IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2006 MTWCC 31

WCC No. 2000-0222

ROBERT FLYNN and CARL MILLER, Individually and on Behalf of Others Similarly Situated

Petitioners

vs.

MONTANA STATE FUND

Respondent/Insurer

and

LIBERTY NORTHWEST INSURANCE CORPORATION

Intervenor.

Appealed to Supreme Court 10/18/06
Affirmed in Part and Reversed in Part 11/25/08

ORDER DETERMINING STATUS OF FINAL, SETTLED, CLOSED, AND INACTIVE CLAIMS

Summary: Petitioners, Respondent, Intervenor, and additional insurers briefed the issue of how this Court should deal with final, settled, closed, and inactive claims, and more specifically, how the rule of law as set forth in a prior decision in this case applies to claimants whose claims fall into one of those categories.

Held: The Court determined that the Montana Supreme Court directed this Court to determine only which claims are final or settled. The Court then determined that a settled claim is a claim in which a department-approved settlement or court-ordered compromise of benefits has been made between the claimant and insurer. The Court further determined that a final claim is a claim in which a final judgment has been entered by the Worker's Compensation Court only if the claim is not currently pending on appeal. Claims

which are settled or final in accordance with these definitions shall not be subject to the retroactivity of *Flynn*.

Topics:

Courts: Retroactivity of Decisions. Consistent with the Montana Supreme Court's holding in *Dempsey v. Allstate Ins. Co.*, 2004 MT 391, 325 Mont. 207, 104 P.3d 483, the retroactive effect of a decision does not apply to cases which are final or settled prior to a decision's issuance. Therefore, although the court in *Schmill II* commented that many claims which might be affected by the rule of law announced in *Schmill I* are "settled, closed, or inactive," it explicitly directed this Court to determine, within the context of workers' compensation law, which cases would be considered "final or settled."

Settlements: Reopening. The Court is unpersuaded that claimants who settled their claims after this Court's initial ruling in *Flynn* should be allowed to reopen their settlements because the Court cannot presume they settled in reliance on that ruling, which was later overturned. Furthermore, any claimant who did settle in reliance on that ruling was aware of the existence of *Flynn* and therefore would have been aware the case could be appealed and possibly overturned.

Claims: Settled. Section 39-71-107(7), MCA, sets forth a clear definition of what constitutes a "settled claim," and it is not this Court's function to rewrite what the legislature has already defined.

Statutes and Statutory Interpretation: Generally. Section 39-71-107(7), MCA, sets forth a clear definition of what constitutes a "settled claim," and it is not this Court's function to rewrite what the legislature has already defined.

Claims: Final. In accordance with the Montana Supreme Court's holding in *Dempsey v. Allstate Ins. Co.*, 2004 MT 391, 325 Mont. 207, 104 P.3d 483, this Court concludes that a final claim is a claim in which a final judgment has been entered by this Court, provided the claim is not currently pending on appeal.

¶1 All parties to this case were given the opportunity to brief the issue of how this Court should deal with final, settled, closed, and inactive claims in light of the Montana Supreme

Court's rulings in this case,[1] *Dempsey,*[2] and *Schmill II.*[3] The deadline for submitting the simultaneous answer briefs now passed, the Court deems this matter submitted and ripe for decision.

I. Scope of Retroactivity

¶2 Specifically at issue is whether the retroactive application of the rule of law set forth in *Flynn*[4] applies to claimants whose cases are final, settled, closed, or inactive. Petitioners, Respondent/Insurer Montana State Fund ("State Fund"),[5] Intervenor Liberty Northwest Insurance Corporation ("Liberty")[6], Insurer J.H. Kelly, LLC (J.H. Kelly),[7] Insurer

[1] *Flynn v. State Compensation Ins. Fund*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397.

[2] *Dempsey v. Allstate Ins. Co.*, 2004 MT 391, 325 Mont. 207, 104 P.3d 483.

[3] *Schmill v. Liberty Northwest Ins. Corp.*, 2005 MT 144, 327 Mont. 293, 114 P.3d 204.

[4] Pursuant to the common fund doctrine, the State Fund should contribute, in proportion to the benefits it actually received, to the costs of the litigation, including reasonable attorney fees, when a claimant pursues SSD benefits from the Social Security Administration which results in an offset of benefit payments which benefits the State Fund. *Flynn*, ¶ 18 (expanded on remand to include other workers' compensation insurers, *see* Order Clarifying Global Lien, 2004 MTWCC 17).

