

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 27

WCC No. 2001-0300

FILED

CASSANDRA SCHMILL

JUL 10 2007

Petitioner

vs.

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer

and

MONTANA STATE FUND

Intervenor.

ORDER ADOPTING ORDER OF SPECIAL MASTER

Summary: On December 11, 2006, this Court ordered the parties to brief certain unresolved issues. On July 9, 2007, the Special Master appointed by the Court issued his "Findings and Conclusions by Special Master on Issues Presented Pursuant to December 11, 2006, Order of the Workers' Compensation Court."

Held: The "Findings and Conclusions by Special Master on Issues Presented Pursuant to December 11, 2006, Order of the Workers' Compensation Court" dated July 7, 2007, are adopted.

¶ 1 Issues in the above-entitled matter were duly briefed before Special Master Jay Dufrechou, who considered the evidence and prepared and submitted his Order for consideration by the Court. These issues are fully set forth in the Special Master's Order.¹

¶ 2 Thereupon, the Court considered the record in the above-captioned matter, considered the Order of the Special Master, and enters the following Order.

¹ The Findings and Conclusions by Special Master on Issues Presented Pursuant to December 11, 2006, Order of the Workers' Compensation Court are attached and by this reference are made a part of this Order.

¶ 3 IT IS HEREBY ORDERED the "Findings and Conclusions by Special Master on Issues Presented Pursuant to December 11, 2006, Order of the Workers' Compensation Court" are adopted as follows:

¶ 3a The retroactive application of *Schmill* involves the period from July 1, 1987, through June 21, 2001, inclusive. Unless otherwise excluded, all claims arising out of occupational diseases which were first diagnosed as work-related during this period should be identified, reviewed, and paid under *Schmill*, subject to specific objections that arise in particular cases or with regard to categories of cases.

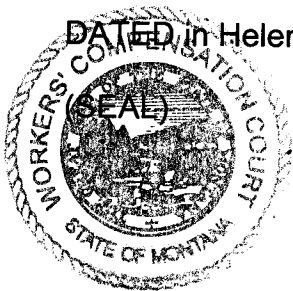
¶ 3b Excluded from the retroactive application of *Schmill* are cases which were settled through a department-approved settlement or court-ordered compromise of benefits.

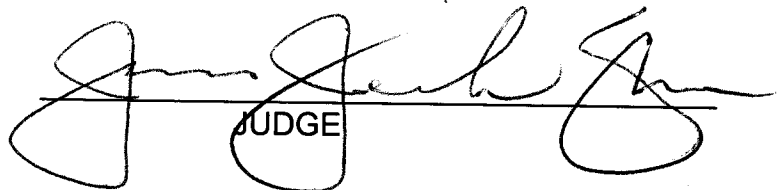
¶ 3c Excluded from the retroactive application of *Schmill* are cases in which a final judgment was entered by the WCC, and that judgment is not pending on appeal to the Montana Supreme Court, if the circumstances of the particular judgment indicate that the underlying occupational disease claim is no longer actionable. However, the Special Master reserves ruling on specific Class V issues until presentation of specific claims or until interested parties present particular classes of "judgment" situations for negotiation or ruling.

¶ 3d Neither the doctrine of laches nor any particular statute of limitations limits the retroactivity of cases in the implementation period noted above.

¶ 3e Claims handled by the UEF are subject to the retroactive application of *Schmill*, though the UEF may later argue that reduction in payment on particular claims is necessary pursuant to statutory mandate.

¶ 4 Any party to this dispute may have twenty days in which to request reconsideration from this Order Adopting Order of Special Master.




JUDGE

c: Counsel of Record via Website
Jay P. Dufrechou

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 2001-0300

CASSANDRA SCHMILL

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer

and

MONTANA STATE FUND

Intervenor.

FINDINGS AND CONCLUSIONS BY SPECIAL MASTER ON
ISSUES PRESENTED PURSUANT TO DECEMBER 11, 2006
ORDER OF THE WORKERS' COMPENSATION COURT

¶ 1 This *Order by Special Master* is made pursuant to the *Order* appointing Special Master issued by the Workers' Compensation Court (WCC) on April 23, 2007. The Special Master was directed to resolve all factual and legal issues necessary to implement the decisions of the Montana Supreme Court in *Schmill v. Liberty Northwest Insurance Corp. (Schmill I)*¹ and *Schmill v. Liberty Northwest Insurance Corp. (Schmill II)*².

