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OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CASSANDRA M. SCHMILL, Petitioner, v. LIBERTY NORTHWEST INSURANCE CORPORATION, Respondent/Insurer and MONTANA STATE FUND, Intervenor.	WCC No. 2001-0300 **STATE FUND'S ANSWER BRIEF REGARDING RETROACTIVITY**

COMES NOW the Intervenor, Montana State Fund ("State Fund"), and hereby files its Answer Brief Regarding Retroactivity, Statute of Limitations and Laches, and status of the Uninsured Employers' Fund, the issues set out in the Workers' Compensation Court's November 8, 2006, Order Delineating Issues to be Briefed, and December 11, 2006, Order Vacating and Resetting Briefing Schedule, and Petitioner's Opening Brief, filed December 15, 2006. The State Fund asserts that claims that have been paid in full and claims that have been resolved by judgment are exempt from retroactive application of *Schmill I*. For purposes of this action only, the State Fund takes no position on the applicability of statutes of limitations and the doctrine of laches. The State Fund seeks to focus this Court's consideration upon retroactivity concepts.

DOCKET ITEM NO. 356

BACKGROUND

The Montana Supreme Court's decision in *Schmill v. Liberty Nw. Ins. Corp.*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290 (*Schmill I*), affirmed this Court's conclusion holding Montana Code Annotated § 39-72-706 unconstitutional. The Court held that § 39-72-706 violated the equal protection clauses of the Montana and United States Constitutions because that Occupational Disease Act (ODA) statute required reduction of disability benefits based on non-occupational factors, while no such reductions were required under the Workers' Compensation Act (WCA).

Two years later, the Montana Supreme Court held that *Schmill I* applied retroactively to all affected claims arising after July 1, 1987, but not yet final or settled on the date of *Schmill I*'s issuance. *Schmill v. Liberty Nw. Ins. Corp.*, 2005 MT 144, 327 Mont. 293, 114 P.3d 204 (*Schmill II*). The Supreme Court remanded to this Court for administration of retroactive *Schmill I* benefits.

In Orders dated November 8, 2006, and December 11, 2006, this Court directed the parties to submit briefing on the issue "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*?"

The State Fund submits that this Court's reasoning in *Flynn v. Mont. State Fund*, 2006 MTWCC 31, must control which categories of *Schmill* claims are deemed final and settled, which means claims that are paid in full or resolved by final judgment are exempt from retroactive application of *Schmill I*.

ARGUMENT

I. Schmill claims that have been paid in full or settled by final judgment are exempt from retroactive application of Schmill I.

The State Fund agrees with Petitioner that certain types of claims are clearly subject to retroactive *Schmill* benefits, while others are clearly not. As stated by Petitioner, claims in which TTD benefits are being paid and were either apportioned in the past, or are still being apportioned ("Class I" claims, under Petitioner's classification scheme), are subject to retroactive application of *Schmill I*, because benefits are currently being paid. Similar reasoning means that *Schmill I* must retroactively apply to 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, and PTD benefits continue to be paid (the first of two categories of claims labeled by Petitioner as "Class III" claims, hereinafter referred to as "Class III(a) claims"). Claims settled by way of a petition for settlement approved by the Department of Labor and Industry or by way of a stipulated

judgment (Petitioner's "Class IV" claims) are inarguably final and exempt from retroactive application of *Schmill I*.

The State Fund disagrees, however, with Petitioner's assessment of three types of claims: (A) 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 (what Petitioner calls "Class II" claims); (B) claims in which TTD benefits were paid at an apportioned rate, the claimant was found to be PTD, and the PTD benefits were paid at an apportioned rate until the claimant reached retirement age (Petitioner's second class of "Class III" claims, hereinafter "Class III(b) claims"); and (C) judgments (Petitioner's "Class V" claims). The first and second of these types, Class II and Class III(b) claims, were paid in full, and are therefore "settled" pursuant to this Court's correct reasoning in *Flynn*. Class V claims, with few exceptions, were made final by judgment, and are therefore not subject to retroactive *Schmill* benefits.

A. Claims that have been paid in full are "settled."

1. This Court is bound by its reasoning in the *Flynn* decision, which applies § 39-71-107(7)(a), MCA (2005)'s definition of "settled" claim, including claims that have been paid in full.

