

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 55

WCC No. 2000-0222

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ROBERT FLYNN

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer.

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**APPEAL DISMISSED WITHOUT PREJUDICE 1/28/04**

DECISION AND ORDER REGARDING RETROACTIVITY AND ATTORNEY FEES

**Summary:** On remand following decision in *Flynn v. State Compensation Ins. Fund*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397, claimant seeks common fund attorney fees. The State Fund objects to the request on the ground that it is untimely and on the further ground that the decision in *Flynn* is not retroactive.

**Held:** (1) Since claimant's entitlement to attorney fees is a matter of law and arose only after the decision on appeal, the post-remand request for attorney fees is timely. State Fund's due process, *res judicata*, and other arguments against allowing the claim to be made after appeal are rejected.

(2) Whether the blanket rule of retroactivity of judicial decisions adopted by the United States Supreme Court in *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993), or the more flexible rule from *Chevron Oil C. v. Huson*, 404 U.S. 97 (1971), is applied, the decision in *Flynn v. State Compensation Ins. Fund*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397, must be applied retroactively. The inequities of applying the decision retroactively are slight in comparison to policy considerations and are offset by financial gain the State Fund has previously reaped from computing benefits inconsistently with the rule announced in *Flynn*.

**Topics:**

**Courts: Retroactivity of Decisions.** Given different statements of the Montana Supreme Court in recent cases, it is unclear whether Montana has adopted a blanket rule giving retroactive effect to judicial decisions or whether it still follows the three-part *Chevron* test in determining retroactivity. This Court's impression is that when it directly confronts the issue the Supreme Court will follow *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993), and adopt a blanket rule of retroactivity.

**Courts: Retroactivity of Decisions.** Whether a blanket rule of retroactivity or the three-part analysis of *Chevron Oil C. v. Huson*, 404 U.S. 97 (1971), is applied, *Flynn v. State Compensation Ins. Fund*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397 must be applied

retroactively. Under *Chevron* analysis, retroactive application is consistent with the purpose of the rule announced in *Flynn* and the purposes of the Workers' Compensation Act. The inequities of applying the decision retroactively are slight in comparison and are offset by financial gain the State Fund has previously reaped from computing benefits inconsistently with the rule announced in *Flynn*.

**Benefits: Social Security Offset: Reduction for Attorney Fees.** *Flynn v. State Compensation Ins. Fund*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397, which requires the insurer to absorb a pro-rata share of attorney fees incurred in securing social security disability benefits which are offset against workers' compensation total disability benefits, must be applied retroactively.

**Pleading: Attorney Fees.** Failure to request common fund attorney fees in the petition or pretrial order does not preclude a claimant from requesting such fees after litigating his or her claim on the merits. The claim for common fund fees arises only after the claimant has established a precedent benefitting other claimants.

¶1 This case is on remand from the Supreme Court. *Flynn v. State Compensation Ins. Fund*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397. That Court held that an insurer taking a social security offset pursuant to section 39-71-701(5) or 39-71-702(4), MCA, must bear a proportionate share of the costs and attorney fees incurred by claimant in pursuing social security benefits. On remand the claimant's attorney asserts he is entitled to common fund attorney fees with respect to amounts due similarly situated claimants whose attorney fees have not been taken into account in determining the amount of their social security offsets.

¶2 The respondent State Fund objects to imposition of common fund fees on two grounds. First, it asserts that the request for fees is barred by claimant's failure to request fees until the case was remanded by the Supreme Court. Second, it argues that the decision in *Flynn* is prospective only. It also argues that the common fund doctrine is inapplicable in any event. The objections have been fully briefed and are now ready for decision.

## Discussion

### I. The Common Fund Issue

¶3 The common fund doctrine is summed up in *Murer v. State Compensation Mutual Ins. Fund*, 283 Mont. 210, 223, 942 P.2d 69, 76 (1997), as follows:

[W]hen a party, through active litigation, creates a common fund which directly benefits an ascertainable class of non-participating beneficiaries, those non-participating beneficiaries can be required to bear a portion of the litigation costs, including reasonable attorney fees. Accordingly, the party who creates the common fund is entitled, pursuant to the common fund doctrine, to reimbursement of his or her reasonable attorney fees from that fund.

