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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 REPLY BRIEF

The State Fund, Liberty NW Ins. Corp., Safeco Companies (hereinafter "Safeco"), and Insurers represented by Steve Jennings (hereinafter "Insurers") filed responsive briefs to the Petitioner's Opening Brief Regarding Retroactivity. The Claimant files this brief in reply to the arguments made in those pleadings. For the reasons stated herein, the Respondents' arguments should be rejected and the Court should rule on the retroactivity issues as set forth in the Claimant's opening brief.

In her opening brief, the Claimant set out five potential classes of *Schmill* I claims. The Respondents agreed that Class I and Class III claims where benefits are still being paid are subject to retroactive application of *Schmill* I. (State Fund Brief, p. 2; Safeco Brief, pp. 3-4; Insurers' Brief, p. 5.) The Respondents and Claimant are also in agreement that Class IV claims, claims which were settled by way of a petition for settlement approved by DLI, or by way of a stipulated judgment, are not subject to retroactive application of *Schmill* I. (State Fund Brief, pp. 2-3; Safeco Brief, p. 4; Insurers' Brief, p. 5.) Lastly, the parties agree that Class V claims, judgments other than stipulated judgments, which decided a claimant's

entitlement to and/or the amount of TTD or PTD benefits are "final" and not subject to the retroactive application of *Schmill* I unless they are currently on appeal. (State Fund Brief, p. 9; Safeco Brief, p. 10; Insurers' Brief, p. 11.) The foregoing agreements resolve the question of what cases are "final" for *Schmill* I retroactivity purposes. What remains in dispute is the definition of "settled" claims.

I. OD CLAIMS CANNOT BE "PAID IN FULL" AND THEREFORE CANNOT BE "SETTLED."

The Claimant argues that only claims which have been closed pursuant to a settlement petition approved by the DLI are "settled" claims. Consistent with such an argument is the Claimant's position that the mere passage of time without the payment of indemnity benefits (TTD or PTD benefits are the only indemnity benefits in *Schmill* I OD cases) cannot convert an "open" claim into a "settled" claim. The Respondents argue that "settled" claims include those claims "paid in full." As anticipated, the Respondents rely on section 39-71-107(7)(a), MCA (2005), for this argument. What is missing from the Respondents' argument, however, is a definition of "paid in full." Once the Court tries to define this phrase, it will see the weakness of the Respondents' argument. A claim "paid in full" is no different than a "closed" or "inactive" claim and, therefore, cannot constitute a "settled" claim.

The phrase "paid in full" is not defined anywhere in the WCA or ODA. An implied definition is that "paid in full" means that all benefits which are owed in a particular claim have been paid, however, absent an approved settlement petition, a claim can never be "paid in full" because additional indemnity benefits may be owed years after a claimant reaches MMI. As long as medical benefits are open, even if the claimant was paid indemnity benefits (TTD or PTD), if the claim was not settled pursuant to a petition for settlement or stipulated judgment, the claimant may become entitled to additional TTD benefits if his/her medical condition worsens due to the natural progression of the disease again rendering the claimant totally disabled. If the claimant is no longer at MMI and becomes re-entitled to TTD benefits, he/she may also become entitled to section 39-72-405, MCA, benefits or PTD benefits.

Under such circumstances, the claim was clearly not "paid in full" after the first payment of indemnity benefits because additional benefits became due and owing. At best, the claim was "inactive." The claim certainly wasn't "settled." Due to the possibility of additional benefit entitlement, an OD claim with open medical benefits can never be "paid in full." Since the claim can never be "paid in full" it cannot be considered "settled."