In *Flynn*, this Court sought to interpret the Montana Supreme Court's *Schmill II* directive that "final" and "settled" claims are not subject to retroactive application of judicial decisions, as well as *Schmill II*'s implication that "closed" and "inactive" claims are likewise exempt. *Flynn*, ¶ 5 (quoting *Schmill II*, ¶¶ 18-19). This Court was faced with a difficult task, because workers' compensation claims are different from other types of claims, such as ordinary torts, and the definitions that apply in other contexts do not easily transfer to the workers' compensation arena.

Setting out to determine the meaning of "settled," this Court recognized that it need not judicially-create a definition to fit the workers' compensation context from scratch; rather, it could turn to the considered judgment of the Montana Legislature on the same subject, in the same context. This Court explained that "Section 39-71-107(7), MCA, sets forth a clear definition of what constitutes a 'settled claim.'" *Flynn*, ¶ 16. This Court reasoned that, "[j]ust as it is not this Court's function to expand upon directives from the Supreme Court, it is not this Court's function to rewrite what the legislature has already defined." *Flynn*, ¶ 16 (citing Mont. Code Ann. § 39-71-107(7)(a)). This Court concluded that "the language of § 39-71-107(7)(a), MCA (2005), defining a 'settled claim,' as 'a department-approved or court-ordered compromise of benefits between a claimant and an insurer ***or*** a claim that was paid in full,' shall be the definition of a 'settled claim' for purposes of this case." *Flynn*, ¶ 16 (emphasis added).

This Court gave further credence to the need to include paid-in-full claims in any settled definition when it dismissed the insurers' invitation to give effect to the Montana Supreme Court's implication in *Schmill II* that "closed" and "inactive" claims would also be excluded from the retroactive effect of any later judicial decision. *See Flynn*, ¶¶ 4-9 (citing *Schmill II*, ¶¶ 18-19 ("[T]he State Fund argues that a retroactive application would affect as many as 3,543 claim files . . . . [However, a]s the State Fund admits, many of these claims are settled, closed, or inactive."). This Court's rationale for excluding "closed" and "inactive" claims was simply that, if "a 'closed' or 'inactive' claim is one which has been paid in full and thus 'perfectly matches' Montana's definition of a 'settled claim' . . . , then the designations of 'closed or 'inactive' would be nothing more than redundancies since those potential claimants would already be excluded as 'settled' claims." *Flynn*, ¶ 8.

2. Section 107's definition of "settled" is not limited to post-2001 claims.

This Court did not state that its adoption of this definition was conditioned in any way upon the statute's effective date preceding the dates relevant to the *Flynn* decision, and this Court need not do so to use this definition in this and future cases. Primarily, this is because the statute does not state anything similar to "from this date forward, the definition of settled is . . . ," and it would be absurd for it to have done so. The legislature, faced with the task of defining "settled" in a workers' compensation/ occupational disease context, determined that it should include "paid in full." This Court, in *Flynn* and currently, is likewise tasked with defining "settled" in a workers' compensation/occupational disease context. This Court can, of course, invent its own definition, as urged by Petitioner, or it can take the wiser and more intellectually honest approach and borrow the definition selected by the Montana legislature. As this Court recognized, "it is not this Court's function to rewrite what the legislature has already defined." *Flynn*, ¶ 16.

The same reasoning underlies the long-standing rule that the Court must apply the rules of procedure in effect at the time of trial, even though the substantive law in effect at the time of injury applies. *See EBI/Orion Group v. Blythe* (1997), 281 Mont. 50, 54, 931 P.2d 38, 40 ("[S]tatutes in effect at the time of trial control when the subject is procedural rather than substantive."). Even when the application of a procedural rule denies a substantive right, the rule in effect at the time of trial still applies. *In re Hill*, 811 F.2d 484, 487 (9th Cir. 1987) ("The application of virtually any procedural rule can result in the denial of a 'substantive' right, yet this does not transform the procedural rule into a substantive rule."). The definition of "settled" is not a substantive law. Rather, it is a functional explanation of a process to which injured claimants have no substantive right. Because the definition of "settled" is a rule of procedure, this Court should apply the most current version, as it did in *Flynn*.

