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FILED

MAY 19 2009

OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 2001-0300

CASSANDRA M. SCHMILL,

Petitioner,

v.

LIBERTY NORTHWEST INSURANCE CORP.,

Respondent/Insurer,

and

MONTANA STATE FUND,

Intervenor.

MOTION TO STAY PROCEEDINGS AND SUPPORTING BRIEF

COMES NOW the above-named Respondent, pursuant to A.R.M. 24.5.316, and the inherent power of the Court to control its own proceedings, and moves the Court for an order staying the proceedings in this case for the reasons set forth with particularity in the brief that appears immediately below.

BRIEF

The above administrative rule governs motions for relief generally and the Court has the inherent power to control the proceedings before it in the interest of judicial efficiency and justice. Attached as Exhibit A is a copy of the May 7, 2009 letter from the undersigned to Ms. Wallace and the Minute Entry attached to that letter from the *Flynn/Miller v. Montana State Fund and Liberty Northwest Ins. Corp.*, dated April 22, 2009, WCC No. 2000-0222 (four pages).

DOCKET ITEM NO. 460

Attached as Exhibit B is Ms. Wallace's May 13, 2009 response. Based on Ms. Wallace's response, Liberty has filed this motion to stay all the mediation efforts in this case. The reason is simply that until the term "paid in full" has been interpreted and defined by this Court in *Flynn/Miller*, exactly what remediation effort in Schmill is necessary or appropriate is unknown. Any remediation efforts by the parties in Schmill could be ineffective, inappropriate, over-inclusive, under-inclusive, and/or nullity depending on this Court's ruling in the *Flynn/Miller* decision.

As regards Schmill's claim for common fund attorney fees from Liberty, Docket No. 417 states Liberty's position regarding common fund attorney fees and states it agrees with the State Fund's pleading Docket No. 414 in which the Fund notes at page 2 of this pleading that common fund attorney fees could be impacted by the decision in *Flynn*.

Although Ms. Wallace states the rulings in *Flynn* do not apply to the instant case, any remediation efforts in Schmill require a definition of retroactive application and the definition in *Flynn/Miller* will control in Schmill. Assuming no appeal is taken in *Flynn/Miller* and/or *Schmill*.

The efficient use of the Court's resources, as well as the same efficient use of the limited resources of the parties is best served by staying all proceedings in *Schmill* until the period of retro-application for the *Schmill* decision can be determined which in turn requires a decision in the *Flynn/Miller* case of the meaning of "paid in full."

For the reasons stated above, let me request that the Court all remediation efforts in *Schmill* be held in abeyance and that the stay remain in place until such a time as the Court so orders it be lifted which would be sometime after this Court's decision in the *Flynn/Miller* case.

DATED this 19 day of May, 2009.



Larry W. Jones
Attorney for Respondent/Insurer

CERTIFICATE OF SERVICE

I hereby certify that on the 14 day May, 2009, I served the original of the foregoing MOTION TO STAY PROCEEDINGS AND SUPPORTING BRIEF, on the following:

Ms. Clara Wilson
Clerk of Court
Workers' Compensation Court
PO Box 537
Helena, MT 59624-0537

Also via e-mail: dliwccfilings@mt.gov

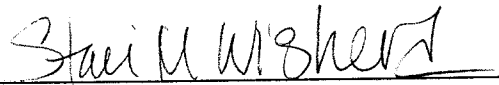
VIA: U.S. Mail Hand-Delivery Fax Email

And a copy of the same to the following:

Ms. Laurie Wallace
Bothe & Lauridsen, PC
PO Box 2020
Columbia Falls, MT 59912

Also via e-mail: legalpad@digisys.net

VIA: U.S. Mail Hand-Delivery Fax Email



Staci M. Wisherd, Legal Secretary

6H131090214

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May 07, 2009

Ms. Laurie Wallace
Bothe & Lauridsen, PC
PO Box 2020
Columbia Falls, MT 59912

Via Facsimile and U.S. Mail ✓
(406)892-0207

RE: Schmill v. Liberty Northwest Insurance Corp. & Montana State Fund, et al
Cause No. No. DA 08-0407; Claim No. WC687-030696-00

Dear Laurie:

Attached is a copy of the Minute Entry in the *Flynn - Miller* case. Please note in the last paragraph the Court states "The *Reesor* and *Stavenjord* matters are contingent on the ruling in *Flynn* as to the definition of "paid in full;" remediation efforts are held in abeyance and the stay remains in place."