¶4 As seen from the Supreme Court decision in this case, the doctrine extends not only to situations where a common fund benefits multiple claimants but also to funds which benefit a single claimant and an insurer. The common fund initially at issue in this case

was, of course, the social security disability benefits which claimant sought and obtained. Both claimant and State Fund benefitted from claimant securing the social security benefits. The claimant benefitted because he netted one-half of the social security benefit. The insurer benefitted through the social security offset, §§ 39-71-701(5) and -702(4), MCA (1991), which reduced its liability for the total disability benefits it was paying the claimant.

¶5 Having now established the obligation of insurers to pay their pro-rata shares of attorney fees and costs incurred in securing social security disability benefits, the claimant's attorney now argues that the precedent established in this case created a second common fund. The second level fund is of the *Murer* type, consisting of additional benefits due other claimants as a result of the precedent established in this case. Claimant's attorney asserts that he is entitled to common fund fees and costs from these other benefitted claimants.

¶6 The State Fund argues that the common fund doctrine has no application because claimant was simply seeking to establish his own entitlement. The argument is without merit. Assuming the decision in *Flynn* is retroactive, the precedent established in this case entitles other State Fund claimants receiving, or who have received, social security benefits to pro rata credits for any attorney fees and costs they paid to obtain their social security benefits. The situation is indistinguishable from *Murer*, in which the Supreme Court said:

As a result of our decision in *Murer II* [read *Flynn*], the State Fund became obligated to increase the rate of benefits payments to a substantial number of workers' compensation claimants who were neither parties to, nor directly involved in the *Murer* litigation. . . .

283 Mont. at 221, 942 P.2d at 75.

## II. Failure to Plead, etc.

¶7 The State Fund argues that the claimant's request for common fund fees should be denied on procedural grounds. First, it asserts that since claimant did not previously plead or argue for common fund fees with respect to **other** claimants he is now barred from doing so. Second, it argues that claimant is judicially estopped from requesting common fund fees because he represented earlier in this proceeding that he was not seeking them. Third, it argues that claimant's request for common fund fees is barred by the doctrine of *res judicata*. Finally, it argues that consideration of common fund fees at this stage of the proceedings would violate the State Fund's right to due process of law. None of the arguments is meritorious.

### A. Failure to Plead

¶8 Rule 24.5.301(3) of this Court requires that a claim for attorney fees be specifically pled in the petition. The rule provides:

(3) Any claim for attorney fees and/or penalty with respect to the benefits or other relief sought by the petitioner shall be joined and pleaded in the petition. Failure to join and

plead a claim for attorney fees and/or penalty with respect to the benefits or other relief sought in the petition shall constitute a waiver and shall bar any future claim with respect to such attorney fees and/or penalty.

¶9 There is no question that prior to remand from the Supreme Court the claimant did not plead or argue for common fund fees respecting other benefitted claimants. That failure would seemingly bar consideration of claimant's current claim. However, as noted below, the Supreme Court has held that attorney fees do not always need to be asserted in the pleadings or the pretrial order and may be raised after the merits of the case have been determined. Moreover, I further note that the attorney fees requested in this case are not against the insurer but rather against benefitted claimants. Entitlement to fees from the benefitted claimants arose only after the claimant in this case successfully litigated his claim and established a precedent. I note that the Court's rule regarding the pleading of attorney fees is aimed at providing notice where claimant seeks imposition of attorney fees against an insurer pursuant to section 39-71-611 or -612, MCA. The rule was not calculated to cover common fund fees.

