

January 14, 2004

The Honorable Mike McCarter
Workers' Compensation Judge
1625 11th Avenue
PO Box 537
Helena, MT 59624-0537

Re: *Flynn and Miller v. State Fund*

Dear Judge McCarter:

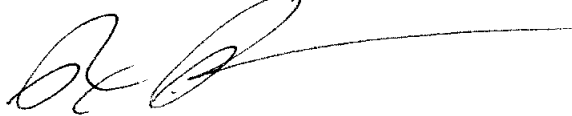
You may recall that we had a telephone conference on November 4, 2003, with Brad Luck, Tom Martello, Tom Harrington and I on the line. Among other things, we discussed that I would prepare a proposed NOTICE OF CLAIM OF ATTORNEY LIEN for the Court to send all workers' compensation insurers other than the State Fund. At that time you asked that I provide a copy to the State Fund for review. I provided the proposed notice to the Court and the State Fund on December 29, 2003.

The proposed notice is patterned after notices which the Court has used in other recent common fund cases. Today I spoke with Brad Luck and he said they have no objection to the proposed notice.

Enclosed is a copy of the proposed notice and attachment which is my Amended Notice of Attorney's Lien. The docket sheet indicates that the original Amended Notice of Attorney's Lien was filed on January 2, 2004, and is now with the Supreme Court.

Please let me know if you want anything else from me in order to move this notice process forward.

Sincerely,
ATTORNEYS INC., P.C.



Rex Palmer

RP:crr
Enclosures

January 14, 2004

The Honorable Mike McCarter
Workers' Compensation Judge
1625 11th Avenue
PO Box 537
Helena, MT 59624-0537

Re: *Flynn and Miller v. State Fund*

Dear Judge McCarter:

Enclosed please find a copy of my letter to Brad Luck at Garlington, Lohn and Robinson dated January 14, 2004, without enclosures.

If you have any questions or concerns, please do not hesitate to contact this office.

Sincerely,
ATTORNEYS INC., P.C.



Rex Palmer

RP:crr
Enclosure

January 14, 2004

Bradley J. Luck
Garlington, Lohn & Robinson
199 W Pine
PO Box 7909
Missoula, MT 59807-7909

Re: *Flynn and Miller v. State Fund*

Dear Brad:

Pursuant to our conversation today, enclosed please find a copy of our letter to the Court dated January 14, 2004, with enclosures.

If you have any questions or concerns, please do not hesitate to contact this office.

Sincerely,
ATTORNEYS INC., P.C.



Rex Palmer

RP:crr
Enclosures
cc: Judge McCarter

Rex Palmer
ATTORNEYS INC., P.C.
301 W Spruce
Missoula, Montana 59802
(406) 728-4514
ATTORNEYS FOR PETITIONER

IN THE WORKERS' COMPENSATION COURT IN THE STATE OF MONTANA
BEFORE THE WORKERS' COMPENSATION JUDGE

Robert Flynn,)	WCC No. 2000-0222
)	
and)	
)	AMENDED NOTICE of
Carl Miller, individually and on behalf)	ATTORNEY'S LIEN
of others similarly situated,)	
Petitioners,)	
v.)	
)	
Montana State Fund)	
Respondent/Insurer.)	

* * * * *

COMES NOW the undersigned, and herewith gives notice to all insures and self insurers writing or maintaining workers' compensation coverage in the State of Montana on or after July 1, 1974, of the undersigned's attorney's lien upon the common fund created and to be created which has or will directly benefit all ascertainable absent workers' compensation claimants. Those absent claimants should be required to contribute, in proportion to the benefits they receive or will

FILE COPY

identified in the preceding paragraph. A copy of the attorney's Amended Notice of Attorneys Lien, as filed with the Court, is attached hereto.

The mailing certificate for this NOTICE OF CLAIM OF ATTORNEY LIEN is on file with the Workers' Compensation Court, PO Box 537, Helena, MT 59624-0537.

Dated in Helena, Montana, this _____ day of _____, 200__.

(Seal)

Judge

OFFICE OF
WORKERS COMPENSATION JUDGE
HELENA, MONTANA

JAN 1 5 2004

RECEIVED

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF
MONTANA**

**WCC No. 2000-0222
WCC NO. 2003-0771**

* * * * *

**ROBERT FLYNN
and
CARL MILLER,
individually and on behalf of others similarly situated,
Petitioners,**

v.

**MONTANA STATE FUND,
Respondent/Insurer.**

* * * * *

NOTICE OF CLAIM OF ATTORNEY LIEN

* * * * *

To all insurers and self insurers writing or maintaining workers' compensation coverage in the State of Montana on or after July 1, 1974.