[5] Two notices of joinder were filed in support of State Fund's opening brief, the first by Ace American Insurance Co., Ace Fire Underwriters Insurance Co., Ace Indemnity Insurance Co., Ace Property & Casualty Insurance Co., Bankers' Standard Fire & Marine, Bankers' Standard Insurance Company, Century Indemnity Co., Insurance Co. of North America, Indemnity Insurance Co. of North America, and Pacific Employers Ins. Co. (*see* Docket Item No. 443), and the second by Royal & Sun Alliance, Lumbermans Underwriting Alliance, ASARCO, Inc., Benefis, Continental Casualty Co., Golden Sunlight Mines, Northwest Healthcare Corporation, Northwestern Energy LLC, F.H. Stoltze Land & Lumber Co., Safeway, and Plum Creek Timber Company Inc. (*see* Docket Item No. 451).

[6] A Notice of Joinder was filed in support of Liberty's opening brief by Royal & Sun Alliance, Lumbermans Underwriting Alliance, ASARCO, Inc., Benefis, Continental Casualty Co., Golden Sunlight Mines, Northwest Healthcare Corporation, Northwestern Energy LLC, F.H. Stoltze Land & Lumber Co., Safeway, and Plum Creek Timber Company Inc. (*see* Docket Item No. 451).

[7] J.H. Kelly, LLC, and Louisiana Pacific Corporation filed their brief jointly (*see* Docket Item No. 442).

American Alternative Insurance Corp. ("American Alternative"),[8] and Insurer Affiliated FM Insurance Company ("Affiliated FM")[9] briefed the issue to this Court.

¶3 Two years after its ruling in *Flynn*, the Montana Supreme Court clarified in *Dempsey* the rule of retroactivity in Montana. In expounding on the rule of retroactivity in Montana, the court explained that Montana has had two lines of case law concerning retroactivity.[10] The first line of cases are those which relied on *Chevron Oil Co. v. Huson*.[11] Then, in *Porter v. Galarneau*,[12] the court seemingly adopted the U.S. Supreme Court's holding in *Harper v. Virginia Dep't of Taxation*.[13] As the court explained in *Dempsey*, however, this reference was dicta and without any substantive analysis of *Harper*.[14] In reconciling these lines, the court explained in *Dempsey* that "the two lines of cases may be comfortably

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[8] American Alternative Ins. Corp. is the first named party on an opening brief with the following additional insurance companies: American Re-Insurance Company, Centre Insurance Company, Clarendon National Insurance Company, Everest National Insurance Company, Markel Insurance Company, Evanston Insurance Company, SCOR Reinsurance Company, General Security Insurance Company, General Security National Insurance Company, Penn Star Insurance Company, Fairfield Insurance Company, General Reinsurance Corp., Genesis Insurance Company, North Star Reinsurance Corp., XL Insurance America, Inc., XL Insurance Company of New York, XL Reinsurance America, XL Specialty Insurance Company, Greenwich Insurance Company, American Guarantee & Liability Insurance Company, American Zurich Insurance Company, Assurance Company of America, Colonial American Casualty & Surety, Fidelity & Deposit Company of Maryland, Maryland Casualty Company, Northern Insurance Company of New York, Valiant Insurance Company, Zurich American Insurance Company, and Zurich American Insurance Company of Illinois (*see* Docket Item No. 445).

[9] Affiliated FM is the first named party on an opening brief with the following additional insurance companies: AIG National Insurance Co., AIU Insurance Company, American Home Assurance Company, American General Corp., American International Insurance Co., American International Pacific Insurance Company, American International Specialty Lines Insurance, Birmingham Fire Insurance Company, Bituminous Fire & Marine Insurance Co., Bituminous Casualty Corp., Commerce & Industry Insurance Company, Dairyland Insurance Company, Factory Mutual Insurance Co., Farmers Insurance Exchange, Federal Express Corporation, FedEx Ground Package System, Inc., FM Global, Grain Dealers Mutual Insurance Company, Granite State Insurance Company, Great American Alliance Insurance Co., Great American Assurance Co., Great American Insurance Co., Great American Insurance Co. of NY, Great American Spirit Insurance Co., Hartford Accident & Indemnity Co., Hartford Casualty Insurance Co., Hartford Fire Insurance Co., Hartford Insurance Co. of the Midwest, Hartford Underwriters Insurance Co., Illinois National Insurance Co., Insurance Company of the State of Pennsylvania, L.H.C., Inc., Michigan Millers Mutual Insurance Co., Mid-Century Insurance Co., Middlesex Insurance Company, Millers First Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA, New Hampshire Insurance Company, P P G Industries Inc., Petroleum Casualty Co., Property & Casualty Insurance Co. of Hartford, Republic Indemnity, Sentinel Insurance Company Ltd., Sentry Insurance Mutual Co., Sentry Select Insurance Company, Truck Insurance Exchange, Trumbull Insurance Co., Twin City Fire Insurance Co., and Universal Underwriters Group (*see* Docket Item No. 446).

