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**FILED**

**JAN 24 2001**

OFFICE OF  
WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

ROBERT FLYNN	)	WCC No. 2000-0222
Petitioner,	)	
v.	)	AGREED STATEMENT OF FACTS
MONTANA STATE FUND,	)	
Respondent/Insurer for	)	
	)	
SALISH KOOTENAI COLLEGE	)	
Employer.	)	

\* \* \* \* \*

COME NOW the parties, by and through their counsel of record, and stipulate that the following statements are true.

1. That prior to and on June 23, 1993, Claimant suffered an occupational disease arising out of and in the course of his employment with Salish Kootenai College in Lake County, Montana. Claimant injured his arms/hands while performing repetitive activities.
2. At the time the occupational disease arose and progressed, Claimant's employer was enrolled under Compensation Plan III of the Workers' Compensation Act and its insurer is State Compensation Insurance Fund

[State Fund].

3. State Fund has accepted Claimant's claim and has paid both medical and temporary total disability benefits. Claimant has been continuously totally disabled since the summer of 1993 and State Fund has paid total disability benefits for this entire period of time. State Fund has recently conceded permanent total disability.
4. The parties have complied with any mediation procedure required in the Workers' Compensation Act. The Department of Labor, Employment Relations Division, has declined to mediate the issues presented by Claimant's Petition for Hearing on the ground that it does not have jurisdiction over those issues.
5. On June 23, 1993, R. D. Marks, MD, diagnosed Claimant with carpal tunnel syndrome.
6. Also on June 23, 1993, Lennard Wilson, MD, a neurologist, performed nerve conduction studies and diagnosed Claimant with bilateral carpal tunnel syndrome.
7. On July 7, 1993, Rory Wood, MD, an orthopedic surgeon, diagnosed Claimant with bilateral carpal tunnel syndrome. At the time of his evaluation, Claimant had been having numbness and tingling in both hands for quite some time. Dr. Wood noted that claimant had "seen Dr. Marks about this, and had nerve conduction studies done which show bilateral carpal tunnel syndromes." State Fund received this information on August 13, 1993.
8. On August 24, 1993, Claimant presented State Fund with his Claim for Compensation, wherein he stated "Beginning during the last three months of 1992 I noticed gradually increasing pain, numbness and loss of control in my hands. This developed into continual tingling and restricted motion and loss of grip strength." He listed the cause of his condition as "overuse and repetitive activity" affecting his "arms and hands" "beginning during last 3 months 1992."
9. On November 4, 1993, Claimant presented State Fund with a "Claimant

Travel Expense Voucher" wherein he claimed travel expenses for 14 separate trips for medical care related to his carpal tunnel syndrome. The first claimed trip was for 140 miles on June 23, 1993, and described as "went to Dr. Marks and Dr. Wilson."

10. On May 4, 1994, State Fund agreed to pay for the claimed travel expenses "from June 1993 forward."
11. On February 8, 1996, State Fund wrote to Claimant that since Social Security had accepted his claim and started paying him \$1,029.00 per month, it had reduced Claimant's weekly compensation rate from \$336.00 to \$217.59 effective February 7, 1996. At this same time, State Fund also wrote that due to the retroactive lump sum Social Security payment, State Fund calculated that it had overpaid \$14,006.25. Claimant's Social Security benefits were the result of Claimant pursuing active litigation and hearing before an Administrative Law Judge of the Social Security Administration. State Fund also wrote that if Claimant did not contact State Fund to arrange repayment, State Fund might suspend biweekly payments for a period sufficient to recover the overpayment.
12. On February 19, 1996, Claimant wrote to State Fund and asked that his benefits not be suspended, stated that he would prefer a monthly reduction and asked that State Fund take into account the \$4,000.00 he paid in attorney fees to establish and collect his Social Security benefits.
13. On March 26, 1996, State Fund wrote that "on February 28, the State Fund referred Mr. Flynn's claim to Crawford & Company to obtain a Coles Analysis" and that "14 days from the date of this letter, Mr. Flynn's temporary total disability benefits will be suspended. Once the Coles Analysis is completed, the State Fund will be in a better position to revisit this decision regarding [Claimant's] benefits."
14. State Fund suspended biweekly benefits effective April 3, 1996.
15. On April 5, 1996, State Fund wrote, (confirming an April 3, 1996, phone conversation) regarding the attorney fees Claimant paid to obtain his Social Security benefits, "There is no statute which requires the State

Fund to take those attorney fees into consideration.”

