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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 2000-0222

ROBERT FLYNN

Petitioner,

vs.

MONTANA STATE FUND

Respondent/Insurer

AMICUS CURIAE
(Retroactivity and
Remand Bar on Amending Petitions)

COMES NOW amicus curiae Geoffrey C. Angel, counsel for Mark Mathews and Jeremy Ruhd, and files the following brief addressing the issues:

1) Is Flynn barred after remand from amending his petition to include common fund/class claims?
2) Is the Supreme Court's decision in Flynn retroactive?

There is no authority for barring Flynn from a post-remand amendment of his petition to seek common fund/class relief including recovery of costs and attorney fees.

The Supreme Court's decision in Flynn **must** be applied retroactively because the decision redresses State Fund's unconstitutional application of the social security offset which did not include a reduction for fees incurred in obtaining Social Security benefits. *Article 2 Section 16, Montana Constitution.* "No person shall be deprived of this full legal redress for injury incurred in employment." *Id.* The Montana Supreme Court made clear that "all "new" rules of constitutional law **must** . . . be applied to all those cases which are still subject to direct review." *City of Bozeman v. Peterson, 227 Mont. 418, 739 P.2d 958 (1987) quoting Shea v. Louisiana, 470 U.S. 51 (1985).* Under either this constitutional exception to the *Chevron* test or application of the three pronged analysis (if its still good law) the decision in *Flynn* should be applied completely retroactive.

Flynn was not expressly decided based on constitutional grounds but applied the equitable common fund doctrine to accomplish the constitutional mandate of full legal redress for injuries incurred in employment. The State Fund's refusal to bear a *pro rata* share of fees incurred in order to obtain a benefit in which it asserted an interest deprived Flynn of full legal redress under the governing law. The *Flynn* decision fulfills the constitutional mandate and therefore must be applied retroactively.

"Generally, judicial decisions will apply retroactively." *State, City of Bozeman v. Peterson, 227 Mont. 418, 739 P.2d 958 (1987) citing Solem v. Stumes, 465 U.S. 638 (1984).* "The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student." *Rivers v. Roadway Express, Inc., 511 U.S. 298, ___ (1994) quoting United States v. Security Industrial Bank, 459 U.S. 70, 79 (1982).* "Judicial decisions have had retrospective operation for near a thousand years." *Rivers, 511 U.S. at ___ quoting Kuhn v. Fairmont Coal Co., 215 U.S. 349 (1910)(Holmes, J., dissenting).* "A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers, 511 U.S. at ___.*

The Montana Supreme Court has often stated that judicial decisions will be given retroactive effect. *Haugen v. Blaine Bank of Montana, 279 Mont. 1, 926 P.2d 1364 (1996) citing Kleinhesselink v. Chevron, U.S.A., 277 Mont. 158 (1996); Porter v. Galarneau, 275 Mont. 174 (1996); State, City of Bozeman v. Peterson, 227 Mont. 418, 739 P.2d 958, 960 (1987).* "We will continue to give retroactive effect to judicial decisions, which is in accord with the U.S. Supreme Court's holding in *Harper v. Virginia Dept. of Taxation", 509 U.S. 86 (1993). Porter, supra 275 Mont. at 185, 911 P.2d at 1150.* This rule, however, was not always absolute.

The United States Supreme Court's balancing test for the nonretroactive application of a judicial decision set forth in *Chevron Oil Company v. Huson, 404 U.S. 97 (1971)*, adopted by the Montana Supreme Court in *LaRoque v. State, 178 Mont. 315, 583 P.2d 1059 (1978)* allowed the Court to make a decision nonretroactive if any of the following were present:

1. The decision established a new principle of law that was not foreshadowed.
2. The purpose and effect of the new principle of law will be defeated.
3. The retroactive application would be inequitable.

This *Chevron* test is not three mutually exclusive criteria but three interdependent factors to be weighed in the analysis whether to apply a decision only prospectively. Prospective application is clearly disfavored and ultimately led the Supreme Court to overrule its holding in *Chevron. See James Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991); Harper v. Virginia Dept. of Taxn, 509 U.S. 86 (1993).*

Stare decisis reflects the western concern for stability, predictability and equal treatment but it does not require adherence to a manifestly wrong decision. *Haugen, 291 Mont. at 9, 926 P.2d at 1369. Laroque* and its progeny are premised upon an exception to the retroactive application of judicial decisions that has since been renounced by the United States Supreme Court. The *Chevron* analysis as an exception to the retroactive application of judicial decisions is dead in America.

If *Chevron* were applied in this case the *Flynn* decision would still be applied retroactively. *Means, Hall* and *Murer* were clear precedence for the distribution of the expense to all who share in a recovery (passive beneficiary) not just the party taking the risks (active beneficiary). *Flynn* seeks to insure full legal redress to injured workers who receiving social security who suffer a disproportionate deduction from the insurer under the social security offset after the costs of recovery are deducted. This purpose of *Flynn* would be defeated if others similarly situated were not treated equally. The State Fund cannot demonstrate that applying *Flynn* retroactively would be inequitable because it has retained the *pro rate* share of fees from all permanently disabled workers and equity demands that they now return those benefits.

Flynn was decided on equitable grounds and that equity would be furthered by it retroactivity.

In sum, barring Flynn's request for common fund attorney fees from all other similarly situated claimants now entitled to recover the social security offset withheld by State Fund would ignore the very nature of the common fund doctrine. State Fund's arguments miss the point. The Flynn decision must be applied retroactively because it remedied a constitutionally protected right and therefore is an exception to the *Chevron* analysis even if it still applies in Montana. The *Chevron* analysis also supports the retroactive application of *Flynn* which creates an ascertainable class of insureds who are now entitled to recover the improperly reduced PPD benefits. The equitable doctrine supports the award of reasonable attorney fees from this common fund.

DATED this 11th day of July 2003.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 11th day of July 2003 a true and correct copy of the foregoing was hereby served, by depositing the same, in an envelope in the United States mail, first-class, postage pre-paid, addressed to:

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