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**FILED**

MAR 28 2013

OFFICE OF  
WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

IN THE WORKERS COMPENSATION COURT OF THE STATE OF MONTANA

|                        |   |   |
|------------------------|---|---|
| CASSANDRA SCHMILL,     | ) |   |
|                        | ) | WCC NO. 2001-0300                         |
| Petitioner,            | ) |   |
|                        | ) |   |
| vs.                    | ) |   |
|                        | ) | PETITIONER'S RESPONSE TO AFFIDAVIT        |
| LIBERTY NW INS. CORP., | ) | INSURERS' MOTION FOR RECONSIDERATION      |
|                        | ) | OR, IN THE ALTERNATIVE, FOR CLARIFICATION |
| Respondent.            | ) |   |
|                        | ) |   |
| and                    | ) |   |
|                        | ) |   |
| MONTANA STATE FUND,    | ) |   |
|                        | ) |   |
| Intervenor,            | ) |   |
| _____                  | ) |   |

COMES NOW the Petitioner, CASSANDRA SCHMILL, by and through her attorneys of record, and submits the following response to Affidavit Insurers' Motion for Reconsideration or, in the Alternative, for Clarification. For the reasons stated herein, the Petitioner asks the Court to deny the Affidavit Insurers' Motion for Reconsideration and to provide the clarification as outlined in this response.

The "Affidavit Insurers" have motioned for reconsideration or, alternatively, for clarification of the Court's Order dated February 11, 2013, claiming they do not know what the Court is ordering them to do. In its Order, the Court sustained Petitioner's objection to dismissing the Affidavit Insurers on the grounds that they did not properly review their files for potential *Schmill* claimants because they used the wrong review date. As such, the Court's

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Order requires the Affidavit Insurers to search their files for potential *Schmill* claimants using the correct review date.

The Summons approved by this Court at the beginning of the *Schmill* common fund required all insurers to search their files for claims "in which an apportionment was taken prior to and including June 22, 2001, for dates of occupational diseases occurring on or after July 1, 1987." (Docket No. 79.) The Montana Supreme Court decision in *Flynn v. Montana State Fund* (2011) 363 Mont. 55, 267 P.3d 23, modified the retroactive applicability of the *Schmill* decision when it held that *Flynn* and the other common fund cases could only be retroactively applied to claims that were not final or had not been settled if they were not yet paid in full. The Court explained that "it is the actual payment of a benefit, following the issuance of a judicial decision, that results in a claim not being 'paid in full.' At the moment the latter benefit is paid, it becomes clear the claim was not 'paid in full.'" *Id.* at ¶20.

The *Flynn* decision changed the insurers' *Schmill* review from looking for cases where apportionment had been taken between July 1, 1987, through June 22, 2001, to looking for cases where such apportionment had occurred and the case was still open, meaning it had not been settled or finalized in some way, or where additional benefits had been paid after the "triggering" judicial decision. In the Omnibus Hearing held on March 8, 2012, counsel for Affidavit Insurers stated that the insurers used the date of the Supreme Court decision (4/10/03) affirming this Court's *Schmill* decision (6/22/01) as the "triggering" judicial decision:

"[I]f someone were to ask me what a *Schmill* claimant was or how to find one, I would say: identify all Montana claimants receiving benefits on or after April 10, 2003, from that list; remove all claimants whose claims were filed after April 10, 2003; from the remaining list identify all claimants whose benefits were apportioned for non-occupational factors."

(*Schmill* Docket No. 518, p. 35, lines 7-14.) In her brief objecting the dismissal of the Affidavit Insurers, Petitioner objected to the use of the date of the Supreme Court decision on the grounds that all other insurers had used the date of this Court's decision when identifying *Schmill* claimants. Therefore, by only searching their claim files back to April 10, 2003, the Affidavit Insurers were omitting almost two years of claims activity where benefits may have been paid on previously apportioned claims, thereby wrongly eliminating qualified claimants from *Schmill* benefits since such claims would not yet be paid in full.

According to Affidavit Insurers counsel's statements at the Omnibus Hearing on March 8, 2012, the Affidavit Insurers did not search their files from July 1, 1987, to June 22, 2001, looking for apportioned claims and then applied the relevant retroactivity rules to determine if they owed any *Schmill* benefits, but only reviewed their files back to April 10, 2003, looking for potential *Schmill* claimants. While Petitioner does not agree that such a backward-looking review complies with the original Summons in this case, as well as the applicable retroactivity rulings, if the Court finds that it does, then Affidavit Insurers' claim review must go back as far as June 22, 2001, since that was the "triggering" judicial decision agreed to by all insurers at

the inception of this common fund. As such, in response to the Court's Order sustaining Petitioner's objections to dismissing the Affidavit Insurers, the Affidavit Insurers must review their files in line with the original Summons and the relevant retroactive decisions using June 22, 2001, for all paid in full claims and file new affidavits attesting to these actions.

If, contrary to their counsel's statements at the Omnibus Hearing, the Affidavit Insurers are now representing to this Court that they did review their files from July 1, 1987, to April 10, 2003, looking for *Schmill* claimants, then for any claims where apportionment occurred prior to June 22, 2001, the Affidavit Insurers must still review those claims from April 10, 2003, to the present to see if any benefits were paid thereby qualifying such claimants for *Schmill* benefits, and file new affidavits reflecting such actions.

In response to the Affidavit Insurers' argument that Petitioner's dismissal of two insurers after objecting to the dismissal of the other insurers using "the exact same search methodology" is inconsistent, Petitioner would state that those insurer's were not dismissed based on the search methodology they used, but on their answers to discovery wherein they stated that between July 1, 1987, and June 22, 2001, they did not have any Montana occupational disease claims. Obviously, if these insurers did not have any Montana occupational disease claims, they could not have any *Schmill* claims, regardless of what search methodology they used. The Affidavit Insurers listed in Petitioner's pleading objecting to dismissing certain insurers all signed affidavits stating that they did not have any claims meeting the Court's criteria as set forth in the Summons. This response puts into question their search methodology and, therefore, is not inconsistent with Petitioner's position.

WHEREFORE, for the foregoing reasons, the Affidavit Insurers' Motion for Reconsideration should be denied and the Court should instruct the Affidavit Insurers to file new affidavits after completing a proper search of their files for *Schmill* claimants using June 22, 2001, as the appropriate triggering judicial decision.

Dated this 26 day of March, 2013.

ATTORNEYS FOR PLAINTIFF

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By:   
LAURIE WALLACE

Certificate of Mailing

I, the undersigned, do hereby certify that on the 26 day of March, 2013, I served a true and accurate copy of the PETITIONER'S RESPONSE TO AFFIDAVIT INSURER'S MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR CLARIFICATION by U.S. mail, first class, postage prepaid to the following:

Mr. Steven Jennings  
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Robin Stephens