¶10 In *Kunst v. Pass*, 1998 MT 71, ¶ 38, 288 Mont. 264, 957 P.2d 1, the Supreme Court held that a plaintiff in a dispute involving the Residential Landlord and Tenant Act could seek attorney fees despite failing to mention a claim for attorney fees in the complaint, pretrial order, or trial brief. The Court specifically noted that the plaintiffs did not become entitled to attorney fees until after they had prevailed on the merits and found that the nature of the action, along with a catchall request for "other and further relief as the Court deem just and proper" was sufficient notice of the claim:

In this case, the complaint does not specifically request attorney's fees. However, the complaint itself was brought pursuant to the Residential Landlord and Tenant Act. As pointed out earlier, the first count specifically states that it was brought pursuant to § 70-24-303(1)(d), MCA, and both the second and third counts specifically reference that Act. The fourth count incorporates by reference each allegation of the other counts, including the Act. Both Plaintiffs and Defendants reference the Act several times in the pretrial order, and the Plaintiffs' trial brief addresses the Plaintiffs' claim that the Defendants were liable under the Act for failing to properly maintain the heating system. The Act itself provides that attorney's fees may be awarded to the prevailing party in an action "arising under this chapter." Section 70-24-442(1), MCA. Accordingly, although the Plaintiffs did not specifically request attorney's fees, it should have been apparent to Defendants that if Plaintiffs prevailed, an award of attorney's fees was possible. Furthermore, in the complaint the Plaintiffs requested that they be awarded "other and further relief as the Court may deem just and proper." This Court liberally construes pleadings, and under this demand for general relief, the court could grant Plaintiffs any relief to which they were entitled.

Second, any claim by the Defendants of unfair surprise or that they had no opportunity to defend themselves lacks merit. The Defendants had a full opportunity to file objections to the request for attorney's fees and to be heard at oral argument as to why the Plaintiffs should not receive such an award. We conclude that the Defendants did indeed have notice and an opportunity to defend themselves.

*Kunst*, ¶¶ 36-37.

¶11 In the subsequent case of *In re Estate of Lande*, 1999 MT 179, 295 Mont. 277, 983 P.2d 316, the Court held that where a specific statute provides for an award of attorney fees, fees may be awarded post-trial even though not pleaded and not set out as an issue in the pretrial order.<sup>(1)</sup> Its rationale was as follows:

The purposes of pretrial orders are to "prevent surprise, simplify the issues, and permit the parties to prepare for trial." *Nentwig v. United Industry, Inc.* (1992), 256 Mont. 134, 138-39, 845 P.2d 99, 102. Requiring inclusion in the pretrial order of a request for attorney fees pursuant to § 72-12-206, MCA, which mandates such fees in the event a party successfully defends the validity of a will, would not further those purposes. **Indeed, where attorney fees are a straightforward statutory entitlement in the event a party prevails in the action, no surprise could result from a posttrial claim by such a successful party for the statutorily-mandated fees. In addition, inclusion in the pretrial order of the subject of attorney fees which become an entitlement only after the prevailing party has been determined at trial could neither simplify trial issues nor allow for better trial preparation, since no evidence need be presented on the question and no legal determinations are required before or during trial.** [Emphasis added.]

*In re Estate of Lande*, ¶ 26.

¶12 Finally, in the recent case of *Mountain West Farm Bureau Mutual Ins. Co. v. Brewer*, 2003 MT 98, the Court rejected the argument that by failing to raise and argue attorney fees in conjunction with a motion for summary judgment or on appeal of that judgment, the plaintiff's waived their right to request them in post-remand proceedings. *Id.*, ¶¶10-12. The plaintiffs in that case did include a prayer for attorney fees in their Petition for Declaratory relief. However, the case must be read together with *Estate of Lande* and is cited here because the Court held that plaintiffs did not waive their right to seek attorney fees by first pursuing the merits of their claim and then seeking the attorney fees.

¶13 The logic of *Estate of Lande* is persuasive in the present case. Unlike fees awarded under section 39-71-611 or 39-71-612, MCA, the fees requested in this case do not require proof of unreasonableness on the part of the insurer or any other factual basis for the fee. Like a statutory entitlement, common fund fees are a legal consequence of claimant prevailing in the original action and thereby benefitting other claimants. As in *Estate of Lande*, inclusion of the request for attorney fees in the petition or pretrial order would not have simplified trial issues or enhanced trial preparation.

¶14 I therefore hold that the claimant's request for common fund fees with respect to benefitted claimants is not barred by his failure to make the request at an earlier stage of these proceedings.