Given that the "paid in full" issue is relevant to identifying what cases, if any, fall under the *Schmill I* decision, I am requesting that you agree to a stay of all remediation efforts in *Schmill*.

Please let me know your client's position. If you have any questions or otherwise want to discuss the case, please let me know.

Very truly yours,


Larry W. Jones
Attorney at Law

LWJ/smw
Enclosure

C: Ms. Anna Waller

EXHIBIT

A

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MAY 07 2009

Missoula Legal

WORKERS' COMPENSATION COURT

Hearing No. 4054
Volume XVII

Helena, Montana
April 22, 2009

ROBERT FLYNN and CARL MILLER

Rex Palmer

vs.

MONTANA STATE FUND

Bradley J. Luck
Thomas E. Martello

and

LIBERTY NORTHWEST INSURANCE CORPORATION
(Intervenor)

Larry W. Jones

WCC No. 2000-0222

An in-person conference came on this date at 10:30 a.m. in the Workers' Compensation Court, Helena, Montana, at the initiation of the Court. The Honorable James Jeremiah Shea, Judge of the Workers' Compensation Court, presided. The court reporter was Kim Johnson.

Petitioners were represented by Rex Palmer. Respondent Montana State Fund was represented by Bradley J. Luck and Thomas E. Martello. Intervenor Liberty Northwest Insurance Corporation was represented by Larry W. Jones. Mr. Jones advised that he is also appearing on behalf of the Safeco Insurance Companies. K.D. Feedback was present on behalf of Teck Cominco American, Inc. Mark Cadwallader was present on behalf of the Uninsured Employers' Fund. Steve Jennings was present representing AIU Ins. Co.; American International Pacific Ins. Co.; American Home Assurance Co.; Birmingham Fire Ins. Co.; Commerce & Industry Ins. Co.; Granite State Ins. Co.; Ins. Co. of the State of Pennsylvania; National Union Fire Ins. Co. of Pittsburgh, Pa; New Hampshire Ins. Co.; AIG National Ins. Co.; American International Specialty Lines Ins.; American International Ins. Co.; Illinois National Ins. Co.; American General Corp.; American Alternative Ins. Corp.; American Re-Ins. Co.; Bituminous Fire & Marine Ins. Co.; Bituminous Casualty Corp.; Old Republic Ins. Co.; Old Republic Security Assurance Co.; Centre Ins. Co.; Clarendon National Ins. Co.; Everest National Ins. Co.; Truck Ins. Exchange; Mid Century Ins. Co.; Farmers Ins. Exchange; Federal Express Corporation; Fed Ex Ground Package System, Inc.; Affiliated FM Ins. Co.; Factory Mutual Ins. Co.; Grain Dealers Mutual Ins. Co.; Great American Ins. Co.; Great American Ins. Co. of NY; Great American Assurance Co.; Great American Alliance Ins. Co.; Great American Spirit Ins. Co.; Republic Indemnity of America; Hartford Accident & Indemnity Co.; Hartford Casualty Ins. Co.; Hartford Fire Ins. Co.; Hartford Ins. Co. of The Midwest; Hartford Underwriters Ins. Co.; Property & Casualty Ins. Co. Of Hartford; Sentinel Ins. Co. Ltd.; Twin City Fire Ins. Co.; Trumbull Ins. Co.; L.H.C., Inc.; Markel Ins. Co.; Evanston Ins. Co.; Michigan Millers Mutual Ins. Co.; Millers First Ins. Group; Petroleum Casualty Co.; SCOR Reinsurance Co.; General Security Ins. Co.;



