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IN THE WORKERS COMPENSATION COURT OF THE STATE OF MONTANA
IN AND FOR THE AREA OF KALISPELL
BEFORE THE WORKERS' COMPENSATION JUDGE

CASSANDRA SCHMILL, Petitioner, vs. LIBERTY NW INS. CORP., Respondent/Insurer, and MONTANA STATE FUND, Intervenor.	WCC NO. 2001-0300 PETITIONER'S OPENING BRIEF REGARDING RETROACTIVITY

COMES NOW the Petitioner, CASSANDRA SCHMILL, by and through her attorney of record, and submits the following brief pursuant to the Court's Order dated December 11, 2006. In that order, the Court asked the parties to brief the following issues:

(1) What *Schmill* claims (with entitlement dates between July 1, 1987, and June 22, 2001) are subject to review and increase in benefits based upon a retroactive application of *Schmill* I?

(2) Whether the scope of retroactive application is limited by any applicable statute of limitations or laches.

(3) Whether the Uninsured Employers' Fund falls within the ambit of the Montana Supreme Court's decision in *Schmill* II.

DOCKET ITEM NO. 348

1. What *Schmill* claims (with entitlement dates between July 1, 1987, and June 22, 2001) are subject to review and increase in benefits based upon a retroactive application of *Schmill* I?

According to *Schmill v. Liberty NW Ins. Corp.,* 2005 MT 144, 327 Mont. 293, 114 P.3d 204 (*Schmill II*), the foregoing question is answered as follows:

> "*Schmill I* is retroactive to all cases not yet final or settled at the time of its issuance." ¶28

In order to understand what "final or settled" means in the context of *Schmill I*, the Court needs to look at the types of claims which are potentially impacted by the *Schmill I* decision. There are five potential sets of claims:

1. Claims[1] in which TTD benefits are being paid and were either apportioned in the past, or are still being apportioned.

2. Claims in which TTD benefits were paid at an apportioned rate, the claimant returned to work with no wage loss, no additional benefits were paid other than medical benefits.

3. Claims in which TTD benefits were paid at an apportioned rate, the claimant was found to be PTD and benefits were paid at an apportioned rate, PTD benefits are either continuing to be paid, or stopped automatically because the claimant reached retirement age.

4. Claims in which TTD and/or PTD benefits were paid at an apportioned rate and the claim was settled by way of a petition for settlement approved by DLI or a stipulated judgment. (OD settlements could only be paid out in a lump sum, not bi-weekly. §§39-72-405 and 39-72-711, MCA.)

5. Judgments.

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[1] The Claimant's use of the word "claims" is intended only to apply to the *Schmill I* claims (July 1, 1987 to June 22, 2001).

In *Stavenjord v. Montana State Fund*, 2006 MT 257, 334 Mont. 117, 146 P.3d 724, the Supreme Court provided us with the following definitions of open, settled, and final claims:

> "'Open claims' will encompass those which are still actionable, in negotiation but not yet settled, now in litigation, or pending on direct appeal." ¶15 . . . "*Stavenjord I* does not apply to occupational disease-related PPD claims that became final by way of settlement of judgment prior to the issuance of this opinion . . . Occupational disease-related claims for PPD benefits previously finalized and closed by either court order, or settlement and release, may not be reopened for consideration under *Stavenjord I* or this opinion." ¶16. [Emphasis added.]

By conservatively applying these definitions to the five claims categories listed above, certain conclusions can be drawn. First, since Class I claims are "still actionable" because they are open claims in which TTD benefits are currently being paid, *Schmill I* would apply retroactively to these claims. Second, the same conclusion applies to Class III claims in which PTD benefits are currently being paid. Third, Class IV claims meet the *Stavenjord II* definition of "final" and thus *Schmill I* would not apply retroactively to these claims.

The Claimant believes that all parties should be able to agree to the foregoing conclusions. As to Class II claims and those Class III claims which were paid until the claimant's retirement, the Claimant asserts that such claims are "still actionable," or conversely, not "final or settled" and thus *Schmill I* would apply retroactively to these claims. The defense to this argument is that the claims were "paid in full" and, therefore, such claims are "final or settled." There is no legal basis to support this argument.

The Respondents rely on section 39-71-107(7)(a), MCA (2001), for the argument that "settled" claims include claims "paid in full." There are two reasons why this argument must fail. The full text of section 39-71-107(7)(a), MCA (2001) is as follows:

> "For purposes of **this section**, 'settled claim' means a department-approved or court-ordered compromise of benefits between a claimant and an insurer or a claim that was paid in full." [Emphasis added.]