II. SECTION 39-71-107(7)(a), MCA (2005) DOES NOT DEFINE "SETTLED" CLAIMS FOR USE THOUGHOUT THE ENTIRE WCA/ODA.

The Respondents next argue that the definition of "settled" claims in section 107(7)(a), MCA (2005) was intended by the legislature to broadly apply to the entire WCA/ODA despite the legislature's preface to the definition that it was to be used "[f]or purposes of this section." According to the Respondents, to take the legislature at its word

and use the definition of "settled claim" for the purpose of understanding the duties outlined in section 107, MCA, is "too restrictive." (State Fund Brief, p. 5; Safeco Brief, p. 7; Insurers' Brief, p. 8.) According to the Respondents, the Claimant's interpretation is inserting limitations the legislature chose to omit. (Id.)

What is interesting, however, about the Respondents' argument, is that they never state how the language "for purposes of this section" should be interpreted, only how it shouldn't. In fact, to follow the Respondents' argument that the definition of "settled claim" in section 107(7)(a), MCA (2005), is **not** limited to section 107(7)(a), MCA, but can be used more broadly within the context of WCA/ODA claims, has the effect of excising the phrase entirely from the statute. As the Respondents note, interpretation of statutes by omitting language inserted by the legislature is a sin equal to that of inserting what has been omitted. *Montana Power Co. v. Montana Public Service Com'n*, 2001 MT 102, ¶26, 305 Mont. 260, ¶26, 26 P.3d 91, ¶26.

The Claimant's interpretation of section 107(7)(a), MCA (2005), does not insert language omitted by the legislature, but merely gives meaning to the language which is already there. Conversely, the Respondents' attempts to reconstruct the statute without the phrase "for purposes of this section" violates the foregoing principles of statutory construction and should be rejected.

III. SECTION 39-71-107(7)(a), MCA (2005), DOES NOT APPLY RETROACTIVELY TO *SCHMILL* I CLAIMS.

Just as the Respondents would have the Court read section 107(7)(a), MCA (2005), without the phrase "for purposes of this section," the Respondents would have the Court ignore the effective date of the statute. Section 107(7)(a), MCA (2005), was enacted in 2001 and made effective July 1, 2001, a date after the date of any *Schmill* I claims.

It has been the law in Montana for nearly five decades that the law in effect on the date of injury determines the compensation due the injured worker. *Yurkovich v. Industrial Accident Bd.*, 132 Mont 77, 86, 314 P.2d 866, 872 (1957). For occupational disease claims, the last date of actual employment sets the contractual rights between the parties. *Gidley v. W.R. Grace & Co.*, 221 Mont. 36, 38, 717 P.2d 21, 22 (1986). Pursuant to this rule, section 39-71-701(7)(a), MCA (2005), cannot be applied to any *Schmill* I claims since they all predate the enactment of the statute.

This conclusion is further supported by section 1-2-109, MCA, which states that "[n]o law contained in any of the statues of Montana is retroactive unless expressly so declared." The legislature did not include an applicability provision when it amended section 39-71-107, MCA in 2001. Absent an express statement of legislative intent to apply the amended statute retroactively, section 1-2-109, MCA, prohibits the retroactive application encouraged by the Respondents.

The only exception to the non-retroactivity mandate set forth in section 1-2-109, MCA, is any legislation which does not relate to the substantive rights of the parties. *Weiss*

v. State, 219 Mont. 447, 449, 712 P.2d 1315, 1316 (1986). The practical consequence of the application of amended section 107, MCA (2001), to *Schmill* I claims is to deny additional benefits to these *Schmill* claimants. By foreclosing a benefit entitlement which existed prior to the 2001 amendment, retroactive application of amended section 107, MCA (2001), deprives these claimants of a substantial right, the right to receive benefits. As the Respondent Safeco correctly observed, an injured worker's right to benefits is a substantive right. *EBI/Orion Group v. Blythe* (1997), 281 Mont. 50, 54, 931 P.2d 38, 40. (Safeco Brief, p. 6.)

