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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

**STATUS REPORT, REQUEST FOR  
STAY, AND NOTICE OF JOINDER**

Pursuant to this Court's August 7, 2007 Request for Status Report on Outstanding Issues and Disputes, Docket No. 382, Intervenor Montana State Fund ("State Fund") hereby submits the following Status Report, Request for Stay, and Notice of Joinder in Respondents' Motion to Stay Proceedings.

**I. Status Report**

In the State Fund's Response to Summons, Docket No. 313, the State Fund recognized "that some claimants are entitled to increased benefits pursuant to the

Montana Supreme Court's decision in *Schmill v. Liberty NW Ins. Corp.* ("*Schmill II*"), 2005 MT 144, 327 Mont. 293, 114 P.3d 204." However, the State Fund also noted that the class of entitled claimants would be limited in significant respects. Most significantly, the State Fund, recognizing the Montana Supreme Court's use of the terms "settled," "closed," "final," and "inactive," in *Schmill II*, noted that "the definitions of 'settled,' 'closed,' 'final,' and 'inactive' remain uncertain" in light of this Court's Order in *Flynn v. Montana State Fund*, 2006 MTWCC 31, and the Montana Supreme Court's decision in *Stavenjord v. Montana State Fund*, 2006 MT 257. See Response to Summons, Docket No. 313, ¶ 3.

The State Fund also raised several "implementation issues," including the following:

- a. appropriate search parameters and identification documentation;
- b. the method of notifying claimants;
- c. a verification that overpayments on the files may be deducted from the increased benefits paid;
- d. calculations to be utilized where a Social Security offset is present on a file;
- e. procedure and obligations for locating claimants with changed addresses;
- f. procedure for resolving competing liens from *Schmill*, *Stavenjord*, *Murer*, and *Flynn*;
- g. determination of actual common fund attorney fee obligations and payment by way of due process hearing; and
- h. timeliness for completion of activities given the administrative burdens involved.

See Response to Summons, Docket No. 313, ¶ 6. The State Fund also asserted that deceased claimants are not entitled to an increased benefit award. Response to Summons, Docket No. 313, ¶ 1. None of these issues has been resolved.

Significantly, other issues cited in the State Fund's response to summons, particularly those relating to entitlement dates, have been resolved by stipulation. Thus, this matter continues to involve two general issues which must be fully and finally resolved before the class of entitled claimants can be determined with certainty: first, before any implementation occurs, the scope of retroactivity must be determined; and second, the remaining implementation issues must be resolved.

Although the Findings and Conclusions by Special Master, adopted by this Court by Order dated July 10, 2007, Docket No. 380, purported to resolve the threshold "settled and final claims issue," it did so by relying on this Court's *Flynn* Order, which is pending on appeal before the Montana Supreme Court. See Findings and Conclusions, Docket No. 380, ¶ 39 (stating that, as to "the definition of 'settled claim,' the Special Master concludes that the actual Order of the WCC is controlling"); ¶ 45 (rejecting the State Fund's argument that "closed" and "inactive" claims should be excluded from the common fund because the same argument "was rejected by the WCC in *Flynn*"); and ¶¶ 56(b) and (c) (adopting definitions of "settled" and "final" that track this Court's holding in *Flynn*). The State Fund does not fault the Special Master for relying on *Flynn* in resolving the threshold retroactivity issues in *Schmill*; however, because the *Flynn* Order is on appeal, a complete or partial reversal of *Flynn* would change the entire

landscape of the present case.

Accordingly, the State Fund asserts the proper course of action at this point is for this Court to stay implementation of its Order Adopting Order of Special Master to the extent it purports to resolve the “settled and final issue” and, when *Flynn* is decided, issue a final order on that threshold issue and proceed with implementation guided by the remaining implementation issues discussed above.

## **II. Request for Stay and Notice of Joinder**

Recognizing the possibility that *Flynn* would control the present action, the State Fund filed a Motion for Stay pending final resolution of *Flynn* before proceeding further with resolution of the retroactivity issue in this case. Montana State Fund’s Motion for Stay and Memorandum in Support, Docket No. 330, Nov. 16, 2006. In opposition, Petitioner’s counsel explained that “the definitions of final and settled, as set forth in *Flynn*, do not apply to *Schmill*,” and agreed with the Court that “the basis for [her] opposition to the motion to stay would be that since the *Flynn* definitions don’t apply, the *Flynn* appeal is irrelevant.” Transcript of Nov. 21, 2006 Conference Call, Docket No. 344, p. 3, ll. 9-11; p. 5, ll. 11-14. In response, the Court rephrased the issues to be briefed and the parties proceeded with briefing on the scope of retroactivity. Order Vacating and Resetting Briefing Schedule, Docket No. 346.

However, as discussed above, the *Flynn* definitions did prove to be significant and controlling in the *Schmill* Order. In light of this, this Court should stay the *Schmill* implementation until after the Montana Supreme Court issues a decision in *Flynn*. The

State Fund therefore hereby joins Respondents' Motion to Stay Proceedings and adopts by reference all arguments contained therein.

If Respondents' Motion to Stay Proceedings is granted, and proceedings are stayed pending the Montana Supreme Court's *Flynn* decision, the State Fund submits that the implementation issues set forth above will then need to be resolved. As has been discussed previously, many of these issues may be capable of resolution through direct communication with counsel, and will therefore be submitted to the Special Master only as necessary.

DATED this 31<sup>st</sup> day of August, 2007.

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By Malin Stearns Johnson  
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## CERTIFICATE OF SERVICE

I, the undersigned, of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for Intervenor, hereby certify that on this 31 day of August, 2007, I submitted the foregoing STATUS REPORT, REQUEST FOR STAY, AND NOTICE OF JOINDER for service upon the Workers' Compensation Court website, and also sent a copy, postage prepaid, to the following:

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