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FILED

MAY 21 2003

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

THE WORKERS' COMPENSATION COURT IN THE STATE OF MONTANA

ROBERT FLYNN,

Petitioner,

v.

STATE COMPENSATION
INSURANCE FUND,

Respondent.

WCC No. 2000-0222

**STATE FUND'S BRIEF REGARDING
JURISDICTION TO DETERMINE AN
ENTITLEMENT DATE**

COMES NOW the Respondent/Insurer, State Compensation Insurance Fund ("State Fund"), and pursuant to this Court's Order Staying Retroactive Application of Decision dated May 5, 2003, hereby files its Brief Regarding Jurisdiction to Determine an Entitlement

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Date. For the reasons stated herein, the State Fund asserts that this Court has jurisdiction to determine an entitlement date to use for the prospective application of *Flynn v. State Compen. Ins. Fund*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397.

INTRODUCTION

The present chapter of this case involves a dispute over the retroactive application of *Flynn* as well as the entitlement to expansive common fund fees. The State Fund has taken the position that *Flynn* does not apply retroactively and that Flynn's attorney is not entitled to expansive common fund fees. The parties are in the process of briefing both issues.¹ As explained below, the State Fund believes that its poorly-phrased request for direction on implementation has created some unnecessary confusion. The State Fund is only requesting guidance from the Court in determining an entitlement date to use for purposes of prospective application; it is **not** asking the Court to continually oversee the prospective implementation process. Therefore, the State Fund asserts that the Court has jurisdiction to determine an entitlement date to use for applying *Flynn* prospectively.

DISCUSSION

Although Flynn is seeking a common fund fee for all Social Security disability ("SSD") offsets taken after June 30, 1974, he is not seeking a common fund fee for any SSDI benefits awarded on or after December 5, 2002, the date of the *Flynn* decision. (Statement of Scope of Attorney's Lien 2 (Mar. 18, 2003).) In its Motion for Stay, the State Fund requested a stay on the retroactive application of *Flynn* until this Court determines the rights and obligations of the parties. (Motion for Stay and Direction on Implementation 2 (Apr. 16, 2003).) This Court agreed to stay the implementation of *Flynn* until the retroactivity issue is conclusively resolved. (See Order Staying Retroactive Application of Decision ¶ 2 (May 5, 2003).)

In the same motion, the State Fund requested direction from this Court concerning the method for implementing the *Flynn* decision prospectively. (Motion for Stay and Direction on Implementation 2-3.) Recently, the Court has questioned whether it can

¹The State Fund advised the Court that it intends to prospectively apply the decision but required guidance concerning the identification of claims affected. In response, the Court has questioned whether it has jurisdiction to oversee the prospective implementation of *Flynn* in light of the fact that Flynn's attorney is not claiming a fee on future cases.

oversee the prospective implementation of *Flynn*:

With respect to implementation on a prospective basis, the Court is uncertain it has jurisdiction to oversee that implementation in light of the fact that the claimant is not seeking fees with respect to prospective cases, however, the State Fund will be provided an opportunity to argue the matter. State Fund may file a brief concerning continuing jurisdiction over prospective cases.

Order Staying Retroactive Application of Decision ¶ 3.

I. THIS COURT HAS JURISDICTION UNDER MONTANA CODE ANNOTATED § 39-71-2905 (2001) TO DETERMINE AN ENTITLEMENT DATE TO USE FOR THE PROSPECTIVE APPLICATION OF *FLYNN*.

Montana Code Annotated § 39-71-2905 (2001) confers broad jurisdiction upon this Court to determine all disputes arising under the Workers' Compensation Act ("WCA") and the Occupational Disease Act ("ODA"). See *Liberty N.W. Ins. Corp. v. State Comp. Ins. Fund*, 1998 MT 169, 289 Mont. 475, 962 P.2d 1167; Expansion of Court's Jurisdiction: House Bill 592 (effective Apr. 23, 1999, HB 592 expanded the jurisdiction of the Workers' Compensation Court and specifically conferred original jurisdiction on all disputes arising under the ODA). This Court has acknowledged that it has broad jurisdiction over matters arising under the WCA, including any matters which concern the distribution of benefits payable to claimants. See *Liberty N.W. Ins. Corp. v. Petak*, 1998 MTWCC 21, ¶¶ 6-9. Further, Administrative Rules of Montana 24.5.351 grants this Court the broad authority to make "settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations[.]" See e.g. *Murer v. State Comp. Ins. Fund*, WCC No. 9206-6487, Order Denying Motions (Sept. 14, 1992) (quoting Montana Code Annotated § 27-8-102, which governs declaratory judgment actions in this Court).