## B. Estoppel

¶15 In Respondent's Brief Regarding Common Fund Attorney Fees, State Fund construes claimant's pre-appeal and appeal arguments as representing that "no common fund was being sought from non-participating beneficiaries." (*Id.* at 6.) Citing

the doctrine of judicial estoppel, it argues that he should not now be allowed to invoke the common fund doctrine with respect to other claimants.

¶16 The argument is without merit. The doctrine of judicial estoppel, cited by the State Fund, precludes a party from taking a position inconsistent with a prior position or representation taken or made in court. *Rasmussen v. Heebs Food Center*, 270 Mont. 492, 496-97, 893 P.2d 337, 340 (1995). The doctrine is inapplicable here because the State Fund is simply wrong in its characterization of claimants' positions in this Court and the Supreme Court. The State Fund cites no statement in the record which could be construed as a representation that claimant is not pursuing, and will not pursue, common fund fees from benefitted claimants. While claimant certainly invoked the common fund doctrine with respect to his own case, his use of the common fund doctrine was to establish the State Fund's liability for a pro-rata share of attorney fees incurred in social security disability proceedings. That use was not inconsistent with his now asserting a second level common fee claim with respect to claimants who will benefit from the precedent in this case. By arguing common fund with respect to his personal entitlement, he was not making any representation as to his potential entitlement to common fund fees from benefitted claimants in the event he succeeded.

### C. *Res Judicata*

¶17 Citing this Court's prior decision in *Cheetham v. Liberty Northwest Ins. Corp.*, 2001 MTWCC 65, ¶¶ 27-28, the State Fund argues that claimant's current common fund claim is barred by the doctrine of *res judicata*.

¶18 *Res judicata* applies where a matter is litigated or *could have been litigated* in **another** action. It has no application here since the request is made in the **same** case and the issue was not previously decided.<sup>(2)</sup> The request is equivalent to the post-trial request for attorney fees considered in *Estate of Lande*. An appeal intervened only because this Court erroneously rejected the merits of the claimant's action.

### D. Due Process

¶19 Finally, the State Fund maintains that it will be denied due process of law if the claimant "is allowed to maintain his common fund from non-participating claimants." (Respondent's Brief Re: Common Fund Attorney Fees at 8.) How is not clear. The State Fund is receiving due process right now by defending against the common fund claim. It has been given both notice of the claim and an opportunity to be heard, the very things it claims it is being denied. What it really objects to is the timing of the claim. Moreover, any common fund fees will be assessed against the benefitted claimants, not the State Fund.

### III. Retroactivity

¶20 In *Miller v. Liberty Mutual Fire Ins. Co*, 2003 MTWCC 6, this Court recently reviewed the status of Montana law concerning retroactivity of judicial decisions. I pointed out that in the earlier case of *Klimek v. State Compensation Ins. Fund*, WCC No. 9602-7492, Order and Partial Summary Judgment (October 11, 1996), I had

determined that the Montana Supreme Court had embraced a blanket rule applying all judicial decisions retroactively. My holding in *Klimek* was based on a statement by the Court in *Porter v. Galarneau*, 275 Mont. 174, 185, 911 P.2d 1143, 1150 (1996). The statement was as follows: "We will continue to give retroactive effect to judicial decisions, which is in accord with the U.S. Supreme Court's holding in *Harper v. Virginia Dept. of Taxation* (1993), 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74." In *Harper*, the United States Supreme Court, adopted a blanket rule requiring retroactive application of its decisions, thus it appeared that the Montana Supreme Court intended to do the same.

¶21 Prior to *Porter* the Montana Supreme Court applied a more flexible "Chevron" test of retroactivity which it had adopted in *LaRoque v. State*, 178 Mont. 315, 583 P.2d 1059 (1978). The Chevron test was originally articulated by the United States Supreme Court in *Chevron Oil C. v. Huson*, 404 U.S. 97 (1971), but was repudiated by that Court in *Harper*. Despite embracing *Harper* in *Porter*, in the subsequent case of *Benson v. Heritage Inn, Inc.*, 1998 MT 330, 292 Mont. 268, 971 P.2d 1227, the Supreme Court applied the *Chevron* test in determining whether its prior decision<sup>(3)</sup> clarifying the law concerning liability for accumulations of snow and ice applied retroactively (it did). Thus, as I noted recently in *Miller*, it would appear that "the Chevron test may be alive and well in Montana . . . ." ¶ 24.