[10] *Dempsey*, ¶¶ 12-15.

[11] 404 U.S. 97 (1971).

[12] 275 Mont. 174, 185, 911 P.2d 1143, 1150 (1996).

[13] 509 U.S. 86 (1993).

[14] *Dempsey*, ¶ 13.

merged into a rule of retroactivity," and set forth the court's reasoning and the resulting rule of law.[15] While much of *Dempsey* is instructive to the application of retroactivity in this Court, most pertinent to the matter to be determined today is how this Court interprets the following language:

> [L]imiting a rule of law to its prospective application creates an arbitrary distinction between litigants based merely on the timing of their claims. Interests of fairness are not served by drawing such a line, nor are interests of finality. In the interests of finality, the line should be drawn between claims that are final and those that are not (the line drawn in *Harper*). "New legal principles, even when applied retroactively, do not apply to cases already closed." *Reynoldsville Casket Co. v. Hyde* (1995), 514 U.S. 749, 758, 115 S.Ct. 1745, 1751, 131 L.Ed.2d 820, 830. . . .[16]
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> . . . .
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> Therefore, we conclude that, in keeping with our prior cases, all civil decisions of this court apply retroactively to cases pending on direct review or not yet final, unless all three of the *Chevron* factors are satisfied. For reasons of finality we also conclude that the retroactive effect of a decision does not apply *ab initio*, that is, it does not apply to cases that became final or were settled prior to a decision's issuance.[17]

¶4 In *Schmill II*, the Montana Supreme Court concluded that the rule of law announced in *Schmill I*[18] applied retroactively.[19] Relying on *Dempsey*, the court further explained,

> Drawing from the stipulated facts, the State Fund argues that a retroactive application would affect as many as 3,543 claim files . . . .
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> As the State Fund admits, many of these claims are settled, closed, or inactive. From the record before us, it cannot be determined how many

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[15] *Id.*, ¶ 14.

[16] The *Reynoldsville Casket* language quoted by *Dempsey* indeed uses the word "closed," however, in its decision in that case, the U.S. Supreme Court uses the terms "closed" and "final" synonymously or interchangeably. Considering that no insurance company was a party to that case, there is no indication that the U.S. Supreme Court meant its use of the word "closed" to stand for the way that word is used as a term of art in the insurance industry.

[17] *Dempsey*, ¶¶ 28, 31.

[18] *Schmill v. Liberty Northwest Ins.* Corp., 2003 MT 80, 315 Mont. 51, 67 P.3d 290.

[19] *Schmill II*, ¶ 28.

> of the 3,543 claims would, in the context of workers' compensation law, be considered "final or settled" under our holding in *Schmill I*. We leave that initial determination to the WCC.[20]

¶5 In other words, the Montana Supreme Court noted that, while many of the claims which might be affected by the rule of law announced in *Schmill I* are "settled, closed, or inactive," the explicit direction to this Court was to determine, within the context of workers' compensation law, only those cases which would be considered "final or settled." While acknowledging that some claims are "closed" or "inactive," the Montana Supreme Court did not include these claims within its directive. This is consistent with the court's holding in *Dempsey* that the retroactive effect of a decision does not apply to cases which are final or settled prior to a decision's issuance.[21]

¶6 As Affiliated FM conceded in its brief, there is no legal standard by which a case is considered to be "closed" or "inactive." It is up to each insurance company internally to designate a case file as fitting one of these categories. In that same vein, J.H. Kelly notes that no formal procedure exists for closing a case file in Montana.

