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**FILED**

JUN 20 2005

OFFICE OF  
WORKER'S 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

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COMES NOW Petroleum Casualty Company and in response to this Court's  
*Summons*, dated May 4, 2005, states as follows:

**I. PETROLEUM CASUALTY COMPANY DISPUTES THE ENTITLEMENT OF  
FLYNN BENEFICIARIES TO ADDITIONAL BENEFITS**

Petroleum Casualty Company disputes the entitlement of claimants insured by it  
to additional benefits under the *Flynn* decision. The grounds upon which Petroleum  
Casualty Company disputes said entitlements are as follows:

1. An order requiring Petroleum Casualty Company to identify all *Flynn* beneficiaries creates an unreasonable and undue burden upon Petroleum Casualty Company.
  2. An order requiring Petroleum Casualty Company to pay *Flynn* benefits and/or to pay or withhold the attorney lien in favor of Rex Palmer is prohibited by Article 1, Section 17 of the Montana Constitution.
  3. An order requiring Petroleum Casualty Company 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.
- II. **PLEADING IN THE ALTERNATIVE, IN THE EVENT THAT *FLYNN* ENTITLEMENTS ARE NOT BARRED FOR THE REASONS ENUMERATED ABOVE, AN ORDER REQUIRING PETROLEUM CASUALTY COMPANY TO PAY OR WITHOLD THE ATTORNEY LIEN IN FAVOR OF REX PALMER IMPERMISSABLY REQUIRES PETROLEUM CASUALTY COMPANY TO ACT AS A SURETY FOR THE INDEBTEDNESS OF *FLYNN* BENEFICIARIES TO MR. PALMER.**
- III. **FURTHER PLEADING IN THE ALTERNATIVE, IN THE EVENT THAT *FLYNN* ENTITLEMENTS ARE NOT BARRED FOR THE REASONS ENUMERATED ABOVE, PETROLEUM CASUALTY COMPANY IS ENTITLED TO AN OFFSET FROM SUCH ENTITLEMENTS IN AN AMOUNT EQUAL TO THE COST OF IDENTIFYING AND LOCATING EACH *FLYNN* BENEFICIARY.**
- IV. **FURTHER PLEADING IN THE ALTERNATIVE, IN THE EVENT THAT *FLYNN* ENTITLEMENTS ARE NOT BARRED FOR THE REASONS ENUMERATED ABOVE, MR. PALMER IS NOT ENTITLED TO AN ATTORNEY FEE LIEN IN THE AMOUNT OF TWENTY-FIVE PERCENT OF THE BENEFIT ACCRUED TO NON-PARTICIPATING *FLYNN* BENEFICIARIES.**

Neither Petitioners nor their attorney Rex Palmer are entitled to twenty-five percent of additional benefits that may be awarded to non-participating beneficiaries of the *Flynn* decision. Under the common fund doctrine, the maximum amount of costs and attorneys fees recoverable by the participating litigant and/or his attorney is limited to those costs and attorneys fees actually incurred in creating the benefit for the non-participating beneficiaries. As twenty-five percent of the collective value of the benefits accrued to non-participating beneficiaries in this case would likely exceed the actual costs and fees incurred by Petitioners, neither they nor their attorney are entitled to that percentage. Rather, the costs and attorneys fees for which each beneficiary is liable is determined by dividing Petitioners' actual costs and fees by the number of beneficiaries and then adjusting each beneficiaries liability to a figure above or below the average based upon the greater than average or lesser than average benefit received.

Accordingly, neither Petitioners nor their attorney are entitled to twenty-five percent of each non-participating beneficiary's monetary benefit. Likewise, neither Petitioners nor their attorney are entitled to any costs or fees until such time as they demonstrate an accurate percentage to be withheld from each beneficiary's monetary benefit.

**III. FURTHER PLEADING IN THE ALTERNATIVE, IN THE EVENT THAT *FLYNN* ENTITLEMENTS ARE NOT BARRED FOR THE REASONS ENUMERATED ABOVE, PETROLEUM CASUALTY COMPANY, PROVIDES THE FOLLOWING INFORMATION REQUESTED IN PARAGRAPH 5 OF THE SUMMONS.**

1. Responding to paragraph 5 of the *Summons*, Petroleum Casualty Company states as follows:

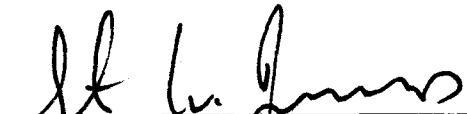
Petroleum Casualty Company has reviewed all Montana workers' compensation claims since 1974 coded greater than TTD as well as those TTD claims with indemnity payments of greater than \$20,000. 38 claims were identified by the computer query as creating potential liability for *Flynn*-type benefits. However, whether any of the identified claimants received Social Security Disability Benefits and whether Petroleum Casualty Company subsequently took an offset for such benefits cannot be determined from the computerized files. Accordingly, Petroleum Casualty Company is currently in the process of locating and reviewing each of the 38 paper files identified. Petroleum Casualty Company estimates that this process will take approximately three to four weeks. Petroleum Casualty Company will supplement this response upon complete review of the files.

WHEREFORE, Petroleum Casualty Company respectfully requests the following relief:

1. an order dismissing this action on the grounds that the *Flynn* entitlement does not exist for any of the reasons enumerated in paragraph 1 above, or alternatively;
2. an order; permitting Petroleum Casualty Company to supplement this *Response* by July 20, 2005.

Dated this 17<sup>th</sup> day of June, 2005.

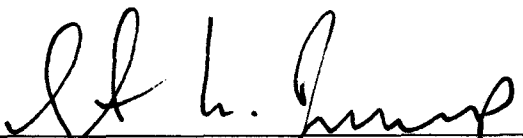
CROWLEY, HAUGHEY, HANSON,  
TOOLE & DIETRICH P.L.L.P.  
Attorneys for Petroleum Casualty Company

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 17<sup>th</sup> day of June, 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

  
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STEVEN W. JENNINGS