I. Background

¶ 2 In *Schmill I*, the Montana Supreme Court found unconstitutional the apportionment provisions of § 39-72-706, MCA, of the Occupational Disease Act. That section required reduction of disability benefits for non-occupational factors, while the Workers' Compensation Act required no similar reduction. After *Schmill I*, occupational disease claimants must receive the full amount of disability

¹ 2003 MT 80, 315 Mont. 51, 67 P.3d 290.

² 2005 MT 144, 327 Mont. 293, 114 P.3d 204.

benefits to which they are entitled, without reduction based on apportionment between occupational and non-occupational factors.

¶ 3 In *Schmill II*, the parties returned to the Supreme Court on various issues, including whether the requirement that occupational disease claimants receive their full entitlement to benefits, without apportionment, applies retroactively to claims already made prior to the *Schmill I* decision. In *Schmill II*, the Supreme Court held that *Schmill I* is retroactive under Montana law as clarified in *Dempsey v. Allstate Insurance Co.*³ The Supreme Court also held that the *Schmill* litigation created a common fund entitling *Schmill*'s attorney to common fund attorney fees. The common fund gives rise to a "global lien against all claimants who may benefit from the decision, not just those whose benefits are paid by Liberty."⁴

¶ 4 With the creation of a global common fund, all insurers, self-insured entities, or third party administrators with responsibility for workers' compensation claims (hereafter collectively referenced as "insurers"), arguably became responsible for identifying claims subject to payment under *Schmill* and for honoring the lien for common fund attorney fees. Thus, on December 7, 2005, the WCC issued an Amended Summons and Notice of Attorney Fee Lien to over 550 insurers and self-insurers identified as having done insurance business in Montana during the relevant time period. The Special Master recognizes that some insurers have raised defenses to implementation based on the argument that they were not properly made parties to the original litigation and cannot be forced to pay common fund claims.⁵ This Order does not address any such issue.

¶ 5 While the ruling on retroactivity is clear, the complexity of workers' compensation laws, the variations in factual histories of particular cases, and the realities of claims adjustment and day-to-day insurance operations, will inevitably give rise to various issues regarding implementation of the retroactive aspect of the *Schmill* decision. The task of the Special Master will be to supervise the implementation of *Schmill* as a common fund matter. This includes resolving issues presented by the parties and, from time to time, requesting reports from the insurers as to their progress in identifying claimants entitled to additional payments under *Schmill*. A large part of the initial work will involve identification of parameters that enable insurers to identify occupational disease claims subject to payment.

³ 2004 MT 391, 325 Mont. 207, 104 P.3d 483.

⁴ *Schmill II*, ¶ 27.

⁵ See, e.g., Respondent Safeco Companies Brief in Response to Petitioner's Opening Brief Regarding Retroactivity, page 3 and fn. 2-3.

II. Implementation Period: Beginning and End Dates

¶ 6 Common fund counsel and several insurers actively participating in this litigation appear to agree on the beginning and end dates of what shall be called the "implementation period" of the common fund.

¶ 7 After the issuance of *Schmill II*, a Stipulation Regarding Prospective Claims was entered into by common fund counsel, the Montana State Fund (State Fund), and Liberty Northwest Insurance Company (Liberty).⁶ On February 13, 2004, the WCC approved the Stipulation as to form and content. The Stipulation provides, in pertinent part:

For prospective implementation purposes, the parties stipulate and agree that a claimant's entitlement date shall be the date a claimant's occupational disease is first diagnosed as work-related. Therefore, all claims arising out of occupational diseases which were first diagnosed as work-related on or after June 22, 2001, the date of the Workers' Compensation Court's decision in this matter, are considered prospective claims. Common fund fees are not payable on prospective claims.

¶ 8 While not all insurers impacted by the global common fund in *Schmill* have entered into this or a similar stipulation, there appears to be no dispute raised by other insurers regarding the means for handling the "entitlement" and "prospective claim" dates in implementation of *Schmill*. These dates are consistent with occupational disease law and prior practice in common fund litigation. The Special Master thus finds that the claimant's entitlement date for purposes of implementation shall be the date the claimant's occupational disease was first diagnosed as work-related. The "end date" for the common fund implementation period shall be June 21, 2001, inclusive. The *Schmill* decisions, of course, require payment of unapportioned benefits for claims *on or after* June 22, 2001, but those claims are "prospective" and not part of the common fund.

