

IN THE WORKERS COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 2001-0300

CASSANDRA SCHMILL

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer

FILED

and

JUN - 1 2009

MONTANA STATE FUND

Intervenor.

OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

PETITIONER'S RESPONSE TO LIBERTY NW'S MOTION TO STAY PROCEEDINGS

Liberty has filed a motion asking the Court to stay "all remediation efforts in *Schmill* . . . until such time as the Court so orders it [the stay] be lifted which would be sometime after this Court's decision in the *Flynn/Miller* case. (Respondent's Brief, p. 2.) Liberty argues that until the phrase "paid in full" is defined pursuant to the briefings in *Flynn/Miller* that it would be an "inefficient use of the limited resources of the parties" to continue with enforcement of the *Schmill* retroactivity decision. Liberty's motion should be denied for the following reasons.

In its Order dated July 10, 2007, in this case (as opposed to *Flynn/Miller*), this Court has already addressed the "paid in full" argument being advanced by Liberty and the other insurers in the *Flynn/Miller* case. The law of the case in *Schmill* is that even if the "paid in full" language is included in the definition of a settled claim, none of the potential *Schmill* claims have been "paid in full." (Order Adopting Order of Special Master, Docket No. 380, ¶42.) The Court explained its reasoning as follows:

¶43 Turning first to Class II claims, these claims involve an occupational disease claimant whose temporary total disability benefits ceased when she or he returned to work with no wage loss and no additional benefits were paid other than medical benefits. It is possible, and not uncommon, for a claimant whose temporary total disability benefits ceased upon return to work to become once more entitled to temporary total disability benefits due to relapse into disability. In addition, entitlement to medical benefits typically

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continues in such cases. Class II claims cannot be considered "paid in full."

¶44 In the situation of claimants whose permanent total disability benefits have ceased because they reached retirement age (Class III(b)), medical benefits relating to the occupational disease typically remain payable when reasonable and necessary. Where these claims are not "paid in full," they are not "settled," even if the "paid in full" language is included in the definition of "settled claim." In addition, these claims remain "open" and "actionable" under the *Stavenjord II* definitions should circumstances arise to mandate entitlement to additional benefits.

¶45 Finally, in the context of workers' compensation/ occupational disease claims as described above, where claims typically remain "open" and "actionable" unless settled or closed by final judgment, the Special Master notes that describing Class II and III(b) claims as "paid and full" [sic] may be no different than describing those claims as "closed" or "inactive." Excluding "closed" or "inactive" cases from the common fund was rejected by the WCC in *Flynn*. The "paid in full" status of Class II or Class III(b) claims may justify moving the insurance file to a location outside the Montana claims examiner's office under §39-71-107, MCA, but does not justify removing the case from the retroactive application of *Schmill*. Such files must be located and reviewed.

The July 10, 2007, Order of this Court in this case goes on to further determine which claims are included in the retroactive application of *Schmill*. It has been nearly two years since the Court issued that Order and Liberty has done nothing to identify *Schmill* claims. Since the Court has already ruled on the "paid in full" dispute in this case, there is no basis upon which the Court can issue the stay requested by Liberty. To the contrary, instead of issuing a stay, the Court should issue an order requiring that Liberty comply with the Court's Order of July 10, 2007, and immediately begin identifying *Schmill* claims.

DATED this 29 day of May, 2009.

ATTORNEYS FOR PETITIONER

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By: 
LAURIE WALLACE

Certificate of Mailing

I, Robin Stephens, do hereby certify that on the 29 day of May, 2009, I served a true and accurate copy of the foregoing instrument by U.S. mail, first class, postage prepaid to the following:

Mr. Larry Jones
Law Offices of Larry W. Jones
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JOHN H. BOTHE
(1951-1996)
May 29, 2009

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


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

Dear Ms. Wilson:

Enclosed please find the Petitioner's Reply Brief to Liberty NW's Motion to Stay Proceedings in regard to the above-referenced matter.

Should you have any questions concerning this matter, please contact me directly.

Sincerely,


LAURIE WALLACE
BOTHE & LAURIDSEN, P.C.

LW/rs
Enc.
cc: Larry Jones