¶7 J.H. Kelly asserts that *Flynn* held that the retroactive effect of the court's decision "only applies to open claims, not those which are settled, closed or inactive."[22] Likewise, American Alternative asserts that *Schmill II* "held that the State Fund would not have to review 'many of these [3543] claims' because they were closed or inactive."[23] Affiliated FM, likewise, mischaracterizes the holding of *Schmill II* as "stating that 'closed' or 'inactive' claims are not subject to retroactivity."[24] In fact, the words "closed" and "inactive" are pointedly ***not*** included within the court's directive in *Schmill II*. Rather, *Schmill II* uses only the words "final or settled."[25] The Supreme Court having drawn these parameters, it is not for this Court to arbitrarily expand them to include language that is simply not present.

¶8 Moreover, if this Court were to agree that cases which an insurer has deemed "closed" or "inactive" were to be excluded from the retroactive application of the ruling in the case at hand, it would allow the insurer to unilaterally determine which cases those

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[20] *Schmill II*, ¶¶ 18-19.

[21] *Dempsey*, ¶ 31.

[22] Brief of J.H. Kelly, LLC and Louisiana Pacific Corporation on "Final, Closed or Inactive" Issue at 5 (*see* Docket Item No. 442).

[23] Respondents' Opening Brief at 3 (*see* Docket Item No. 445).

[24] Respondents' Opening Brief at 3 (*see* Docket Item No. 446).

[25] *Schmill II*, ¶ 19.

would be. As noted above, different insurers have different protocols for deeming cases "closed" or "inactive." Therefore, even if this Court were inclined to insert language that the Supreme Court did not, the end result would be the potential inclusion or exclusion of claimants not on the merits of their claims but on the policies of their particular insurers. On this point, Affiliated FM argues that in the lexicon of workers' compensation insurers, a file deemed "closed" or "inactive" is one which has been paid in full and thus "perfectly matches" Montana's definition of a "settled claim." If that is indeed the case, then the designations of "closed" or "inactive" would be nothing more than redundancies since those potential claimants would already be excluded as "settled" claims.

¶9 In sum, the Supreme Court's mandate from *Schmill II* is for this Court to determine which claims, in the context of workers' compensation law, would be considered "final" or "settled." This approach is consistent with the Supreme Court's holding in *Dempsey*. This Court will not go beyond that mandate.

II. Settled Claims

¶10 All parties found § 39-71-107(7)(a), MCA, instructive in defining a "settled" claim. Section 39-71-107(7)(a), MCA, states that for purposes of that section, a settled claim is a department-approved or court-ordered compromise of benefits between a claimant and an insurer or a claim that has been paid in full.

¶11 J.H. Kelly further offers that "settled" claims are those which are not subject to "good cause" rescission based on a mutual mistake of material fact, including claims which are paid in full or compromised.

¶12 Petitioners argue that no claim which was not settled with the express approval of the Department of Labor and Industry can be considered "settled" for purposes of retroactivity in this case. Petitioners further argue that claims settled after May 18, 2001, must be reopened because those claims were settled with reliance upon a decision of this Court which was later overturned in *Flynn*.

¶13 Petitioners claim that a plain reading of § 39-71-741, MCA, requires that only the express approval of the Department of Labor and Industry, and not a court-ordered settlement or payment in full, should constitute a settled claim. In its answer brief,[26] State

[26] Although State Fund captioned this brief as a reply (Respondent's Reply to Petitioner's Brief Regarding Retroactivity, Docket Item No. 475), due to the simultaneous briefing scheduled established in this matter, it is actually an answer brief and in fact reply briefs were not permitted by this Court in this matter. State Fund's answer brief was joined by the following insurers: Ace American Insurance Co., Ace Fire Underwriters Insurance Co., Ace Indemnity Insurance Co., Ace Property & Casualty Insurance Co., Bankers' Standard Fire & Marine, Bankers' Standard Insurance Company, Century Indemnity Co., Insurance Co. of North America, Indemnity Insurance Co. of North America, Pacific Employers Insurance Co. (*see* Docket Item No. 480), Lumberman's Underwriting Alliance, ASARCO, Inc., Benefis Healthcare, Continental Casualty Co., Golden Sunlight Mines, Northwest Healthcare, Corp., Northwestern Energy, LLC,

Fund responds that the language of this statute merely allows for the possibility of settlement of claims through the Department of Labor and Industry and does not require it.

