

FILED

MAR 19 2004

SETTLEMENT AGREEMENT

This Settlement Agreement is made and entered into this 13TH day of

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

January, 2004, by and between the State Compensation Insurance Fund ("State Fund") and Rex Palmer ("Palmer").

RECITALS

A. An action was commenced and maintained in the Montana Workers' Compensation Court by Palmer 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*").

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, another action was commenced in the Workers' Compensation Court by Palmer 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*").

B. The Workers' Compensation Court ruled in *Flynn/Miller* that as a result of the *Flynn* decision, other workers' compensation claimants situated similarly with Robert Flynn became entitled to have the State Fund pay a pro-rata share of the cost, including fees for representation, the claimants incurred in connection with their successful efforts to obtain Social Security disability benefits ("*Flynn/Miller* benefits"). In addition, Palmer may have become entitled to common fund fees as a result of any claimant benefiting from the precedent. A process was undertaken by the parties hereto to identify the State Fund claimants possibly entitled to *Flynn/Miller* benefits and to calculate potential payments. However, the State Fund has already directly paid *Flynn/Miller* benefits to Robert Flynn by reducing the overpayment that was created by his Social Security disability award.

C. Several issues have arisen in relation to the entitlement for and calculation of *Flynn/Miller* benefits and common fund fees. The parties have reached an agreement in relation thereto which they believe addresses such issues. The purpose of this Settlement Agreement is to set forth the terms and conditions under which the State Fund will identify and pay *Flynn/Miller* benefits and pay common fund fees. The terms and conditions of this Settlement Agreement have been fashioned upon the Court-approved identification and payment process from *Broeker v. State Compensation Mut. Ins. Fund* (1996), 275 Mont. 502, 914 P.2d 967 and *Broeker v. State Compensation Mut. Ins. Fund*, Cause No. 9211.

DEFINITIONS

A. Flynn/Miller benefits means one-half (1/2) of the representative's fee authorized by the Social Security Administration in connection with their representative's successful efforts to obtain Social Security disability benefits. The fee must have been authorized by the Social Security Administration for successfully obtaining a Social Security disability award for a State Fund Workers' Compensation or Occupational Disease Act claimant.

Flynn/Miller benefits also includes one-half (1/2) of the recoverable costs actually incurred and paid by State Fund Workers' Compensation or Occupational Disease Act claimants in connection with their successful efforts to obtain Social Security disability benefits. Recoverable costs are limited to those allowed by Administrative Rule of Montana 24.5.342.

B. Verification of potential Flynn/Miller entitlement means written documentation from the Social Security Administration of successful representation of a State Fund claimant in obtaining Social Security disability benefits and of the fee amount authorized by the Social Security Administration. To verify costs, claimants must provide written documentation - in the form of a cancelled check, receipt or paid invoice - establishing that the claimants actually paid the costs their representatives incurred in connection with their successful efforts to obtain Social Security disability benefits.

NOW THEREFORE, in consideration of the mutual promises contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby expressly acknowledged, the parties agree as follows:

1. **Entitlement Date and Stipulation Regarding Prospective Claims.**

The parties agree that a claimant's entitlement date for an occupational disease shall be the date a claimant's occupational disease is first diagnosed as work-related. The parties also agree that a claimant's entitlement date for an injury claim shall be the date the injury occurred. Consistent with Palmer's Statement of Scope of Attorney's Lien (Mar. 18, 2003), no common fund fees are payable on occupational disease or injury claims with entitlement dates occurring prior to July 1, 1974. Further, occupational disease or injury claims with entitlement dates occurring on or after December 5, 2002, the date of the Montana Supreme Court's decision in *Flynn*, shall be considered prospective claims.

Common fund fees are not payable on prospective claims.

Common fund fees shall be paid for *Flynn/Miller* benefits attributable to occupational disease claims if the following conditions are satisfied: (1) the occupational disease must have been first diagnosed as work-related on or after July 1, 1974, but prior to December 5, 2002; (2) a Social Security disability award arising out of the occupational disease must have been ordered by the Social Security Administration prior to December 5, 2002; and (3) the State Fund must have been actively taking the offset prior to December 5, 2002.

Likewise, common fund fees shall be paid for *Flynn/Miller* benefits attributable to injury claims if the following conditions are satisfied: (1) the work-related injury must have occurred on or after July 1, 1974, but prior to December 5, 2002; (2) a Social Security disability award arising out of the injury must have been ordered by the Social Security Administration prior to December 5, 2002; and (3) the State Fund must have been actively taking the offset prior to December 5, 2002.