Petitioner has not shown, and cannot show, that § 39-71-107(7)(a)'s definition of "settled" should not apply in the present case. Pursuant to *Flynn*, this Court must abide by its determination that the definition of a "settled claim" provided by § 39-71-107(7)(a) applies to the present action. Under § 39-71-107 and *Flynn*, a claim that has been paid in full is a "settled claim," and is not subject to retroactivity.

3. Section 39-71-107(7)(a)'s, definition of "settled" is not restricted to disputes arising under § 107.

Petitioner argues that the statutory definition of "settled," as provided by § 39-71-107(7)(a), MCA, applies only to the remaining portions of § 107. Petitioner also asserts that § 39-71-107 is relevant only to in-state adjusting requirements, not to the Workers' Compensation Act as a whole. Petitioner points to language in § 39-71-107(7)(a) stating that the definition of settled applies "for the purposes of this section" (i.e., § 39-71-107). Thus, Petitioner argues, since this case does not involve a dispute over in-state adjusting, § 39-71-107(7)(a), may not be used to determine the meaning of a "settled" claim in this case.

Petitioner's reading of § 39-71-107 is overly restrictive. Section 39-71-107 states that the definition of "settled" applies "for the purposes of this section," *not* "for the purposes of this section *only*." This indicates only that the legislature found it necessary to define "settled" within that section so there would be no doubt as to its meaning for that section's purposes. Presumably, the legislature's decision to define the word arose from the identical concerns now plaguing this Court and the Montana Supreme Court through this and other common fund cases, i.e., how to define "settled" in a workers' compensation context. It does not, however, demonstrate that the legislature intended to give this common word a different meaning in this section than in other workers' compensation and occupational disease situations.

Petitioner's interpretation of § 39-71-107(7)(a), seeks to restrict the definition in a way the legislature did not. As the Montana Supreme Court has recognized, "it is the obligation of the reviewing court, in interpreting a statute or an Act of legislation, to simply ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." *Mont. Power Co. v. Mont. Pub. Serv. Comm'n*, 2001 MT 102, ¶ 26, 305 Mont. 260, ¶ 26, 26 P.3d 91, ¶ 26; *see also Orr v State*, 2004 MT 354, ¶ 25, 324 Mont. 391, ¶ 25, 106 P.3d 100, ¶ 25 (explaining that principles for interpreting statutes are "designed to give effect to the legislative will, to avoid an absurd result, to view the statute as a part of a whole statutory scheme and to forward the purpose of that scheme"); *Mercury Marine v. Monty's Enters., Inc.* (1995), 270 Mont. 413, 417, 892 P.2d 568, 571 (providing that Montana Supreme Court "will, if possible, construe statutes so as to give effect to all of them"). This Court should resist Petitioner's invitation to essentially insert into § 39-71-107 language which the legislature omitted.

Further, even if the definition of "settled" found in § 39-71-107(7)(a), were intended by the legislature to apply solely to § 39-71-107, and not to other chapters or sections within the Act, the definition is still applicable to this case because, in *Flynn*, this Court made it a part of the common law of workers' compensation, and rightly so. Again, faced with the option of using a legislatively-adopted definition of "settled" in a workers' compensation context or creating its own, this Court appropriately selected the legislature's definition.[1] Because it did, since September 29, 2006, the date of this Court's *Order Determining Status of Final, Settled, Closed and Inactive Claims* in *Flynn*, the law in Montana has been that the definition of a "settled claim" is the one set forth at § 39-71-107(7)(a) which defines a "settled claim" as one which has been paid in full.

This is particularly true where, as discussed above, the Court is determining whether to apply a procedural rule from the Workers' Compensation Act (i.e., the procedural definition of "settled") to claims which, like *Schmill* claims, arose under the ODA. The ODA specifically provides that, "[e]xcept as otherwise provided in this chapter, the practice and procedure prescribed in the Workers' Compensation Act applies to all proceedings under this chapter." Mont. Code Ann. § 39-72-402, (2003).[2]

In any case, as pointed out by the Montana Supreme Court in *Stavenjord II*, judicial decisions are presumed to be retroactively applicable. *Stavenjord v. Mont. State Fund, 2006 MT 257,* ¶ 14, 334 Mont. 117, ¶ 14, 146 P.3d 724, ¶ 14. Thus, this Court's