¶14 Petitioners do not explain which specific language within § 39-71-741, MCA, invites their interpretation. While the current version of this statute states, in part, "[a]n agreement that settles a claim for any type of benefit is subject to department approval," nothing there or elsewhere appears, to this Court, to somehow preclude court-approved settlements or claims which are paid in full to be considered "settled" claims, as contemplated by § 39-71-107(7)(a), MCA.

¶15 Regarding the reopening of post–May 18, 2001, settlements, this Court is not persuaded that claimants who settled their claims after this Court's initial ruling in this case should be allowed to reopen their settlements. As an initial consideration, the Court cannot just presume that a claimant who settled his or her case after May 18, 2001, necessarily settled in reliance on this Court's later overturned ruling. By the same token, any claimant who did settle in reliance upon this Court's May 18, 2001, Order was, by definition, aware of the case to begin with. If the Court is to venture into making presumptions about a claimant's reliance upon a later overturned case, it is equally reasonable to presume that such a claimant would have known that the case could be appealed and possibly overturned. A claimant who made such a decision is not now entitled to reopen his or her claim when the claimant chose to settle with the knowledge that the *Flynn* decision could be overturned on appeal to the claimant's possible future benefit.

¶16 Section 39-71-107(7), MCA, sets forth a clear definition of what constitutes a "settled claim." Just as it is not this Court's function to expand upon directives from the Supreme Court, it is not this Court's function to rewrite what the legislature has already defined. Therefore, the Court concludes that the language of § 39-71-107(7)(a), MCA (2005), defining a "settled claim," as "a department-approved or court-ordered compromise of benefits between a claimant and an insurer or a claim that was paid in full," shall be the definition of a "settled claim" for purposes of this case.

F.H. Stoltze Land & Lumber Co., Plum Creek Timber Co. Inc., Rosauers, Safeway (*see* Docket Item No. 482), Teck Cominco American, Inc. (*see* Docket Item No. 487), American Alternative Insurance Corp., American Re-Insurance Company, Centre Insurance Company, Clarendon National Insurance Company, Everest National Insurance Company, Markel Insurance Company, Evanston Insurance Company, SCOR Reinsurance Company, General Security Insurance Company, General Security National Insurance Company, Penn Star Insurance Company, Fairfield Insurance Company, General Reinsurance Corp., Genesis Insurance Company, North Star Reinsurance Corp., XL Insurance America, Inc., XL Insurance Company of New York, XL Reinsurance America, XL Specialty Insurance Company, Greenwich Insurance Company, American Guarantee & Liability Insurance Company, American Zurich Insurance Company, Assurance Company of America, Colonial American Casualty & Surety, Fidelity & Deposit Company of Maryland, Maryland Casualty Company, Northern Insurance Company of New York, Valiant Insurance Company, Zurich American Insurance Company, and Zurich American Insurance Company of Illinois (*see* Docket Item No. 489).

III. Final Claims

¶17 American Alternative suggests that fully adjudicated claims are "final," explaining,

> "Final judgment" means the finish of the judicial labor, pronouncement of the ultimate conclusion of the court upon the case, and a direction to the clerk to enter judgment. Until these things are done, the case is still in process of judicial determination, and not ripe for the entry of judgment, because judgment has not yet been rendered.[27]

While this definition would mean any court-entered judgment would be "final" regardless of its appeal status, American Alternative notes, in *Dempsey*[28] the court specifically recognized that cases currently on appeal are subject to retroactivity. Therefore, in following American Alternative's reasoning, the retroactive application of *Flynn* would extend only to those claims in which no final judgment has been entered in the Workers' Compensation Court, and those cases in which a final judgment from this Court is currently on appeal.

¶18 Insurers urge this Court to apply the two-year limitation found in § 39-71-2905, MCA, to this common fund and determine that any case which did not occur between December 1, 2000, and December 2, 2002, be considered final and thus nonrecoverable under *Flynn*.

¶19 J.H. Kelly argues that final cases are all claims whose appeal rights have expired, and urges that, since under § 39-71-2905(2), MCA, a claimant has two years in which to file a petition for hearing upon termination of his or her benefits, all claims in which benefits have been denied and in which more than two years have elapsed without a petition having been filed should be considered "final." State Fund agrees, adding that a claimant should not be allowed to accept payments, wait more than two years without disputing a benefit award, and still enjoy the retroactive effect of a newly decided case.