General Security National Ins. Co.; Sentry Ins. Mutual Co.; Sentry Select Ins. Co.; Dairyland Ins. Co.; Middlesex Ins. Co.; PPG Industries, Inc.; Connie Lee Ins. Co.; United National Casualty Ins. Co.; Penn Star Ins. Co.; Fairfield Ins. Co.; General Reinsurance Corp.; Genesis Ins. Co.; North Star Reinsurance Corp.; Universal Underwriters Group; XL Ins. America, Inc.; XL Ins. Co. of New York; XL Reinsurance America; XL Specialty Ins. Co.; Greenwich Ins. Co.; American Guarantee & Liability Ins. Co.; American Zurich Ins. Co.; Assurance Co. of America; Colonial American Casualty & Surety; Fidelity & Deposit Co. of Maryland; Maryland Casualty Co.; Northern Ins. Co. of New York; Valiant Ins. Co.; Zurich American Ins. Co.; and Zurich American Ins. Co. of Illinois.

The purpose of the conference was to identify any outstanding issues and set a briefing schedule on these issues.

After colloquy and hearing argument, the briefing schedule on the definition of "paid in full" as used in the Montana Supreme Court's ruling is as follows:

Simultaneous opening briefs are due Monday, June 8, 2009 ✓
Simultaneous answer briefs are due Thursday, July 23, 2009 ✓
Simultaneous reply briefs are due Monday, August 24, 2009 ✓

No argument will be heard on any other motions at this juncture.

Mr. Jennings advised that his clients dispute the attorneys fee award of 25% and noted his clients raised this argument previously. Mr. Jennings also believes his clients have a due process defense as to jurisdiction. Mr. Jennings advised that once the Supreme Court issues its decision in the *Schmill* matter, he may raise additional implementation and substantive arguments. However, his clients will not stipulate to the holding in *Schmill*, as there may be factual distinctions. I advised that Mr. Jennings' arguments are preserved for the record.

Mr. Palmer requested the Court set a general motions deadline to avoid piecemeal litigation of the numerous arguments. A general motions deadline is set as follows:

Initial motions/briefs are due October 19, 2009 ✓
Answer briefs are due November 18, 2009 ✓
Reply briefs are due December 9, 2009

This includes any other motions that can, in good faith, be filed in light of the Supreme Court's rulings. Any party that files a motion that has been previously been ruled upon or appears to be filed to harass, cause unnecessary delay, or needlessly increase the cost of litigation may be subject to sanctions under M.R.Civ.P. 11 or § 39-71-2914, MCA.

Mr. Palmer requested an opportunity to conduct Rule 30(b)(6) depositions to determine what the insurers are doing to locate claimants potentially deserving of benefits.

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The motion is **denied**. Mr. Palmer will be granted leave to renew this motion contingent on the ruling on the central issue of "paid in full."

Mr. Palmer advised that Tom Murphy wished to inform the Court that the *Reesor* and *Stavenjord* matters are stayed and benefits are not being paid to some claimants. The *Reesor* and *Stavenjord* matters are contingent on the ruling in *Flynn* as to the definition of "paid in full;" remediation efforts are held in abeyance and the stay remains in place. A copy of this minute entry will be docketed in the *Reesor* and *Stavenjord* files.

Court adjourned at 11:55 a.m.

JAMES JEREMIAH SHEA
Judge

c: Parties of record via website.

JMB/PS/JB

Bothe & Lauridsen, P.C.
Attorneys at Law

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KENNETH S. THOMAS
DAVID W. LAURIDSEN
LAURIE WALLACE
DAVID M. SANDLER

JOHN H. BOTHE
(1951-1996)

May 13, 2009

Mr. Larry Jones
Liberty NW Ins. Corporation
700 SW Higgins, Ste. 108
Missoula, MT 59803-1489

RE: SCHMILL v. LIBERTY NW INS. CORP., et al.
Cause No. DA 08-0407

Dear Larry:

I will not agree to Liberty continuing to stall implementation of the *Schmill* decisions. I will not agree to any abeyance or stay which will permit Liberty to continue to delay reviewing its claim files for purposes of paying appropriate *Schmill* benefits. None of the rulings in *Flynn* apply to this case. I want to know what actions Liberty is taking to identify *Schmill* beneficiaries by May 20, 2009. If I do not receive a response by that date, I will begin enforcement actions before the Workers' Compensation Court.

Sincerely,


LAURIE WALLACE
BOTHE & LAURIDSEN, P.C.

LW/rs

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MAY 14 2009

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