }	Hand Delivered
{ }	Federal Express
{ }	Facsimile
{ }	Email



M E M O

TO: Counsel and All Parties of Record in All Common Fund Matters
FROM: Workers' Compensation Court
RE: Affidavit
DATE: December 6, 2005

Affidavit

Attached is a blank form affidavit. If any insurer, self-insured, or guaranty association believes it should be dismissed from any of the common fund matters, you are directed to complete the affidavit and return it to the Workers' Compensation Court. If none of the enumerated reasons apply, you must prepare a separate affidavit for the Court's review.

JB

FILED

DEC - 6 2005

OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

EXHIBIT 'A'
pg 1053

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. _____

Petitioner

vs.

Respondent/Insurer.

AFFIDAVIT

STATE OF _____)
County of _____) : ss.

¶1 I, _____ (NAME), being first duly sworn upon oath, depose and say:

¶2 I, _____ (NAME), am the _____ (POSITION) of _____ (NAME OF INSURER OR SELF-INSURER).

¶3 In my capacity as _____ (POSITION) of _____ (NAME OF INSURER OR SELF-INSURER), I am authorized to make the statements set forth in this affidavit on behalf of _____ (NAME OF INSURER OR SELF-INSURER) and to bind _____ (NAME OF INSURER OR SELF-INSURER) by these statements.

¶4 After a review of our records, I swear under oath that _____ (NAME OF INSURER OR SELF-INSURER) should be dismissed from the above-entitled action for any or all of the following reasons (check any or all that apply):

Ex A 17 2 of 3

- _____ (NAME OF INSURER OR SELF-INSURER) has never written workers' compensation insurance in the state of Montana;
- _____ (NAME OF INSURER OR SELF-INSURER) does not have any Montana claims;
- _____ (NAME OF INSURER OR SELF-INSURER) has no claimants meeting the Court's criteria in this matter as set forth in the summons;
- _____ (NAME OF INSURER OR SELF-INSURER) was or is in liquidation during the period in question set forth in the amended summons served upon me.

¶5 I understand that the Montana Workers' Compensation Court may allow a period of up to 90 days from the date of filing this affidavit within which counsel for Petitioner[s] may conduct discovery and investigation for the limited purpose of proving or disproving the foregoing statement(s) made by me on behalf of _____ (NAME OF INSURER OR SELF-INSURER). After such 90 days, if no objection is lodged by counsel for Petitioner[s], the Court will dismiss the insurer/self-insurer from this action based on the sworn statements made by me in this affidavit.

¶6 I declare under penalty of perjury that the foregoing is correct.

DATED this _____ day of _____, 200_.

(Name)

(Title)

Signed and sworn to before me this _____ day of _____, 200_.

Notary Public for the State of _____
Residing at: _____
My Commission Expires: _____

(SEAL)

Ex A 07 3093

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 2000 - 0222

ROBERT FLYNN and CARL MILLER,
Individually and on Behalf of Others Similarly Situated,

Petitioners

vs.

MONTANA STATE FUND,

Respondent/Insurer,

and

LIBERTY NORTHWEST INSURANCE CORPORATION,

Intervenor.

FILED

FEB 18 2014

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

AFFIDAVIT

State of Oregon

:ss

County of Multnomah

1. I, Tathay McNeilly, Being first duly sworn upon oath, depose and say:
2. I, Tathay McNeilly, am the Assistant Vice President for Workers' Compensation Primary Claims for AIG Property Casualty Inc.
3. In my capacity as Assistant Vice President for Workers' Compensation Primary Claims for AIG Property Casualty Inc I am authorized to make the statements set forth in this affidavit on behalf of AIG Property Casualty Inc and to bind AIG Property Casualty Inc by these statements.
4. I have reviewed the *Summons*, the *Notice of Claim of Attorney Fee Lien*, and the *Amended Notice of Attorneys Lien* filed in the above captioned matter (the "*Flynn*" case" or "*Flynn*"). Pursuant to the criteria set forth in those pleadings, and as further clarified in the cases entitled *Flynn v. State Compensation Ins. Fund*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397; *Flynn v. Montana State Fund*, 2008 MT 394, 347 Mont. 146, 197 P.3d 1007; and *Flynn v. Montana State Fund*, 2011 MT 300, 363 Mont. 55, 267 P.3d 23; there are two claimants covered under workers compensation insurance policies issued by AIG Property Casualty Inc who appear to fall within the scope of the *Flynn* common fund and the attorney fee

EXHIBIT

'B'

pg 1 of 3

DOCKET ITEM NO. 714

PDF

lien asserted by the Petitioner's counsel in *Flynn*. The relevant information for these claimants are:

A. Name: Barbara Ehman
Claim Number: 073-803397
Date of Injury: 12/25/1984

Based upon my search of the claim files, Ms. Ehman was identified as a potential claimant meeting the criteria for a *Flynn* claimant. Ms. Ehman was contacted and provided documentation establishing that she had incurred \$3,430.59 in attorney's fees in order to obtain Social Security Disability Benefits.

On 2/4/2014, AIG Property Casualty Inc, at my direction, sent Ms. Ehman a check in the amount of \$1,029.18 which represents one-half of her attorneys fees incurred minus 40% (\$686.12) thereof withheld for the attorney fee lien asserted by counsel for Petitioner, Rex Palmer, pursuant to the *Amended Notice of Attorneys Lien* filed in this action on January 2, 2004.

AIG Property Casualty Inc is prepared to pay the withheld 40% (\$686.12) either to Mr. Palmer or to Ms. Ehman, as the Court shall direct.

B. Name: Shawn Heidrick
Claim Number: 071-069776
Date of Injury: 2/19/2001

Based upon my search of the claim files, Mr. Heidrick was identified as a potential claimant meeting the criteria for a *Flynn* claimant. Mr. Heidrick was contacted and provided documentation establishing that he had incurred \$5,300 in attorney's fees in order to obtain Social Security Disability Benefits.

On 2/4/2014, AIG Property Casualty Inc, at my direction, sent Mr. Heidrick a check in the amount of \$1,987.50 which represents one-half of his attorney's fees minus 25% (\$662.50) thereof withheld for the attorney fee lien asserted by counsel for Petitioner, Rex Palmer, pursuant to the *Amended Notice of Attorneys Lien* filed in this action on January 2, 2004.

AIG Property Casualty Inc. is prepared to pay the withheld 25% (\$662.50) either to Mr. Palmer or to Mr. Heidrick as the Court shall direct.

5. Other than Ms. Ehman and Mr. Heidrick, AIG Property Casualty Inc has no claimants meeting the *Flynn* criteria as set forth in the *Summons*.

Ex B pg 2 of 3

6. I declare under penalty of perjury that the foregoing is correct.

Dated this 12th day of February, 2014.

Tathay McNeilly

Tathay McNeilly
Assistant Vice President for Workers' Compensation
Primary Claims for AIG Property Casualty Inc

Signed and sworn to before me this 12th day of February, 2014

Dawn Patz
(Signature of Notary)

Dawn Patz
(Typed, stamped or printed Name of Notary)

(NOTARIAL SEAL)

Notary Public for the State of Oregon
Residing at Milwaukie OR
My commission expires 3-13-15



Ex'B' 3-53