¶ 9 Though the filed Stipulation referenced above does not specify a beginning date of the implementation period, the decisions in *Schmill* indicate that the implementation period begins July 1, 1987, the date the 1987 amendments to workers' compensation and occupational disease laws took effect. In its June 4, 2004, decision on the question of retroactivity and other matters, the WCC found that *Schmill* is retroactive to July 1, 1987, the effective date of the statutory scheme found unconstitutional in *Schmill I*. Given the Supreme Court's affirmation of the retroactivity portion of the lower court's decision in *Schmill II*, the implementation period begins with occupational disease claims diagnosed on or after July 1, 1987. Various filings by several

⁶ *Stipulation Regarding Prospective Claims*, filed February 12, 2004.

parties acknowledge this as the appropriate "beginning date" of the implementation period.

¶ 10 Thus, these implementation proceedings are concerned with occupational disease claims with work-related diagnoses dates from July 1, 1987, through June 21, 2001, inclusive.

III. Issues Identified in December 11, 2006, Order of WCC

¶ 11 The first disputed matter for decision by the Special Master involves certain issues which the WCC asked the parties to brief by Order dated December 11, 2006. The issues identified by the WCC, based on input of interested parties, are:

¶ 11a What *Schmill* claims (with entitlement dates between July 1, 1987, and June 22, 2001) are subject to review and increase in benefits upon a retroactive application of *Schmill I*?

¶ 11b Whether the scope of retroactive application is limited by any applicable statute of limitations or laches?

¶ 11c Whether the Uninsured Employers' Fund (UEF) falls within the ambit of the Montana Supreme Court's decision in *Schmill I*?

IV. Question One: Settled and Final Claims

¶ 12 As briefed, the first question involves what cases are excluded from the *Schmill* implementation because they are final and settled, thus not within the common fund pursuant to the law of this case and other common fund decisions. We begin with relevant precedent.

A. Direction in *Schmill*.

¶ 13 In *Schmill II*, the Supreme Court relied upon *Dempsey* in holding that the *Schmill I* ruling applies retroactively. In responding to arguments by the State Fund and Liberty about "the inequity imposed by retroactive application," the Supreme Court noted as follows:

Although *Dempsey* emphasized a presumption of retroactivity, it also stated that retroactive application does not mean that prior contrary rulings and settlements are void *ab initio*. *Dempsey*, ¶ 31. Rather, due to reasons of finality, "[T]he retroactive effect of a decision . . . does not apply to cases that **became final or were settled** prior to a decision's issuance." Thus, if an occupational disease claim **was settled or became final** prior to our ruling in

Schmill I then *Schmill I* does not affect whatever apportionment might have been deducted from the claim's award.⁷

¶ 14 The Supreme Court also noted the State Fund's argument that retroactive application would affect as many as 3,543 claim files dating back to July 1, 1987, and would force the State Fund to review each of these files. Summarizing the State Fund's argument, the Court stated: "This would take many hours of labor, especially because many of the claims are closed and inactive and lack the claimants' current addresses."⁸

¶ 15 In this context, the Supreme Court then stated:

As the State Fund admits, many of these claims are settled, closed, or inactive. From the record before us, it cannot be determined how many of the 3,543 claims would, in the context of workers' compensation law, be considered "**final or settled**" under our holding in *Schmill I*. We leave that initial determination to the WCC.⁹

¶ 16 In an *Order Determining Status of Final, Settled, Closed, and Inactive Claims in Flynn v. Montana State Fund and Liberty Northwest Ins. Corp.*¹⁰, the WCC, after reviewing the language noted above, stated the following regarding the Supreme Court's directive in *Schmill II*:

In other words, the Montana Supreme Court noted that, while many of the claims which might be affected by the rule of law announced in *Schmill I* are "settled, closed, or inactive," the explicit direction to this Court was to determine, within the context of workers' compensation law, only those cases which would be considered "final or settled." While acknowledging that some claims are "closed" or "inactive," the Montana Supreme Court did not include these claims within its directive. This is consistent with the court's holding in *Dempsey* that the retroactive effect of a decision does not apply to cases which are final or settled prior to a decision's issuance.¹¹

⁷ *Schmill II*, ¶ 17. (emphasis added).

⁸ *Schmill II*, ¶ 18.

⁹ *Schmill II*, ¶ 19. (emphasis added).

¹⁰ 2006 MTWCC 31. (appealed 10/18/06).

