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FILED

JUN 20 2005

Of Attorneys for J.H. Kelly, LLC

OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT
OF THE STATE OF MONTANA

WCC No. 2000-0222

9 ROBERT FLYNN,

10 Petitioner,

11 vs.

12 MONTANA STATE FUND,

13 Respondent/Insurer,

14 and

15 LIBERTY NORTHWEST INSURANCE
16 CORPORATION

17 Intervenor.

18 **RESPONSE TO SUMMONS OF J.H.
KELLY, LLC**

19 Pursuant to the Court's Summons of May 4, 2005, respondent
20 J.H. Kelly, LLC files its Response.

21 The Summons resulted from a Notice of Attorney's Lien filed
22 by Mr. Flynn's attorney, Mr. Rex Palmer, claiming a lien with
23 respect to benefits payable as a result of the Montana Supreme
24 Court's decision in *Flynn v. Montana State Fund*, 2002 MT 279,
312 Mont. 410, 60 P.3d 397 (2002).

- 25 1. According to paragraph 1. of the Court's Summons, *Flynn*
26 "held that an insurer is liable for one-half of the
attorney fees a claimant incurs in obtaining social
security disability benefits which are offset by the
insurer against his or her workers' compensation benefits."

Ronald W. Atwood, P.C.
Attorney at Law

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Portland, OR 97204
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6-20-05

1 2. Paragraph 4. of the Court's Summons provides:

2 "4. If you dispute the entitlement of claimants
3 insured by you to additional benefits under the *Flynn*
4 decision, then your response must set forth the
5 particular grounds and defenses you may have and you
need not at present provide the information required
in the next paragraph numbered as 5."

6 3. J.H. Kelly, LLC disputes that any claimants insured by it
7 are entitled to additional benefits under *Flynn*, for the
following reasons:

8 (a) This is not a proper "common fund" case, for the
9 reasons set forth in Justice Rice's dissent in
10 *Flynn*. As he lamented in the penultimate paragraph
11 of his dissent: "* * * Arguably, the [common fund]
12 doctrine is now applicable to virtually anyone
deriving a benefit from a claimant's settlement or
award. That was not, and is not, the purpose of the
doctrine."

13 (b) There is no reason why Mr. Palmer, who performed no
14 service in obtaining social security disability
15 benefits for anyone other than his own clients,
16 should be entitled to an insurer-paid fee under
17 *Flynn* for claimants for whom he did not obtain
18 social security benefits. If the common fund is an
equitable concept, the misapplication of that
concept results in "unjust enrichment" by granting
fees to lawyers who have not earned them.

19 (c) *Flynn* should not be applied retroactively to cases
20 that have become final or were settled prior to the
21 decision's issuance. *Dempsey v. Allstate Insurance*
22 *Co.*, 325 Mont. 207, 104 P.3d 483 (2004). See also
23 *Schmill v. Liberty Northwest Insurance Corporation*,
2005 WL 1332128 (June 7, 2005) (expanding on
Dempsey's "final or settled" language to mean "in
the context of workers' compensation law").

24 4. J.H. Kelly, LLC wishes to advise the Court, in the event it
25 is subsequently requested to provide the information
26 requested in paragraph 5, of the practical and logistical
difficulties in doing so. Kelly became self-insured in
Montana on approximately 1/01/92; Kelly has had four
different third party administrators since that time; there

Ronald W. Atwood, P.C.
Attorney at Law

1 have been 171 Montana claims. Determining which claimants
2 are "Flynn-type" claimants will require a search of Kelly's
3 database to determine their identity, followed by a search
4 of the archived files. Kelly believes its current
5 administrator, Intermountain, has access to all the
6 archived files, however, Kelly is not aware at this time
7 where those archives are located.

- 8
- 9 5. J.H. Kelly, LLC can advise the Court at this time that it
10 is aware of no current files that fall within the *Flynn*
11 category of affected claimants. If subsequently instructed
12 to do so by the Court, Kelly will make a diligent search of
13 its files but at this point believes that there are no
14 additional benefits payable under the *Flynn* decision, for
15 the reasons stated above.
- 16 6. J.H. Kelly, LLC incorporates in this Response any and all
17 defenses that are raised by any of the other
18 Respondents/Insurers in this proceeding.
- 19 7. J.H. Kelly, LLC reserves the right to seek amendment of
20 this Response as circumstances dictate.

21 WHEREFORE, having fully answered the Court's Summons and
22 notice to appear, J.H. Kelly, LLC prays for relief in accordance
23 with the positions and defenses set forth above.

24 Respectfully submitted this 20th day of June, 2005.

25 **RONALD W. ATWOOD, P.C.**

26 By: 

RONALD W. ATWOOD, MSB #5959
of Attorneys for J.H. Kelly, LLC

CERTIFICATE OF SERVICE BY MAIL

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I, Kimberley J. Wouters, hereby declare and state:

I am over the age of eighteen years, employed in the City of Portland, County of Multnomah, State of Oregon, and not a party to the within action. My business address is Ronald W. Atwood, P.C., 333 S.W. Fifth Avenue, 200 Oregon Trail Building, Portland, Oregon, 97204.

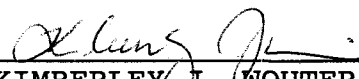
On June 20, 2005, I served the within **RESPONSE TO SUMMONS OF J.H. KELLY, LLC**, on the parties in said caused by placing a true thereof enclosed in a sealed envelope with postage prepaid thereon in the United States Post Office at Portland, Oregon, addressed as follows:

Workers' Compensation Court
P.O. Box 537
Helena, MT 59624-0537

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

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

EXECUTED June 20, 2005 at Portland, Oregon.



KIMBERLEY J. WOUTERS
Legal Secretary

Ronald W. Atwood*

Sara Turner
Legal Assistant

Enoy Lawless
Legal Assistant

* Licensed in Oregon,
Washington and Montana

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June 20, 2005

VIA FACSIMILE & U.S. MAIL

Workers' Compensation Court
P.O. Box 537
Helena, MT 59624-0537

Re: *Robert Flynn v. Montana State Fund and Liberty
Northwest Insurance Corporation
WCC No. 2000-0222*

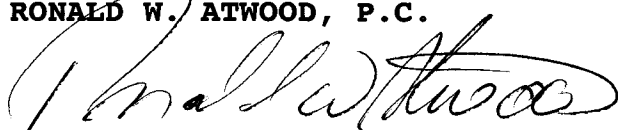
Dear Staff:

We have enclosed the RESPONSE TO SUMMONS OF J.H. KELLY,
LLC, for your review and consideration.

Thank you for your time and attention to this matter.

Very truly yours,

RONALD W. ATWOOD, P.C.



RONALD W. ATWOOD

RWA/kjw

Enclosure

cc w/enc.: Mr. Rex L. Palmer
Mr. Rick Davenport
Ms. Barbara Jones

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