Moreover, in the context of workers' compensation legislation, even purely procedural statues are not automatically applied retroactively absent express legislative intent. *Odenbach v. Buffalo Rapids Projection*, 225 Mont. 96, 99, 731 P.2d 1297, 1298 (1987). In *Odenbach*, the Court was asked to determine if a statute which changed the discount rate on lump sum conversions, as well as the procedural requirements to obtain a lump sum conversion, could be applied to claims which predated the enactment of the amended statute. The Court had previously determined in *Buckman, supra,* that the discount provision could not apply to claims which predated the amended statute, finding that such action would violate the Contract Clause of the Montana Constitution. With regard to the procedural requirements of the amended statute, the Court in *Odenbach* also found that such requirements could not be applied retroactively unless there was an express indication by the legislature to do so. *Id.* The Court noted there was no provision in the 1985 amendments to the WCA stating that any portion of the amendments should be applied retroactively, with the exception of the discount provision. *Id.* Therefore, absent an express statement by the legislature indicating an intent to apply the procedural requirements retroactively, the Court refused to do so citing section 1-2-109, MCA.

The 2001 legislature included applicability provisions, both prospective and retrospective, for a number of amendments to the WCA and ODA. (i.e., see sections 39-71-118 and 123, MCA). There is no applicability provision, however, for section 39-71-107, MCA. In light of the legislature's willingness to use applicability provisions for other amendments to the Acts, its silence regarding the applicability of section 39-71-107 must be interpreted as an indication that the amended statute was not to be applied retroactively. In ascertaining legislative intent, it is this Court's job to rely on the plain language of the statute and not to insert what the legislature has chosen to omit. *Dunnington v. State Compensation Ins. Fund*, 2000 MT 349, ¶ 13, 303 Mont. 252, ¶ 13, 15 P.3d 475, ¶ 13; § 1-2-101, MCA. Since there was no expression of legislative intent to retroactively apply the 2001 amendments to section 39-71-107, MCA, this Court is prohibited from doing so.

Even if the Court concludes that the definition of "settled claim" in section 39-71-701(7)(a), MCA (2005), is procedural and ignores the holding of *Odenbach* that even purely procedural WCA and ODA statutes are not applied retroactively absent express legislative intent, it does not follow that the amended statute must be applied retroactively.

The presumption in section 1-2-109, MCA, against retroactive legislation embodies "[e]lementary considerations of fairness [which] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly . . ." *Landgraf*

v. USI Film Products, 511 US 244, 265 (1994).

As the United States Supreme Court observed in *Landgraf*, however, "deciding when the statute operates 'retroactively' is not always a simple or mechanical task . . . the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 268-269. Montana has long used this definition of retroactivity. *Butte & Superior Mining Co. v. McIntyre*, 71 Mont. 254, 263, 229 P. 730, 733 (1924). As more recently explained in *Porter v. Galarneau* (1996), 275 Mont. 174, 911 P.2d 1143:

> In summary, the canon of statutory construction found at § 1-2-109, MCA, requires that a statute will not be given "retroactive effect" unless the legislature expressly declares the statute to be retroactive. A "retroactive law" is one which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, attaches a new disability in respect to transactions already passed, or gives a transaction **a different legal effect** from that which it had when it occurred. *Continental Oil Co.,* 207 P. at 118; *St. Vincent Hosp.,* 862 P.2d at 9. The adoption of H.B. 158, enacted in 1995, would produce a different legal result and therefore constitutes a "retroactive law," and cannot be applied to the 1992 accident involving Robert Porter. [Emphasis added.]

Porter, 275 Mont. at 185, 911 P.2d at 1150. *See also C. Loney Concrete Construction, Inc. v. Employment Relations Division* (1998), 291 Mont. 41, 47, 964 P.2d 777, 780: "In summary, we do not apply law retroactively if it will cause a different legal effect on a transaction than that under the law when the transaction occurred."

The retroactive effect of foreclosing *Schmill* claimants' entitlement to additional benefits without clear legislative intent to retroactively apply amended section 39-71-107, MCA (2001), is contrary to the principles set forth above. *Porter,* 275 Mont. at 185, 911 P.2d at 1150. The "sound instincts" of this Court and the presumption against retroactivity in section 1-2-109, MCA, preclude such a conclusion. *Landgraf*, 511 U.S. at 269 ("[r]etroactivity is a matter on which judges tend to have 'sound . . . instinct[s],' . . . and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." [Citations omitted.])