¹¹ *Flynn*, 2006 MTWCC 31, ¶ 5.

B. The WCC's Order Determining Status of Final, Settled, Closed, and Inactive Claims in *Flynn v. Montana State Fund and Liberty Northwest Ins. Corp.*

¶ 17 In the *Flynn v. Montana State Fund* case, the WCC addressed the issues surrounding exclusion from common fund implementation of cases designated "final," "settled," "closed," or "inactive." In that case, several insurers argued that claims designated "closed" or "inactive" by an insurer should be excluded from retroactive application of the *Flynn* decision.

¶ 18 In rejecting this argument, the WCC focused on the direction given by the Supreme Court in *Schmill II*, noting:

In fact, the words 'closed' and 'inactive' are pointedly *not* included within the court's directive in *Schmill II*. Rather *Schmill II* uses only the words 'final or settled.' The Supreme Court having drawn these parameters, it is not for this Court to arbitrarily expand them to include language that is simply not present.¹²

¶ 19 With regard to what constitutes a "settled" claim, the WCC referenced § 39-71-107(7), MCA (2005), a statute mandating prompt claims handling of workers' compensation claims by claims examiners located in Montana. Various practices are mandated or proscribed. For instance, subsection (3) of the statute requires that "[s]ettled claim files stored outside of the claims examiner's office must be made available within 48 hours of a request for the file." Subsection (7)(a) provides: "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."

¶ 20 The WCC relied upon this section in finding, in *Flynn*, that both department-approved and court-ordered settlements were "settled claims" for common fund retroactivity purposes. Petitioners in that case had argued that court-ordered settlements were not "settled claims" for common fund purposes.

¶ 21 The WCC found that § 39-71-107(7), MCA, sets forth a clear definition of what constitutes a "settled claim." The WCC stated:

Therefore, the 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 an insurer or a claim that was paid in full,' shall be the definition of a 'settled claim' for purposes of this case.¹³

¹² *Flynn*, ¶ 7.

¹³ *Flynn*, ¶ 16.

¶ 22 As common fund counsel in the present matter points out, the actual Order of the WCC in the *Flynn* proceeding, with regard to “settled claims,” states: “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 the insurer.”¹⁴ The language from § 39-71-107(7)(a) defining a “claim that was paid in full” as a “settled claim” is **not** included in the actual order.

¶ 23 Regarding what constitutes a “final claim,” the WCC rejected the request by insurers to use the two-year limitation period of § 39-71-2905, MCA, to limit retroactivity to a two-year period. The WCC noted that a denial of benefits must occur to trigger § 39-71-2905, MCA, which does not occur in a situation where a claimant has never requested benefits not yet available under a statutory scheme.

¶ 24 The Order of the WCC in *Flynn* regarding a final claim was: “A FINAL CLAIM is a claim in which a final judgment has been entered by the Workers’ Compensation Court only if the claim is not currently pending on appeal.”

C. Guidance from *Stavenjord v. Montana State Fund (Stavenjord I)*¹⁵ and *Stavenjord v. Montana State Fund (Stavenjord II)*¹⁶

¶ 25 Following *Schmill II*, and after the WCC’s Order in *Flynn*, the Montana Supreme Court issued a decision on retroactivity and other matters in the *Stavenjord* litigation. *Stavenjord* involves similar issues to *Schmill*. In *Stavenjord I*, the Supreme Court held that section 39-72-405, MCA, of the Occupational Disease Act denied equal protection to occupational disease claimants by not making available to them the permanent partial disability benefits available under the Workers’ Compensation Act. In *Stavenjord II*, the Supreme Court held that *Stavenjord I* applies retroactively to “open” claims arising on or after June 30, 1987, the effective date of the 1987 Workers’ Compensation and Occupational Disease Acts used by the Court in that case.

¶ 26 As relevant here, the *Stavenjord II* Court stated its ruling as follows:

Therefore, we conclude that the WCC erred in ordering only partial retroactive application of *Stavenjord I* to cases arising on or after June 3, 1999. Rather, *Stavenjord I* shall apply retroactively to those claims arising on or after June 30, 1987, which remain “open” as herein defined. **Occupational disease-related claims**

¹⁴ *Flynn*, ¶ 26.

¹⁵ 2003 MT 67, 314 Mont. 466, 67 P.3d 229.

¹⁶ 2006 MT 257, 334 Mont. 117, 146 P.3d 724.