¶20 Petitioners disagree, arguing that this two-year statute of limitations did not even exist prior to 1997, and that it is disingenuous to claim that a two-year statute of limitations applicable to denied benefits begins to run before the claimant even requests such benefits. Petitioners urge an expansive definition of "final," arguing even that claims resolved by litigation are not truly "final," since pursuant to § 39-71-2909, MCA, such claims may be reopened upon a showing that a claimant's disability has changed. Petitioners argue that the only way a claim may be considered "final" is if it is settled with the express approval

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[27] *Security Trust Sav. Bank of Charles City, Iowa v. Reser*, 58 Mont. 501, 193 P. 532, 533 (1920).

[28] *See* ¶ 31.

of the Department of Labor and Industry and claims which arose before 1987 may not be considered "final" until four years after the Department-approved settlement has occurred.

¶21 Section 39-71-2905, MCA (2005), states in pertinent part that a claimant or an insurer who has a dispute concerning benefits may petition the Workers' Compensation Judge. Since 1997, the statute has further stated that the petition for hearing must be filed within two years after the benefits are denied. While Petitioners' point that pre-1997 claims are not subject to this two-year limit is well taken, this Court determines that this statute is inapposite to the issue at hand. The issue in the case before this Court is the contribution by an insurer to a claimant's costs of litigation for Social Security disability benefits from which the insurer also benefits. First, there must be a denial of benefits. For a claimant who has never requested such a contribution, no denial of benefits has occurred, and thus the statute of limitations did not begin to run.

¶22 State Fund points out that in workers' compensation cases, the "moment of finality" may be difficult to discern. Furthermore, as long as a claimant has timely notified his or her employer of the claimed injury or disease and has timely filed a claim for compensation, there is no statutory time limit for the claimant to seek benefits.[29]

¶23 State Fund argues, however, that regardless of how this Court defines "finality" for purposes of this litigation, judicial decisions can only apply retroactively to those claims that are currently in active litigation. State Fund points to language from *Harper* which the Montana Supreme Court quotes in *Dempsey*, and which states, "When this Court applies a rule of federal law . . . that rule is the controlling interpretation . . . and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement . . . ."[30] State Fund overlooks the fact that the entire point of the reasoning behind *Dempsey* was the Montana Supreme Court's attempt to reconcile the *Chevron* and *Harper* lines of cases.

¶24 The ultimate holding of *Dempsey* is not the various quotations from these two cases found within the *Dempsey* opinion, but rather the reconciliation of the cases, in which the court says, "Therefore, we conclude that, in keeping with our prior cases, all civil decisions of this court apply retroactively to cases pending on direct review or not yet final, unless all three of the *Chevron* factors are satisfied."[31] Even assuming *arguendo* that State Fund's interpretation of the *Harper* quotation is correct, having considered that language, the Montana Supreme Court chose not to employ it in the final *Dempsey* holding. Rather, in determining the scope of retroactivity in *Dempsey*, the court held it applied to "cases

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[29] See generally §§ 39-71-601, -603, MCA.

[30] *Dempsey*, ¶ 23.

[31] *Id.*, ¶ 31 (emphasis added).

pending on direct review or not yet final."[32] The use of the disjunctive in this instance clearly encompasses cases which are not currently pending on direct review, or to use State Fund's language, "in active litigation."

¶25 Therefore, in accordance with the Supreme Court's holding in *Dempsey*, this Court concludes that a final claim is a claim in which a final judgment has been entered by this Court, provided the claim is not currently pending on appeal.

Based on the foregoing, therefore, this Court **ORDERS**:

¶26 A SETTLED CLAIM is a claim in which a department-approved settlement or court-ordered compromise of benefits has been made between the claimant and insurer.

¶27 Claims which have been SETTLED in accordance with the above definition shall not be subject to the retroactivity of *Flynn*.

¶28 A FINAL CLAIM is a claim in which a final judgment has been entered by the Worker's Compensation Court only if the claim is not currently pending on appeal.

¶29 Claims which are FINAL in accordance with the above definition shall not be subject to the retroactivity of *Flynn*.

¶30 Claims which are neither FINAL nor SETTLED shall be subject to the retroactive application of this case.

¶31 This Order is certified as final for purposes of appeal.

DATED in Helena, Montana, this 29th day of September, 2006.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Parties of Record via Website
Submitted: March 3, 2006

[32] *Id*. (emphasis added).