Determining an entitlement date for prospective application purposes constitutes a dispute arising under the WCA and the ODA. If *Flynn*'s attorney is successful in his pursuit of common fund fees based on a retroactive application of *Flynn*, then the determination of an entitlement date will affect the distribution of benefits because those claimants who fall within the window of retroactive application will have their benefits reduced to pay *Flynn*'s common fund fees. Accordingly, under the plain language of Montana Code Annotated § 39-71-2905 and consistent with the acknowledgment in *Petak*, this Court has jurisdiction to determine an entitlement date. Additionally, the State Fund asserts the Court may determine an entitlement date pursuant to the broad scope of Administrative Rule of

Montana 24.5.351 because the *Flynn* decision has created uncertainty surrounding the parties' rights and obligations with respect to determining a specific entitlement date for prospective application purposes.

A. Neither Flynn's Lien Nor Montana Law Provide a Specific Entitlement Date for Prospectively Applying *Flynn*.

The Montana Supreme Court remanded this case for further proceedings consistent with the holding that Flynn was entitled to have the State Fund pay a pro-rata share of his SSD litigation expenses. *See Flynn*, ¶¶ 18, 26. On remand, Flynn is attempting to recover common fund fees based on a retroactive application of the decision. However, Flynn is not claiming common fund fees for any SSD benefits awarded after December 5, 2002. Flynn's request for common fund fees and the scope of his lien has created legal confusion regarding what dates to use as entitlement dates for purposes of prospective application because the date of the *Flynn* decision is not necessarily dispositive of the entitlement issue and it may actually have no bearing on the determination. Thus, the State Fund seeks guidance from this Court in determining the entitlement dates of OD claims and injury claims.

1. *Determining An Entitlement Date For Prospective Application of Flynn as Applied to OD Claims.*

The Montana ODA determines benefits on the basis of an entitlement date, which may be determined by reference to Montana Code Annotated § 39-72-403 ("the date the claimant knew or should have known that the claimant's condition resulted from an occupational disease."). Identifying the OD entitlement date is an inexact science. The State Fund notes that the entitlement date may end up being either (1) the date the parties agree as the date of the claimant's knowledge of the employment-relatedness of the condition, or (2) the date the condition was first treated or first diagnosed as work-related. Although the above approach is logical and consistent with Montana law, other dates – such as the date of the *Flynn* decision, or the date a claimant reached medical stability – may end up serving as entitlement date for purposes of prospective application. Given the uncertainty surrounding the identification of an OD entitlement date, the State Fund seeks direction from the Court to ensure that its prospective implementation of *Flynn* is consistent with an approach approved by this Court.

2. *Determining An Entitlement Date For Prospective Application of Flynn as Applied to Injury Claims.*

The Montana WCA determines benefits based upon the law in effect at the time of the claimant's injury. See *Buckman v. Montana Deaconess Hosp.* (1986), 224 Mont. 318, 730 P.2d 380. It seems logical to assume that the entitlement date to use for the prospective application of *Flynn* as applied to claims under the WCA would be the injury date. Accordingly, *Flynn* should prospectively apply to all claimants who are injured on or after December 5, 2002. However, the State Fund is uncertain if *Flynn* applies to claimants who were injured prior to December 5, 2002, but whose SSD benefits were not awarded until December 5, 2002 or later. Therefore, the State Fund requests direction from this Court regarding the determination of an entitlement date to use for the prospective application of *Flynn* as applied to injury claims.

CONCLUSION

The State Fund's poorly-phrased request for direction on implementation was merely a request for guidance on determining what constitutes the entitlement date for the prospective application of *Flynn* as applied to both OD claims and injury claims. After the entitlement dates are conclusively determined, the State Fund does not anticipate any additional involvement from the Court with respect to prospective application.

Determining an entitlement date for prospective application purposes is a dispute arising under the WCA that affects the distribution of benefits payable to some claimants. This Court has jurisdiction over the dispute under Montana Code Annotated § 39-71-2905, *Petak* and Administrative Rules of Montana 24.5.351. Without the establishment of specific entitlement dates, the State Fund is uncertain how to handle several claims, including those which were filed before December 5, 2002, but are still unresolved. Accordingly, in order to apply *Flynn* prospectively in a manner that is consistent with an approach approved by this Court, the State Fund seeks this Court's guidance.

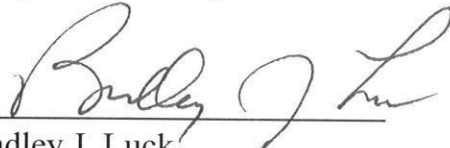
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DATED this 21 day of May, 2003.

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By 
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CERTIFICATE OF MAILING

The undersigned, a representative of the law firm of GARLINGTON, LOHN & ROBINSON, PLLP, hereby certifies that on the 21st day of May, 2003, she mailed a true and correct copy of the foregoing STATE FUND'S BRIEF REGARDING JURISDICTION TO DETERMINE AN ENTITLEMENT DATE, postage prepaid, to the following:

Rex Palmer, Esq.
Attorneys Inc., P.C.
301 W Spruce
Missoula, MT 59802



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