First, by its own terms, section 39-71-107(7)(a), MCA (2001)'s definition of "settled claim" applies only to section -107, not the entire WCA. Within section -107 the phrase "settled claim" is used in reference to describing the duties of an instate claim's examiner. For example, a "settled claim" stored away from the claim's examiner's office must be made available to a requesting claimant or the department within 48 hours. §39-71-107(3), MCA

(2001).[2] There is nothing in section -107 which indicates an intention on the part of the legislature to state a general purpose definition of "settled claims" to be used throughout the entire WCA/ODA. Therefore, the language of section -107 should be interpreted as written and limit the definition of settled claims in section 39-71-107(7)(a), MCA (2001) to section 39-71-107, MCA (2001).

Second, section 39-71-107(7)(a), MCA (2001) was enacted in 2001 and made effective July 1, 2001. The *Schmill I* decision is limited to claims in which apportionment was taken prior to and including June 22, 2001, for occupational disease claims occurring on or after July 1, 1987. Therefore, none of the *Schmill I* claims are subject to the 2001 WCA/ODA.

An additional defense to the Class II and III claims will likely be the argument that the mere passage of time without the payment of benefits converts an "open" claim into a "settled" claim. The Court rejected this argument in *Flynn v. Montana State Fund*, 2006 MTWCC 31, and for the same reasons the argument should be rejected here.

Additionally, when viewed as a whole, there are many provisions in the WCA which inherently reject the notion that an inactive claim is a settled claim. For example, in section 39-71-407, MCA, the legislature broadly defined an insurer's liability for work-related injuries. More importantly, the legislature also enumerated exceptions to the insurer's liability within the statute, but did not include "inactive claims" as one of the exceptions.

Moreover, while both the WCA and ODA set out statutes of limitations for claim filings, neither act states a statute of limitations with respect to benefits which may become due in the future. This Court has recognized that a claimant has a right to seek benefits "years and even decades after her injury or disease." *Stavenjord v. Montana State Fund*, 2004 MTWCC 62, ¶20.

Finally, it just doesn't make sense that a statutory scheme which so carefully sets out a procedure for settling claims and which gives the judge opportunities for reopening prior judgments and awarding additional benefits, would permit claims to silently extinguish as a result of the mere passage of time. §§39-71-741 and -2909, MCA. The Respondents point to nothing in the WCA/ODA which supports this argument and, therefore, it must fail. Since Class II and III claims are neither final nor settled, *Schmill I* applies retroactively to these claims.

The final class of potential *Schmill I* claims is judgments. The Court in *Flynn* held that "a final claim is a claim in which a final judgment has been entered by this Court, provided

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[2] The existence of this statutory duty undermines the Respondents' entire "paid in full" argument. If "settled" and "paid in full" claims were truly "final," there would be no need to retrieve these files for any purpose and thus no need to have a statutory duty to retrieve these files with 48 hours. The fact that such a duty exists implies the need to retrieve and review both settled and paid in full claims and possibly take further action, including payment of additional benefits.

the claim is not currently pending on appeal." ¶25. The Claimant agrees with this definition provided it is limited to judgments which finally resolved the entire OD claim. For example, if the judgment only resolved a dispute over medical benefits, or the judgment imposed liability against an insurer, such judgments should not prevent retroactive application of *Schmill I* as the claims continued after the judgment was entered. Such claims eventually ended up as a Class I, II or III claim. Only those claims which were resolved once and for all as a result of the entry of the judgment should be considered "final" for purposes of *Schmill I* retroactivity.

(2) Whether the scope of retroactive application is limited by any applicable statute of limitations or laches.

There are no applicable statutes of limitations or laches which limit the retroactive application of *Schmill I* to Class I, II, or III claims. Having survived the "final or settled" limitation, these claims cannot be excluded from the application of *Schmill I* on some other basis. To do so would expand the definitions of "final or settled" beyond their recognized meanings. The Respondents cannot cite to any case law in which a court has defined "finality" by reference to a statute of limitations. This is because statutes of limitations prevent the creation of a legal claim, they don't extinguish an already existing legal claim. Since all of the OD claims in Classes I, II, and III were accepted claims where benefits have been paid when *Schmill I* was decided, they cannot now be extinguished by a statute of limitations.

