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**FILED**

**JUL 13 2005**

OFFICE OF  
WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

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.

WCC No. 2000-0222

RESPONSE TO SUMMONS AND  
NOTICE OF ATTORNEY FEE LIEN

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COMES NOW L.H.C., Inc., by and through its counsel of record, Crowley, Haughey, Hanson, Toole & Dietrich P.L.L.P., and files this response to the *Summons and Notice of Attorney Fee Lien* issued in this case as follows:

**RESPONDENT, L.H.C., INC., DISPUTES THE ENTITLEMENT OF FLYNN  
BENEFICIARIES TO ADDITIONAL BENEFITS**

Respondent disputes the entitlement of claimants to additional benefits under the *Flynn* decision. The grounds upon which Respondent disputes said entitlements are as follows:

DOCKET ITEM NO. 319

1. Certain claimants' entitlement to *Flynn* benefits are precluded by the passage of time and the applicability of the doctrines of waiver, estoppel, laches, and/or various statutes of limitations.

2. An order requiring Respondent to pay *Flynn* benefits and/or to pay or withhold the attorney lien in favor of Rex Palmer is prohibited by the due process clause of the Montana Constitution, Article II, Section 17. Respondent was not a party to and did not have an opportunity to be heard on the merits of the *Flynn* or *Miller* cases.

3. An order requiring Respondent to pay *Flynn* benefits and/or to pay or withhold the attorney lien in favor of Rex Palmer is prohibited by the due process clause of the 14<sup>th</sup> Amendment to the United States Constitution. Respondent was not a party to and did not have an opportunity to be heard on the merits of the *Flynn* or *Miller* cases.

4. No common fund may be maintained against Respondent in this case because the purported non-participating beneficiaries of the *Flynn* decision are not ascertainable for several reasons, including but not limited to: (a) Montana statutes and regulations do not require the indefinite retention of claim files; and (b) Montana statutes and regulations do not presently and have not previously required that claimants report to the workers' compensation insurer paying benefits the amount of attorney fees paid by claimants to obtain SSDI benefits.

5. Petitioners' common fund attorney's lien does not and cannot extend to "all Montana workers' compensation claimants who incurred costs or fees to obtain a social security award for which the entity providing workers' compensation coverage took an offset or had a policy of taking an offset without accounting for the costs incurred by the claimant to recover the award" from July 1, 1974 through August 3, 2003." Petitioners' purported attorney lien notice is overbroad because workers' compensation claimants whose claims were released or closed are not entitled to additional benefits. Moreover, to the extent that closed claim files have not been retained, such claimants are unascertainable.

6. Even if a common fund were created through the efforts of Petitioners, neither Petitioners nor their attorney are entitled to a fixed percentage of additional benefits that may be awarded to non-participating beneficiaries with whom neither Petitioners nor their attorney have any relation. Under the common fund doctrine, non-participating beneficiaries should contribute, in proportion to the benefits actually received by them, only to the litigation costs incurred by Petitioners in the *Flynn* and *Miller* litigation, including reasonable attorney fees. The maximum amount of costs and attorneys' fees recoverable by the participating litigants and/or their attorney is limited to those costs and fees actually incurred in creating the benefit for the non-participating beneficiaries.

7. Respondents request and reserve the right to assert additional grounds and defenses, or to adopt the grounds presented by others responding to the *Summons* as circumstances apply and warrant.

Respondent further states that it is not an insurance company. Investigation has revealed that Respondent was listed in the *Summons and Notice of Attorney Fee Lien* because the Department of Labor & Industry had advised this Court that Respondent was a Plan 1 self-insurer. While Respondent had, at one point, attempted to qualify as a Plan 1 self-insurer, it denies that it was ever such a self-insurer during the period specified in the *Summons and Notice of Attorney Fee Lien*. Respondent is currently attempting to locate documentation which would establish that it was never a Plan 1 self-insurer during the relevant period. Accordingly, Respondent reserves the right to move this Court to dismiss Respondent in the event that it is able to document that it was never a self-insurer, and thus has no *Flynn*-type liability.

WHEREFORE, Respondent respectfully requests this Court to enter an order denying the entitlement to *Flynn*-type benefits by any potential claimants insured by Respondent.

Dated this 13<sup>th</sup> day of July, 2005.

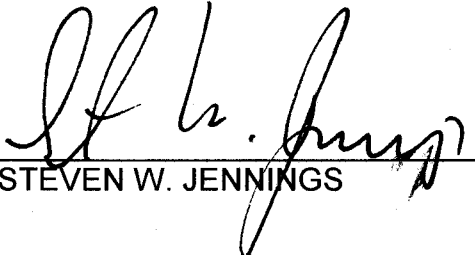
CROWLEY, HAUGHEY, HANSON,  
TOOLE & DIETRICH P.L.L.P.  
Attorneys for L.H.C., Inc

By:   
STEVEN W. JENNINGS

**CERTIFICATE OF SERVICE**

I, STEVEN W. JENNINGS, one of the attorneys for the law firm of Crowley, Haughey, Hanson, Toole & Dietrich P.L.L.P., hereby certify that on the 13<sup>th</sup> day of July, 2005, I mailed a true and correct copy of the foregoing document, postage prepaid, to the following:

Mr. Rex Palmer  
Attorneys Inc., PC  
301 W. Spruce  
Missoula, MT 59802

  
STEVEN W. JENNINGS