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FILED

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OFFICE OF
WORKERS' 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.

LIBERTY'S BRIEF RE WORKERS' COMPENSATION COURT JURISDICTION

Pursuant to this Court's Order filed June 2, 2009, Liberty files this brief regarding the Court's jurisdiction to take action enforcing the common fund award in *Schmill v. Liberty Northwest Ins. Corp.*, 2005 MT 144 (*Schmill II*) regarding its earlier holding in *Schmill v. Liberty Northwest Ins. Corp.*, 2003 MT 80, (*Schmill I*) that apportionment under the Occupational Disease Act was unconstitutional.

The third appeal in this case was filed on August 27, 2008. WCC Docket # 449.

On May 19, 2009 Liberty filed a pleading captioned "Motion to Stay Proceedings and Supporting Brief." Attached to that pleading is a Minute Entry from *Flynn/Miller v. Montana State Fund and Liberty Northwest Ins. Corp.*, dated April 22, 2009, WCC No. 2000-0022, in which this Court stayed the remediation by the parties in that case pending this Court's resolution of the retroactive

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application of the *Flynn/Miller* in the context of what it meant for a case to be settled when it had been "paid in full." The *Flynn/Miller* court in 2008 MT 394 held a claim "paid in full" was settled and therefore not subject to the retroactive application of a Montana Supreme Court decision.

Although Liberty denominated its motion one to stay proceedings, when read in its entirety it is more specifically a motion to stay enforcement of *Schmill I* and *Schmill II*. That is Liberty is not asking that holdings in *Schmill I* and *Schmill II* be stayed pending a decision of *Schmill III*, and instead has simply raised the enforcement/implementation issue related to *Schmill II*.

In this context Liberty's request is best understood in the context of *Harrison v. Liberty Northwest Ins. Corp.*, 2006 MTWCC 24, Order Denying Stay of Execution and Waiver of Supersedeas Bond. In *Harrison* Stillwater moved for an order staying the judgment of this Court in which it found Stillwater and not Liberty was liable to the claimant for the payment of benefits. Stillwater appealed the decision and asked for a stay pending a decision on appeal.

This Court noted at ¶14 that if the decision were stayed Liberty could terminate payment of benefits pending the appeal and the claimant would be without recourse until the appeal process was completed. Without a stay of the case, the Court retained jurisdiction to enforce the judgment.

Therefore, as in *Harrison*, enforcement of the decision in *Schmill I* and *Schmill II* remains at issue. Just as this Court in *Harrison*, absent a stay, was faced with the issue of enforcement the court retained jurisdiction proceeding under *Schmill I* and *Schmill II* because *Schmill III* could have no effect on the holding in *Schmill II*. Stated differently, *Schmill I* and *Schmill II* are no longer on appeal and therefore there is no issue regarding apportionment or the common fund attorney lien except the retroactive application of those two decisions. *Schmill III* does not divest this Court of jurisdiction on those holdings which are *res judicata*.

If the Court were to review the briefs filed in *Schmill III* the Court would find the issue was whether non-party carriers to the *Schmill I* and *Schmill II* cases have to participate in the type of enforcement/implementation process Liberty and other party carriers in *Schmill I* and *Schmill II* are subject to. This is the unusual case in which we appeal with the same caption as the first two appeals in fact does not involve the issue now before the Court which is the enforcement/implementation of *Schmill I* and *Schmill II*. When seen in this context, then the *Flynn/Miller* ruling on "paid in full" is directly relevant to *Schmill I* and *Schmill II* and until "paid in full" is interpreted by this Court the parties subject to enforcement/implementation in *Schmill I* and *Schmill II* do not know what constitutes a case "paid in full" and therefore settled and not subject to retroactive application of *Schmill I* and *Schmill II*.

Liberty's reference to a motion to stay is really to one of enforcement/implementation of cases whose holdings are *res judicata*, but these holdings' retroactive application can not be know until the *Flynn/Miller* issue of "paid in full" is resolved. Therefore the real issue is does the Court have jurisdiction to take action in *Schmill I* and *Schmill II* because *Schmill III* is on appeal. The enforcement/implementation of *Schmill I* and *Schmill II* will be unaffected by the decision in *Schmill III*. The *Schmill III* appeal therefor does not divest the Court of jurisdiction of the *Schmill I* and *Schmill II* holdings which are *res judicata* as regards Liberty.

For the reasons stated above, Liberty requests that its Motion to Stay enforcement/implementation be granted pending resolution of "paid in full" issue.

DATED this 11th day of June, 2009.



Larry W. Jones
Attorney for Respondent/Insurer

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day June, 2009, I served the original of the foregoing LIBERTY'S BRIEF RE WORKERS' COMPENSATION COURT JURISDICTION, on the following:

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Clerk of Court
Workers' Compensation Court
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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:

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Staci M. Wisherd, Legal Secretary