This same reasoning defeats the Respondents' argument that the two year statute of limitations found at section 39-71-2905, MCA (1997), bars certain Class I, II, and III claimants from pursuing *Schmill I* benefits because they failed to file a petition for hearing within two years of the termination of their benefits. A statute of limitations cannot run on a right that does not yet exist. *Cechovic v. Hardin & Assoc. Inc.,* (1995), 273 Mont. 104, 119, 902 P.2d 520, 529. Prior to *Schmill I*, none of the Class I, II, or III claimants had a right to demand payment of unapportioned benefits. Since no right to unapportioned benefits existed, no demands for payment of benefits could be made and, therefore, no statute of limitations began to run.

Likewise, the same reasoning defeats the defense of laches. Laches is an equitable doctrine "which exists where there has been an unexplainable delay of such duration or character as to render the enforcement of an asserted right inequitable." *Sperry v. Montana State University* (1989), 239 MT 25, 31, 778 P.2d 895, 899. However, laches is only appropriate "[w]here a party is actually or presumptively aware of his rights but fails to act . . ." *Id.*

Since the right to unapportioned benefits did not exist prior to *Schmill I*, no Class I, II, or III claimant could have been actually or presumptively aware of such a right prior to the decision, and thus cannot be found to have failed to act. The Respondents want this Court to apply the doctrine of laches to the claimant's opportunity to challenge the existing law by finding that the claimants prior failure to challenge the law now prevents them from being able to assert a right which arose once the law was successfully challenged years later.

However, laches does not apply to the opportunity to challenge a law, but to an unexplainable delay in enforcing an already existing right. Again, since the right to unapportioned benefits did not exist until *Schmill I*, the delay, if any exists, must be determined from the date of the decision forward. Obviously, no unexplainable delay has occurred since that time.

The last defense the Respondents may raise is that of waiver. Waiver is also an equitable doctrine which applies "when there is an intentional or voluntarily relinquishment of a known right, claim, or privilege, or such conduct as warrants an inference of the relinquishment of such right." *Sperry*, 239 Mont at 30, 778 P.2d at 898. Section 39-71-409, MCA prohibits an employee from waiving any of his rights under the WCA. In light of this statutory prohibition, waiver is not a defense in this case.

(3) Whether the Uninsured Employers' Fund falls within the ambit of the Montana Supreme Court's decision in *Schmill* II.

Pursuant to section 39-71-503(1)(a), MCA, the UEF is required to pay an injured employee "the same benefits the employee would have received if the employer had been properly enrolled under compensation Plan 1, 2, or 3 . . ." The only exception to this requirement to pay full benefits is if the UEF does not have sufficient funds. §39-71-503(3), MCA. Under such circumstances, the UEF is to give the payment of weekly disability benefits preference over payment of medical benefits and to make "appropriate proportionate reduction in benefits to all claimants." §§39-71-503(3) and -510.

As the foregoing statutes make clear, the UEF's duty to pay full benefits is not dependent on whether it's "an insurer," but on whether it's financially solvent. Even if the UEF is not financially solvent, it is required to pay TTD/PTD benefits before medical benefits.

With these principles in mind, the Claimant would assert that the UEF must pay *Schmill* claimants all TTD/PTD benefits they are due to the extent of its financial solvency and it must give such payments priority over payment of medical benefits.

CONCLUSION

The decision in *Schmill I* applies retroactively to all claims in which apportionment was taken prior to and including June 22, 2001, for dates of ODs occurring on or after July 1, 1987, and which were not "final or settled" at the time of the *Schmill I* decision. Settled claims are those claims which a department approved settlement or Court ordered compromise of benefits has been made between the claimant and the insurer. A final claim is a claim in which a final judgment has been entered by the Workers' Compensation Court leaving no open benefit entitlement other than additional medical benefits. All claims which are neither final nor settled shall be subject to the retroactivity of *Schmill I*.

DATED this 15 of December, 2006.

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By: Laurie Wallace
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CERTIFICATE OF MAILING

I, Robin Stephens, do hereby certify that on the 15 day of December, 2006, I served a true and accurate copy of the PETITIONER'S OPENING BRIEF REGARDING RESTROACTIVITY by U.S. mail, first class, postage prepaid to the following:

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December 15, 2006

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RE: SCHMILL v. LIBERTY NW INS. CORP.
WCC No. 2001-0300

Dear Ms. Wilson:

Enclosed please find the Petitioner's Supplemental Trial Brief in regard to the above-referenced matter.

Should you have any questions concerning this matter, please contact me directly.

Sincerely,

LAURIE WALLACE
BOTHE & LAURIDSEN, P.C.

LW/rs
Enc.
cc: Bradley Luck
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