16. On May 29, 1996, Claimant wrote (confirming a phone conversation of the same day) requesting that State Fund reinstate his total disability benefits retroactive to the date of his last benefit check which was April 2, 1996. Claimant explained that reinstatement was mandatory since (1) State Fund had terminated benefits before completing the Coles Analysis and (2) Claimant did not agree as to the amount or method of Social Security recoupment. Claimant directed State Fund to Mackney vs. State Fund, WCC No. 9211-6622, June 18, 1993, page 15 and quoted that portion of the opinion where the Court stated:

“the fund apparently unilaterally determined that it would use claimant’s impairment award entitlement to offset the claimant’s Social Security overpayment obligation to the insurer....there is no authority in the workers’ compensation act to allow it (recoupment) to be done indiscriminately. There is certainly no prohibition in simplifying the process, however, the insurer should not assume that the claimant will in all instances agree with this method of recoupment.”

Claimant advised that if an agreement could not be reached, State Fund could take the matter to court but could not unilaterally initiate recoupment.

17. On May 31, 1996, State Fund notified Claimant that it would reinstate total disability benefits retroactive to April 3, 1996, since his last benefit check paid through April 2, 1996. In this same letter, State Fund stated that it had failed to initiate the Social Security offset described in its letter of February 8, 1996, which created an additional overpayment of \$947.28. (Specifically, State Fund paid from February 7, 1996, through April 2, 1996, eight weeks, at a rate of \$336.00 per week for a total of \$2,688.00 rather than \$217.59 per week for a total of \$1,740.72.)

State Fund also wrote that:

“...the State Fund owe’s [Claimant] temporary total disability benefits from April 3, 1996, through May 27, 1996, or 8

weeks. These weeks at the temporary total disability rate of \$217.59 equals \$1,740.42. In order to avoid additional overpayment on top of the already \$14,006.25, [State Fund had] recouped from the back TTD, \$947.28."

State Fund paid Claimant the sum of \$793.44 shortly after this letter.

18. On June 11, 1996, Claimant notified State Fund that he did not agree with State Fund's unilateral decision to recoup the claimed overpayment of \$947.28 in a lump sum. Claimant pointed out that under the Mackney rational this lump sum recoupment was not permissible without agreement of the Claimant. Claimant asked State Fund, "Please reconsider your position and forward the sum of \$947.28 which you withheld from the previous payment."
19. On July 3, 1996, State Fund wrote to Claimant agreeing to pay the additional \$947.28 which it had withheld, with the caveat that this sum would be added to the existing overpayment.
20. On July 10, 1996, Claimant wrote State Fund reiterating his wish that State Fund pay him the additional \$947.28 which it had withheld. State Fund complied with Claimant's request in due course after July 10, 1996.
21. On September 26, 2000, State Fund wrote to Claimant confirming that his occupational disease "was diagnosed on June 23, 1993," and conceding that Claimant is "unable to return to any form of gainful employment in his usual occupations and, as such, is permanently totally disabled as defined by the Workers' Compensation Act."

State Fund also wrote that it had calculated the overpayment resulting from Claimant's SSDI entitlement to be \$14,984.58 and that it would immediately initiate recovery of overpayment by unilaterally reducing Claimants benefits by \$49.86 per week, in addition to the ongoing Social Security offset. State Fund reduced Claimant's benefits as it said it would.

22. On October 6, 2000, Claimant notified State Fund by telephone and letter that he did not want his benefits "terminated or reduced unless and until

an agreement has been reached between him and the State Fund as to the exact method and amount."

Claimant reminded State Fund that "the law which permits unilateral reduction of benefits to accomplish offset for any Social Security overpayment was not enacted until 1993. Although arising in 1993, Mr. Flynn's claim occurred under the 1991 law; i.e., before July 1, 1993."