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[1] Virtually all present Montana standards for determining retroactivity have been fashioned by the Courts, utilizing common sense and borrowing from many sources of legal authority. Our present primary rule on the subject, fashioned in *Dempsey v. Allstate Ins. Co.*, 2004 MT 391, ¶ 29, 325 Mont. 207, ¶ 29, 104 P.3d 483, ¶ 29, modified the judicially-created rules emanating from *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). In *Flynn*, this Court was faced with fashioning a rule interpreting the meaning, for purposes of workers' compensation claims, of words of common usage. It properly looked to the insight and direction of the legislature on the subject, and, regardless of other arguments, was free to create an appropriate rule utilizing such reference. The rule fashioned by reference is logical, peculiar to the handling of workers' compensation claims, and legally sound in source and application.

[2] In addition, the ODA makes it clear that there are "[n]o vested right[s] to compensation." Mont. Code Ann. § 39-72-103, (2003), provides that "[t]he right to the compensation provided for herein shall not nor shall the rate or amount thereof be or become vested or continuing rights in persons awarded compensation under this chapter or any amendment hereof, but the state reserves the right, by act of the legislature, to reduce the rate or amount of compensation thereafter to be received by any person theretofore or thereafter receiving compensation under this chapter or any amendment hereof or to wholly discontinue to all persons all compensation provided for by this chapter or any amendment hereof."

reasoning in *Flynn* is retroactively applicable to all claims made prior to the date of the *Flynn* order adopting that definition.

Petitioner makes a technical argument that the § 39-71-107 definition does not apply, but presents no persuasive argument for this position, nor for why any alternative definition is preferable. Petitioner's proposed definition is identical to the § 39-71-107 definition in all respects except for the inclusion of claims that are "paid in full." Pet'r's Opening Br. Regarding Retroactivity 6 (Dec. 15, 2006)("Pet'r's Br.") ("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."). Petitioner does not argue or demonstrate why this unsupported alternative is preferable, why this Court should reject its *Flynn* definition, or how *Flynn* was decided incorrectly. In the absence of any preferable alternative, this Court should maintain its reasoning in *Flynn* and include within any class of "settled" claims, claims which have been paid in full.

Bolstering this conclusion is the fact that, prior to issuing its *Flynn* decision regarding the definition of a "settled claim," this Court invited all common fund parties to join the briefing precisely because this Court intended to use *Flynn* as the vehicle for establishing the definition of a "settled claim" to be used in other common fund actions requiring payment of retroactive benefits. *Flynn, v.* WCC No. 2000-0222, *Order Setting Briefing Schedule*, ¶ 2 (Dec. 6, 2005) ("All parties named in any and all of the common fund litigation matters are invited to intervene for the limited purpose of briefing these issues."). Petitioner could have joined in this briefing, but chose not to. Having ignored the Court's invitation in *Flynn*, and having failed to provide any support for her assertion that the definition of "settled claims" does not include claims paid in full, Petitioner should not be permitted to erase existing law by substituting her definition of a "settled claim" with the definition adopted by this Court, as a matter of law, in *Flynn*.

4. Because they are paid in full, Class II and Class III(b) claims are "settled" and not subject to retroactive *Schmill* benefits.

What Petitioner calls "Class II" claims are paid in full because, after all TTD benefits have been paid, and the claimant returns to work with no wage loss, the claimant is no longer entitled to TTD benefits. Similarly, Petitioner's "Class III(b)" claims, i.e., claims in which TTD benefits were paid at an apportioned rate, claimants were found to be PTD, such PTD benefits were paid at an apportioned rate, and such PTD benefits were terminated upon retirement, have been paid in full. In *Satterlee v. Lumberman's Mut. Cas. Co.*, 2005 MTWCC 55 (Dec. 12, 2005), this Court held that Montana Code Annotated § 39-71-710, which permitted insurers to terminate PTD benefits upon retirement, was not unconstitutional. Upon retirement, a Class III(b) claimant's benefits are terminated; thus, the claim has been paid in full. Accordingly, Class III(b) claims are "settled", and are therefore not subject to retroactive *Schmill* benefits.

This Court's prior precedent demonstrates that claims that have been paid in full are "settled," and therefore exempt from retroactive application of *Schmill I*. Petitioner offers this Court no legal reason to set this conclusion aside. Because Class II and Class III(b) claims are paid in full, they are settled, and claimants in these categories are not entitled to retroactive *Schmill* benefits.