2. **Handling of Claims Arising Between July 1, 1974 and June 30, 1982.**

As set forth in Paragraph 1 of the settlement agreement in *Broeker*, the State Fund published a notice in the major newspapers primarily serving Kalispell, Missoula, Helena, Butte, Bozeman, Great Falls and Billings on three consecutive Sundays. The published notice was directed to injured workers with injury dates between July 1, 1974 and June 30, 1982, who received workers' compensation total disability benefits through the State Fund, who received Social Security disability benefits as a result of their injuries, and who had not settled their claims. The notice instructed such individuals to submit a request for benefits in writing to the State Fund along with proper documentation, including written verification from the Social Security Administration of receipt of Social Security disability benefits.

The State Fund will send letters¹ to individuals with State Fund claim numbers who responded to the publication in *Broeker*. However, the State Fund will not be required to send letters to any claimants who are clearly unqualified to receive *Flynn/Miller* benefits under the terms and conditions of this Settlement Agreement. The State Fund's letter, the contents of which will be approved by Palmer and the Court, will require the individuals to submit the required documentation² verifying their potential entitlement to *Flynn/Miller* benefits.

In order for a claim to be considered for potential entitlement to *Flynn/Miller* benefits, the State Fund must receive the required documentation within 210 days from the date the letters are mailed to claimants. Documentation received outside of this 210-day window shall be considered untimely, and claimants who submit untimely documentation shall be ineligible for entitlement to *Flynn/Miller* benefits.

If the State Fund receives insufficient documentation from a claimant within the 210-day window, it will forward the insufficient documentation to Palmer within 5 business days from the date the State Fund receives the letters from the Workers' Compensation Court. If Palmer or the claimant is unable to submit all the required documentation to the State Fund within the 210-day

¹ The letters will be sent on letterhead from the Workers' Compensation Court and will contain a self-addressed, stamped envelope to help facilitate the return of documentation verifying a potential entitlement to *Flynn/Miller* benefits.

² As used in this Settlement Agreement, the term "required documentation" refers to the written materials required by Paragraph B of the Definitions section.

window, then the claim shall be considered untimely and shall be ineligible for entitlement to *Flynn/Miller* benefits.

Any *Flynn/Miller* benefits due shall be paid in the manner directed herein.

3. **Handling of Claims Arising Between July 1, 1982 and February 2, 1997.**

As set forth in Paragraph 2 of the settlement agreement in *Broeker*, the State Fund queried its computer system and databases and identified approximately 6,665 claimants who had a rate decrease of \$1 or greater. From this data, further refinements were made and approximately 3,817 claimants, which includes approximately 500 from the CMS system, were identified as potentially entitled to additional *Broeker* benefits. The State Fund sent letters to those 3,817 claimants, which required them to submit written documentation to the State Fund if they had received workers' compensation benefits from the State Fund, received Social Security disability benefits as a result of their injury, and had not settled their workers' compensation claim.

The State Fund will send letters³ to individuals with State Fund claim numbers who responded to the letters in *Broeker*. However, the State Fund will not be required to send letters to any claimants who are clearly unqualified to receive *Flynn/Miller* benefits under the terms and conditions of this Settlement Agreement. The State Fund's letter, the contents of which will be approved by

³ The letters will be sent on letterhead from the Workers' Compensation Court and will contain a self-addressed, stamped envelope to help facilitate the return of documentation verifying a potential entitlement to *Flynn/Miller* benefits.

Palmer and the Court, will require the individuals to submit the required documentation verifying their potential entitlement to *Flynn/Miller* benefits.

In order for a claim to be considered for potential entitlement to *Flynn/Miller* benefits, the State Fund must receive the required documentation within 210 days from the date the letters are mailed to claimants. Documentation received outside of this 210-day window shall be considered untimely, and claimants who submit untimely documentation shall be ineligible for entitlement to *Flynn/Miller* benefits.

If the State Fund receives insufficient documentation from a claimant within the 210-day window, it will forward the insufficient documentation to Palmer within 5 business days from the date the State Fund receives the letters from the Workers' Compensation Court. If Palmer or the claimant is unable to submit all the required documentation to the State Fund within the 210-day window, then the claim shall be considered untimely and shall be ineligible for entitlement to *Flynn/Miller* benefits.

Any *Flynn/Miller* benefits due shall be paid in the manner directed herein.

4. Claims Identified on the CMS System.

All unsettled claims on the State Fund's CMS system with entitlement dates from February 3, 1997 to December 4, 2002 that have a completed Social Security screen will be identified to determine eligibility for *Flynn/Miller* benefits.