Please take notice that pursuant to the *common fund doctrine*; the decision of the Montana Supreme Court in *Flynn v Montana State Fund*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397; and the *DECISION AND ORDER REGARDING RETROACTIVITY AND ATTORNEY FEES* of this Court dated August 5, 2003, in the above-entitled matter, the attorneys in the above-entitled matter claim a lien with regard to Montana workers' compensation claimants who incurred costs or fees to obtain a Social Security award for which the entity providing workers' compensation coverage took an offset or had a policy of taking an offset without accounting for the costs incurred by the claimant to recover the award.

The lien is for a percentage of the funds which the insurer is now required to remove from its offset calculation, as required by the two Court decisions

receive, to the cost of the litigation, including reasonable attorney fees allowable by law at the time of the claimants' respective industrial injury or occupational disease.

The undersigned commenced and maintained an action in the Montana Workers' Compensation Court for Robert Flynn entitled, *Flynn v. Montana State Fund*, WCC NO., 2000-0222. The legal issues in the matter were ultimately decided by the Montana Supreme Court in *Flynn v. Montana State Fund*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397 ("*Flynn*"). The *Flynn* Court stated that "...equity demands that all parties receiving a benefit from the common fund share in the costs of its creation." The Court ruled that pursuant to the *common fund doctrine*, where the workers' compensation claimant incurred costs to establish entitlement to social security benefits, the workers' compensation insurer "...should contribute, in proportion to the benefits actually received, to the costs of the litigation, including reasonable attorney fees."

On remand from the Montana Supreme Court, additional issues were raised in the Workers' Compensation Court concerning the legal consequences of the *Flynn* decision. As well, the undersigned commenced and maintained another action in the Workers' Compensation Court for Carl Miller and others similarly situated entitled, *Miller, et al. v. Montana State Fund*, WCC No. 2003-0771 ("*Miller*"). The Workers' Compensation Court concluded that the appropriate way to handle the *Miller* action was within the same proceedings as the post remand *Flynn* issues and sua sponte consolidated the two actions on May 30, 2003. On August 5, 2003, the

Workers' Compensation Court issued a ruling on many of the outstanding issues in the consolidated action ("*Flynn/Miller*").

The Workers' Compensation Court ruled in *Flynn/Miller* that (1) as a result of the *Flynn* decision, others workers' compensation claimants situated similarly with Robert Flynn became entitled to have the insurer pay a pro-rated share of the cost, including attorney fees for representation, the claimants incurred in connection with their successful effort to obtain Social Security benefits and (2) common fund fees were payable, based on the benefit received.

SCOPE OF LIEN

1. The lien is asserted against all insurers and self insurers writing or maintaining workers' compensation coverage in the State of Montana on or after July 1, 1974.
2. The lien extends to all Montana workers' compensation claimants who incurred costs or fees to obtain a Social Security award for which the entity providing workers' compensation coverage took an offset or had a policy of taking an offset without accounting for the costs incurred by the claimant to recover the award, as required by the *Flynn* decision.
3. The amount of the claimed lien is that amount granted by the attorney fee statute and the Department of Labor, more particularly;
 - A) For each claimant with an injury or occupational disease entitlement dated on or after November 11, 1988, 25% of the benefit to which each claimant is entitled as a result of the *Flynn/Miller* decision; and
 - B) For each claimant with an injury or occupational disease entitlement date prior to November 11, 1988, 33% of the benefit to which each claimant is entitled as a result of the *Flynn/Miller* decision if paid before decision on appeal and 40% if paid after decision on appeal of the pending *Flynn/Miller* action.

The undersigned claims no lien on any of the following:

1. Any Social Security offset initiated prior to July 1, 1974; and
2. Any Social Security award ordered to be paid after the date of the *Flynn/Miller* decision of August 5, 2003.

Dated this 29th day of December 2003.



Rex Palmer
ATTORNEYS INC., P.C.
301 W Spruce
Missoula, MT 59802
(406) 728-4514
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of December 2003, a true and correct copy of the foregoing was served upon the following by U.S. mail, hand-delivery, Federal Express, or facsimile:

Bradley J. Luck
Garlington, Lohn & Robinson
199 W Pine
PO Box 7909
Missoula, MT 59807-7909

U.S. Mail
 Hand Delivered on the 30th of
 Federal Express December, 2003
 Facsimile

Larry Jones
Liberty Northwest
700 SW Higgins Avenue, Ste 108
Missoula, MT 59803-1489

U.S. Mail
 Hand Delivered
 Federal Express
 Facsimile