IV. THE DEFINITION OF "SETTLED" FROM *FLYNN* IS NOT CONTROLLING IN *SCHMILL* I CLAIMS.

The Respondents argue that the definition of "settled" from *Flynn* is applicable to *Schmill* I claims because "in *Flynn*, this Court made it [the definition of "settled"] part of the common law of workers' compensation . . ." (State Fund Brief, p. 6; Safeco Brief, p. 8; Insurers' Brief, p. 9.) There are several reasons to challenge the Respondents' conclusion.

First, the Court said in *Flynn* that the use of section 107(7)(a), MCA (2005), to define

a "settled claim" was limited to the *Flynn* case:

> [T]he Court concludes 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 insurer or a claim that was paid in full,' shall be the definition of a 'settled claim' **for purposes of this case**. [Emphasis added.]

Flynn, ¶16.

Second, the Court's order in *Flynn*, ¶26, restates the definition of a "settled" claim without reference to section 107(7)(a), MCA (2005), or the language "paid in full":

> "A SETTLED CLAIM is a claim in which a department-approved settlement or court-ordered compromise of benefits has been made between the claimant and insurer."

Flynn, ¶26.

Since the Court's order at ¶26 defines "settled claim" differently than ¶16 of the Court's decision, it's debatable whether the *Flynn* decision definitions "settled claim" by incorporating the phrase "paid in full."

Third, *Flynn* is on appeal and, therefore, it has no precedential value. *Bordas v. Virginia City Ranches Ass'n*, 2004 MT 342, ¶20, 324 Mont. 263, ¶20, 102 P.3d 1219, ¶20.

Fourth, to the extent the Court's decision in *Flynn* included "paid in full" in the definition of "settled" claims, the decision is wrong as applied to *Schmill* I claims for the reasons stated above. Including "paid in full" in the definition of a "settled" claim is equivalent to including the words "closed" or "inactive" in the definition. The Court rightly rejected those words when it considered the definition of "settled" in *Flynn*, and should likewise reject the phrase "paid in full."

CONCLUSION

The parties agree on what claims are "open" and on what claims are "final," but disagree as to what claims are "settled." The Respondents insist that claims "paid in full" are settled. While the Petitioner disputes this conclusion, even if the Court agrees with the Respondents, the Court must then ask the question, "What *Schmill* I claims were paid in full?" The answer is "none," other than those claims which meet the definition of "final." All other *Schmill* I claims are not yet paid in full because there is still the possibility that those claimants may become entitled to indemnity benefits if their medical conditions worsen. Therefore, even if the Court concludes that a "settled" claim is one which was "paid in full," no Class II or Class III *Schmill* I claims would be "settled" because none have been "paid in full."

WHEREFORE, for the foregoing reasons and those stated in her opening brief, the Petitioner respectfully requests the Court rule that a "settled" claim is only one in which the Department has approved a settlement, or the Court has issued a stipulated judgment. Alternatively, if the Court concludes that a settled claim also includes one which was "paid in full," the Petitioner would ask the Court to find that none of the Class II or Class III *Schmill* I claims were "paid in full."

DATED this 29 of January, 2007.

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By: Laurie Wallace
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CERTIFICATE OF MAILING

I, Robin Stephens, do hereby certify that on the 29 day of January, 2007, I served a true and accurate copy of the PETITIONER'S REPLY BRIEF by U.S. mail, first class, postage prepaid to the following:

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January 29, 2007

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

Dear Ms. Wilson:

Enclosed please find the Petitioner's Reply Brief in regard to the above-referenced matter. Should you have any questions concerning this matter, please contact me directly.

Sincerely,

Laurie Wallace

LAURIE WALLACE
BOTHE & LAURIDSEN, P.C.

LW/rs
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