The State Fund will send letters⁴ to the individuals identified on the CMS system, as described above, who may be potentially entitled to *Flynn/Miller* benefits. Letters will not be sent to any claimants who are clearly unqualified to receive *Flynn/Miller* benefits under the terms and conditions of this Settlement Agreement. Additionally, if the individuals identified on the CMS system will be receiving a letter from the State Fund pursuant to Paragraphs 2, 3 or 5, then no duplicate letter will be sent. The State Fund's letter, the contents of which will be approved by Palmer and the Court, will require the individuals to submit the required documentation verifying their potential entitlement to *Flynn/Miller* benefits.

In order for a claim to be considered for potential entitlement to *Flynn/Miller* benefits, the State Fund must receive the required documentation within 210 days from the date the letters are mailed to claimants. Documentation received outside of this 210-day window shall be considered untimely, and claimants who submit untimely documentation shall be ineligible for entitlement to *Flynn/Miller* benefits.

If the State Fund receives insufficient documentation from a claimant within the 210-day window, it will forward the insufficient documentation to Palmer within 5 business days. If Palmer or the claimant is unable to submit all the required documentation to the State Fund within the 210-day window, then the

⁴ The letters will be sent on letterhead from the Workers' Compensation Court and will contain a self-addressed, stamped envelope to help facilitate the return of documentation verifying a potential entitlement to *Flynn/Miller* benefits.

claim shall be considered untimely and shall be ineligible for entitlement to *Flynn/Miller* benefits.

Any *Flynn/Miller* benefits due shall be paid in the manner directed herein.

5. Cross-Checking Claims Using the State Fund's Computer Systems.

Subject to Paragraphs 2-4, and consistent with its reasonable efforts to identify claimants who may be entitled to *Flynn/Miller* benefits, the State Fund has conducted broad computer runs on claims occurring on or after July 1, 1982, and identified 2,278 claimants who may qualify for additional *Flynn/Miller* benefits. The State Fund will send letters⁵ to any of the 2,278 claimants who were not sent a *Broeker* letter or who did not respond to the *Broeker* notice. However, the State Fund will not be required to send letters to any of the 2,278 claimants who are clearly unqualified to receive *Flynn/Miller* benefits under the terms and conditions of this Settlement Agreement. The State Fund's letter, the contents of which will be approved by Palmer and the Court, will require the individuals to submit the required documentation verifying their potential entitlement to *Flynn/Miller* benefits.

In order for a claim to be considered for potential entitlement to *Flynn/Miller* benefits, the State Fund must receive the required documentation within 210 days from the date the letters are mailed to claimants. Documentation received outside of this 210-day window shall be considered untimely, and

⁵ The letters will be sent on letterhead from the Workers' Compensation Court and will contain a self-addressed, stamped envelope to help facilitate the return of documentation verifying a potential entitlement to *Flynn/Miller* benefits.

claimants who submit untimely documentation shall be ineligible for entitlement to *Flynn/Miller* benefits.

If the State Fund receives insufficient documentation from a claimant within the 210-day window, it will forward the insufficient documentation to Palmer within 5 business days from the date the State Fund receives the letters from the Workers' Compensation Court. If Palmer or the claimant is unable to submit all the required documentation to the State Fund within the 210-day window, then the claim shall be considered untimely and shall be ineligible for entitlement to *Flynn/Miller* benefits.

Any *Flynn/Miller* benefits due shall be paid in the manner directed herein.

6. Reasonableness of State Fund's Identification Efforts.

During the State Fund's claims adjusting process, if any claims are identified by a State Fund claims adjuster outside the scope of the review process set forth in Paragraphs 2-5 as having a potential entitlement to *Flynn/Miller* benefits, the State Fund will send letters to those claimants requiring them to submit the required documentation verifying their potential entitlement to *Flynn/Miller* benefits. The State Fund must receive all the required documentation within the 210-day window set forth in Paragraphs 2-5. Documentation received outside of the 210-day window shall be considered untimely, and claimants who submit untimely documentation shall be ineligible for entitlement to *Flynn/Miller* benefits. This shall be the exclusive manner in which the State Fund will consider claims outside the scope of the review process set forth in Paragraphs 2-5. The

State Fund shall have no independent obligation to reviews claims which are not identified by State Fund claims adjusters during their claims adjusting and pursuant to the review process set forth in Paragraphs 2-5. Further, neither Palmer nor any other counsel shall receive common fund fees on any *Flynn/Miller* benefits paid to claimants who are identified outside of the scope of the exclusive review process set forth in Paragraphs 2-5.

7. **Settlements.**

All settlements approved by the Department of Labor or the Workers' Compensation Court, and all settlements approved as stipulated judgments in the Workers' Compensation Court, will remain closed and are not subject to any review for or entitlement to *Flynn/Miller* benefits. This includes claims which settled between December 5, 2002, and the effective date of this Agreement, even if the claimant's entitlement date was on or before December 4, 2002. Letters required by Paragraphs 2-5 hereof will not be sent to claimants on claims known to have been settled.

