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FILED

MAY - 2 2003

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

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

Robert Flynn,)	WCC No. 2000-0222
Petitioner,)	
v.)	
)	PETITIONER'S RESPONSE TO
State Compensation Ins. Fund,)	RESPONDENT'S MOTION FOR STAY AND
Respondent/Insurer for)	DIRECTION ON IMPLEMENTATION
)	
Salish Kootenai College,)	
Employer.)	

* * * * *

COMES NOW Petitioner and submits this brief in opposition to Respondent's Motion for Stay and Direction on Implementation.

The thrust of the State Fund's motion is to seek an advisory opinion from the Court before it rules on the merits of the issues presently pending and scheduled for briefing. It provides no statutory or other legal basis for its request.

1. STAY

The State Fund argues that "a stay is necessary to maintain the status quo while the rights and obligations of the parties are determined." It provides no legal authority for this argument or for the relief it requests. In fact, no stay is authorized or necessary under the rules until judgment is entered. After judgment is entered, a stay may be granted only on specified terms not applicable here.

At this point the State Fund's payment obligation is clear under the law; yet it refuses to voluntarily comply with its obligations to totally disabled claimants. It is

understandably worried about the ramifications of its choice not to pay. It anticipates being sued for unfair claims practices. Certainly, when an insurer chooses to violate a clear and simple dictate of the Supreme Court it can reasonably expect to be sued. It cannot, however, reasonably expect this Court, short of ruling on the merits to provide the otherwise absent reasonable basis for its choices and conduct in adjusting claims. The State Fund's request for a stay is a thinly veiled request for an advisory opinion which State Fund hopes to use in defense of its choice to disregard the Supreme Court's decision in *Flynn*.

The Supreme Court has spoken. As a direct consequence of the *Flynn* litigations, Workers' Compensation claimants receiving Social Security benefits through litigation are entitled to contribution, in proportion to the benefits actually received, to the costs of the litigation. This should not require protracted delay or litigation. The entitlement is automatic and requires only:

- 1) Verification of Social Security awards obtained through litigation (State Fund routinely collects this information in order to calculate the statutorily permitted offset.), and
- 2) Simple mathematical calculation (since it received 1/2 the benefit, multiply by 50% the cost incurred by claimants to obtain their Social Security entitlement), and
- 3) Pay (3/4 to claimant, 1/4 to satisfy attorney's lien on file).

No issues remain to determine individual entitlements.

Pending the Court's ruling on the Common Fund claim, Petitioner does not oppose an order requiring Respondent and other insurers to withhold and retain (preferably in an interest bearing account) the amount of the claimed attorneys lien from the payment which it owes to claimants pursuant to the *Flynn* decision

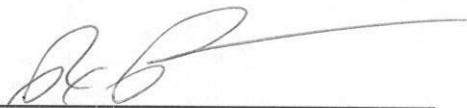
2. Direction on Implementation

The State Fund's Request for direction on prospective implementation of the *Flynn* decision is an unvarnished request for an advisory opinion from this Court.

No doubt the State Fund, and most other insurers, would appreciate advisory opinions from the Court on implementing the mandates of law. Especially where, as here, the insurer has apparently decided it wants to test the water by denying and delaying benefits to totally disabled claimants. It is not the Court's job to provide

advisory opinions. The State Fund has provided no authority for the Court to do so. Petitioner submits that the Court should not do so unless the State Fund notifies the potentially affected claimants so that they have a fair opportunity to be heard on the issue.

Dated this 30th day of April 2003.



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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April 2003, a true and correct copy of the foregoing was served upon the following by U.S. mail, hand-delivery, Federal Express, or facsimile:

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