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FILED

JUN 16 2003

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

<p>CARL MILLER, individually and on behalf of others similarly situated</p> <p>Petitioner,</p> <p>vs.</p> <p>MONTANA STATE FUND,</p> <p>Respondent/Insurer.</p>	<p>WCC NO. 2003-0771</p> <p>Claim No. 03-1985-14602-2</p> <p>RESPONSE TO PETITION FOR HEARING</p>
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COMES NOW Respondent Montana State Fund (hereinafter MSF), by and through its counsel of record, Thomas E. Martello, and hereby responds to the Petition for Hearing as follows:

RESPONDENT'S CONTENTIONS

1. This matter seeks retroactive application of *Flynn v. State Compensation Insurance Fund* prior to a determination of such applicability. The issue of retroactive applicability and related common fund/class action issues is presently before this Court in *Flynn*. Those issues have been fully briefed and submitted for determination as of June 3, 2003. This Court's determination in *Flynn* will resolve issues raised in the present matter.
2. This case is governed by *Flynn*. Although the Court consolidated *Flynn* and *Miller*, any litigation in *Miller* is duplicative of *Flynn*. Upon determination of the scope and breadth of *Flynn*, the State Fund intends to follow its precedent in the present matter. Such

precedent however, if any, is established in *Flynn* and this later case cannot give rise to retroactivity or common fund if it was not first established in *Flynn*.

3. MSF incorporates by references in the present matter, all pleadings, defenses and arguments contained in *Flynn*.
4. MSF has exchanged all pertinent medical records related to Petitioner's injury and will continue to do so.
5. Petitioner is not entitled to attorney fees and costs for himself nor to common fund/class action fees or costs.
6. MSF's actions in handling this matter have been reasonable and do not entitle Petitioner to a penalty.

Should this matter proceed to trial State Fund may call the following witnesses:

- | <u>Witness</u> | <u>Testimony</u> |
|--|------------------------------|
| a. Petitioner | |
| b. Jacqui Garcia, Claims Adjuster | MSF's handling of the claim. |
| c. Rex Palmer | |
| d. All witnesses listed by Petitioner. | |
| e. All witnesses who may be revealed during the course of discovery and trial preparation. | |
| f. All witnesses necessary for impeachment, foundation, or rebuttal. | |
4. Should this matter proceed to trial MSF may introduce the following into evidence:
 - a. All relevant portions of Petitioner's claim file and all pleadings and relevant documents contained in *Flynn*.
 - b. All relevant medical records.
 - c. Petitioner's exhibits.
 - d. All relevant documents revealed during the course of discovery and trial preparation.
 - e. All relevant documents necessary for impeachment, foundation or rebuttal.

WHEREFORE, the Montana State Fund respectfully prays that the Workers' Compensation Court find that:

1. This matter is governed by *Flynn*.
2. Petitioner is not entitled to common fund/class action designation.
3. Montana State Fund's handling of the claim was reasonable.

4. Grant such other relief as the Court deems just.

DATED this 16 day of June 2003.

MONTANA STATE FUND

By: Tom Martello
Thomas E. Martello, Legal Counsel
Special Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing on the following party:

Rex Palmer
ATTORNEYS INC., P.C.
301 West Spruce
Missoula, MT 59802

by depositing the same in the United States Mail, postage prepaid, on this 16th day of June 2003.

Debra Beely