8. **Deceased Claimants.**

Claimants who died prior to December 5, 2002, the date of the Montana Supreme Court's decision in *Flynn*, will not have their claims reviewed for a possible entitlement to *Flynn/Miller* benefits. Letters required by Paragraphs 2-5 hereof will not be sent to claimants who died prior to December 5, 2002.

Claimants who died on or after December 5, 2002, subject to the terms and

conditions of this Settlement Agreement, may through a duly authorized Personal Representative make claim for potential *Flynn/Miller* benefits.

9. **Payment of *Flynn/Miller* Benefits and Attorneys' Fees.**

The Workers' Compensation Court will set the common fund fee attorneys' fee percentage. The State Fund will not object to a contingency fee of 25% or less. *Flynn/Miller* benefits will be paid to qualifying claimants with entitlement dates from July 1, 1974 to December 4, 2002, as explained more fully in Paragraph 1. The payments to claimants will be net of any common fund attorneys' fees.

10. **Additional Attorneys' Fees.**

The State Fund will pay Palmer an additional attorneys' fee of \$50,000.00, upon the approval of this Settlement Agreement. The payment under this paragraph is in addition to common fund fees approved by the Workers' Compensation Court consistent with this Settlement Agreement.

11. **Advances and Overpayments.**

If an entitlement to *Flynn/Miller* benefits is identified on a claim in which a benefit advance or overpayment exists, the State Fund may reduce the advance or overpayment by taking credit for the *Flynn/Miller* benefits. However, common fund fees, if due on the claim, will be paid to Palmer before any credit is calculated. A written explanation of the reduction in payment resulting from the credit will be provided by the State Fund to any affected claimant.

12. Court Action.

This Settlement Agreement shall be submitted to the Workers' Compensation Court for consideration and approval of its terms and conditions. In seeking approval, the parties agree to jointly request an order from the Court which includes language indicating that the interests of the common fund claimants were competently and zealously represented by Palmer, and that all parties acted reasonably in litigating, implementing, remediating and settling the matters at issue in the pending *Flynn/Miller* action.

Upon approval, the parties agree to be bound by the provisions hereof, and all claims in the pending *Flynn/Miller* action between the parties shall be dismissed with prejudice. However, the Workers' Compensation Court shall retain jurisdiction in the action to implement and oversee this Settlement Agreement. The parties shall execute such other documents and undertake such actions as are reasonably necessary to give full effect to the terms, conditions and spirit of this Settlement Agreement.

Common fund attorneys' fees shall be awarded by the Workers' Compensation Court, subject to a procedure adopted by it. The parties hereto shall cooperate in the process of considering and awarding common fund fees.

13. Scope of Release.

Upon the approval of this Settlement Agreement by the Workers' Compensation Court, all claims in the pending *Flynn/Miller* action of any kind or character, all claims based upon the adjustment or handling of the matters

involved throughout the duration of this litigation, including but not limited to claims under Montana Code Annotated §§ 33-18-201 and 242 or any other Montana statute or regulation, and all claims for fraud, misrepresentation, breach of the covenant of good faith and fair dealing, and any other common law claim in favor of any party, shall be fully and finally settled and resolved with prejudice. However, Robert Flynn and Carl Miller specifically reserve their individual rights to pursue claims in connection with any other entitlement to benefits under the Workers' Compensation Act or Occupational Disease Act.

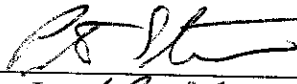
The parties agree that the State Fund's actions during this litigation, including the post-remand disputes and the handling of the implementation issues, were reasonable and appropriate. The parties also agree that no payments due to any qualifying claimants, including Flynn and Miller, were unreasonably delayed. Thus, no penalty or attorney fees under the Workers' Compensation Act, other than common fund fees, are payable on any *Flynn/Miller* benefits.

14. Further Actions.

The State Fund will cooperate in the establishment of reasonable deadlines, with Workers' Compensation Court involvement, for the completion of identification and review of claims with a possible entitlement to *Flynn/Miller* benefits. Reasonable deadlines will take into consideration logistical issues relating to computer programming, file retrieval, file review and personnel, as well as the administrative burdens imposed on the State Fund by pending common fund cases.

DATED this ____ day of January, 2004.


MONTANA STATE FUND

By 
Its VP OPERATIONS SUPPORT

DATED this 13th day of January, 2004.

By 
REX PALMER

APPROVED as to form and content and SO ORDERED on this 19th day
of March, 2004.


Hon. Mike McCarter
Workers' Compensation Judge