B. Claims that have been resolved by judgment are final.

Petitioner recognizes this Court's *Flynn* holding that "final claims" are exempt from retroactivity, and that "judgments" (Petitioner's "Class V" claims) are "final." Pet'r's Br. 4-5 (citing *Flynn*, ¶ 25). Petitioner argues, however, that claims made "final" by "judgments" are only exempt from retroactivity if the judgment resolved the entire claim. Petitioner asserts that certain types of judgments, such as judgments which only resolved medical benefits or imposed liability on insurers, do not finally resolve the entire claim. The State Fund concedes that judgments which settle only tertiary issues and do not resolve the entitlement to or amount of benefits may not be "final" for retroactivity purposes.[3]

However, judgments which resolve the central issues of entitlement to and amount of benefits are final, and are thus exempt from retroactive effect of later judicial decisions. For example, a judgment which found in favor of the insurer on the issue of liability is final for purposes of retroactivity, unless it is pending on appeal, because such a judgment has resolved the entire claim. Following such a ruling no benefits would be paid and the claim would not remain "open" or "actionable." Thus, as Petitioner would likely agree, claims where judgment has been entered in favor of an insurer on the issue of liability are not subject to retroactivity.

Judgments which resolve a dispute over entitlement to or amount of TTD or PTD benefits are also final for purposes of retroactivity. Proceedings over entitlement to and amount of TTD and PTD benefits afforded claimants an opportunity to raise claims similar to those raised by Schmill. The subsequent *Schmill* decisions affect only

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[3] Petitioner is correct that there is a limited class of claims in which final judgments have been entered that are nonetheless eligible for retroactive *Schmill* benefits. Examples include judgments declaring a worker's status as an employee rather than as an independent contractor, or judgments holding that unreported tip income could not be used to calculate time of injury wages, would not be "final," because such judgments do not settle the critical *Schmill* issues of entitlement to and amount of benefits. While a small number of claims may fit into the above category, claims that have been subject to final judgments on the issues of entitlement to and amount of benefits are final, and are not subject to retroactive application of *Schmill I*.

entitlement to and amount of benefits – the very issues settled by way of judgments. Whether benefits have been denied or continue to be paid is beside the point; the contested legal issues have been concluded. Unlike a typical tort action, workers' compensation claims may remain active even following the entry of a final judgment. Workers' compensation claims are not remedied by a final award of damages, but rather by the benefits set forth in the Act. In the tort context, satisfaction of the judgment will occur after the judgment, but not long after, and will not be extended over a long period. In the workers' compensation context, satisfaction of a judgment may occur over an extended period of time by way of payment of benefits.

This Court should not permit claims in which entitlement to or amount of benefits has been settled by final judgments to benefit from the *Schmill* decision. To do so would convert this Court's "final judgments" into something more like "temporary judgments," as the very issues on which the Court passed judgment – entitlement to and amounts of TTD and PTD benefits – are suddenly subject to reopening. This is contrary to this Court's precedent, to the policy of finality that underlies *Schmill II*, and to *Schmill* itself. This Court must find that judgments entered by this Court on the issue of entitlement to or amount of TTD or PTD benefits are not subject to retroactive application of *Schmill*.

II. For purposes of this case only, the State Fund takes no position on the exclusion of any claims based on statutes of limitations or the doctrine of laches.

III. The State Fund takes no position on whether the Uninsured Employers' Fund falls within the ambit of the Montana Supreme Court's decision in *Schmill II*.

CONCLUSION

The fundamental consideration for application of retroactivity concepts should be finality. This status is reached through the payment of benefits in full, formal settlement, or entitlement adjudication. This Court has already properly considered this matter, providing guidance and direction for the latest slate of issues. The utilization of settled, logical concepts will foster finality of claims and prevent interminable litigation.

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DATED this 16th day of January, 2007.

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CERTIFICATE OF MAILING

The undersigned, of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for Intervenors, hereby certifies that on this 16th day of January, 2007, she mailed a copy of the foregoing **STATE FUND'S ANSWER BRIEF REGARDING RETROACTIVITY**, postage prepaid, to the following persons:

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Attached is State Fund's Answer Brief Regarding Retroactivity with copy in the mail to you.