Claimant expressed his concern that "we do not think the State Fund can reap the full benefit of Mr. Flynn's expenses incurred to obtain the Social Security award without also paying some of those expenses. If you have any legal authority to the contrary, it would certainly speed up the negotiation process to determine the proper and acceptable amount of reduction in order to permit recoupment of the Social Security overpayment."

23. On October 11, 2000, State Fund responded to Claimant's October 6, 2000, communication and invited Claimant to make any alternate suggestion for recoupment of the Social Security offset that Claimant might prefer. State Fund advised that despite Claimant's objection, State Fund would continue "the current recovery method" pending an agreement to change the method. State Fund further advised that it would not allow or recognize any reduction in the claimed overpayment as a result of the attorney fees Claimant paid to obtain his Social Security benefits.
24. On October 18, 2000, Claimant wrote to State Fund that he still did not want his benefits terminated or reduced unless and until an agreement has been reached between him and the State Fund as to the exact method and amount. Claimant also asked that State Fund please immediately pay the recent biweekly check reduction and reinstate benefits to the prior level until an agreement is reached or the Workers' Compensation Court orders otherwise.

Claimant went on to propose that any reductions in biweekly benefits begin with the first benefit check coming due in May 2001 with equal reductions through his retirement age. Claimant advised that this would allow him to adjust his budget in preparation for the reduction. He

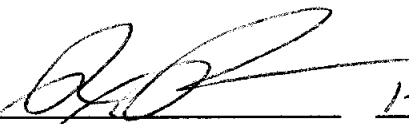
explained that the present reduction which State Fund initiated unilaterally was a violation of law and a hardship on Claimant and his family. He further advised State Fund that, "just this year Claimant's wife had retired from work and they were trying to adjust to the income loss." Also, he advised that at this time of year his utility bills increase from the range of \$30.00 per month in the summer to the range of \$200.00 per month in the winter. He further explained that he can switch to a flat rate budget billing with Montana Power to help adjust to the reduction in workers' compensation benefits, but he understood that this option was not available until spring.

Finally, Claimant pointed out that waiting until spring would allow State Fund and Claimant to work out the attorney fee issue. Claimant pointed out that his counsel's efforts in establishing and collecting Social Security benefits created a common fund from which he and the State Fund both benefitted. Claimant concluded this communication by again reminding State Fund that, "there is no just reason why the State Fund should not share in the cost of that benefit. Again, if you have any authority, legal or otherwise, to the contrary, please provide it to me."


25. On October 24, 2000, State Fund wrote Claimant that it would cease the unilateral reductions in his biweekly payments (of which there were two, a total of \$199.44) but that it would not pay him the funds it had withheld. It went on to advise that it would reinstate reductions beginning April 24, 2001. At that point the reductions would be \$54.64 per week.
26. On November 2, 2000, Claimant wrote State Fund once again advising that he, "does not agree that you may reduce his benefits next spring or any other time until we resolve our differences concerning the State Fund's pro rata share of attorney fees. We stand by our position and continue to instruct you not to withhold any benefits until the Court has ordered or we come to an agreement. This is the law."
27. At all times relevant to the issues and funds in dispute, there has been no court order or agreement between the parties authorizing State Fund to recoup any portion of the alleged overpayment.

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ATTORNEY FOR RESPONDENT

  
\_\_\_\_\_  
by Rex Palmer

1-24-01  
date

  
\_\_\_\_\_  
by Ann E. Clark

2/2/01  
date



**ATTORNEYS INC., P.C.**  
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January 24, 2001

Patricia J. Kessner, Clerk of Court  
Workers' Compensation Court  
PO Box 537  
Helena, MT 59624-0537

Re: Robert Flynn

Dear Ms. Kessner:

I have enclosed a copy of AGREED STATEMENT OF FACTS. The original will be forwarded to the court by Ann Clark.

We request that after the Judge has had time to read the AGREED STATEMENT OF FACTS, Ms. Clark and I have a brief conference call with the Judge to discuss the issues and arrange a briefing schedule.

If you have any questions or concerns, feel free to contact me. Thank you for your assistance.

Sincerely,  
ATTORNEYS INC., P.C.

  
Rex Palmer

RP:mm

Enclosure

cc: Ann Clark