¶22 That said, I also note that *Benson* did not consider or reject *Harper*. I have reviewed the appellate briefs in *Benson*. It appears from the briefs that the district court applied the three-prong *Chevron* test in its decision (which was affirmed). In addition, on appeal only one party - the plaintiff - cited any law or cases concerning retroactive application of judicial decisions, and the law cited was the *Chevron* test as articulated in *Riley v. Warm Springs State Hospital*, 229 Mont. 518, 748 P.2d 455 (1987). *Riley* and the *Chevron* test were then cited by the Court in the *Benson* decision. I further note that in another case decided the same year as *Benson* the Supreme Court reiterated its statement, without discussion, that "[w]e give retroactive effect to judicial decisions." *State v. Steinmetz*, 1998 MT 114, ¶ 10, 288 Mont. 527, 961 P.2d 95. Given these facts, it is not at all clear to this Court that the *Benson* court intended to reject the blanket rule of *Harper* in favor of the *Chevron* test or even considered the issue. Indeed, my sense of the matter is that when squarely confronted with the issue the Supreme Court will adopt a blanket rule of retroactivity with respect to judicial decisions.

¶23 Obviously, if the *Harper* rule applies, the decision in this case must be given retroactive application; no further discussion would be necessary. However, since the Supreme Court's most recent retroactivity analysis was based on the *Chevron* test, I shall consider whether *Flynn* is retroactive under that test.

¶24 Initially, even under *Chevron* retroactive application of judicial decisions is favored. The factors considered under *Chevron* are, after all, "factors to be considered before adopting a rule of *nonretroactive* application." *LaRoque*, 178 at 319, 583 P.2d at 1061. Thus, the burden is on the State Fund to persuade the Court that the decision in this case should *not* be applied retroactively.

¶25 Under *Chevron* three factors are considered. Those factors, as set out in *Riley v. Warm Springs State Hospital*, 229 Mont. 518, 521, 748 P.2d 455, 457 (1987), and repeated in *Benson* at ¶ 24, are as follows:

First, the ruling to be applied nonretroactively must establish a new principle of law either by overruling precedent or by deciding an issue of first impression whose result was not clearly foreshadowed. Next, the new rule must be examined to determine whether retroactive application will further or retard its operation. Third, the equity of retroactive application must be considered.

I consider the three factors in order.

#### First Factor

¶26 In *Stahl v. Ramsey Const. Co.*, 248 Mont. 271, 811 P.2d 546 (1991), the Supreme Court held that attorney fees incurred in connection with obtaining social security benefits could not be apportioned to the insurer for purposes of reducing the social security offset. At first glance, the decision in *Flynn* overrules that decision; however, the Supreme Court specifically held that it did not. Rather, it said that the prior decision was responsive to the specific arguments advanced in that case and that the Court did not have the benefit of the common fund argument made in this case. Thus, *Flynn* does not overrule prior precedent.

¶27 The question then is whether the decision in *Flynn* was or was not clearly foreshadowed by other decisions. In light of the non-apportionment holding in *Stahl* a strong argument can be made that it was not clearly foreshadowed. On the other hand, an argument can be made that the *Flynn* decision is simply a logical extension of well-established common fund doctrine principles. In *Murer v. State Compensation Mutual Ins. Fund*, 283 Mont. 210, 942 P.2d 69 (1997) (*Murer III*), the Supreme Court summarized the nature and purpose of the doctrine by quoting from *Means v. Montana Power Co.*, 191 Mont. 395, 625 P.2d 32 (1981), as follows:

The "common fund" concept provides that when a party through active litigation creates, reserves or increases a fund, others sharing in the fund must bear a portion of the litigation costs including reasonable attorney fees. The doctrine is employed to spread the cost of litigation among all beneficiaries so that the active beneficiary is not forced to bear the burden alone and the "stranger" (i.e., passive) beneficiaries do not receive their benefits at no cost to themselves.

*Murer III* at 223, 942 P.2d 76 (quoting from *Means* at 403, 625 P.2d at 37).

¶28 In context of workers' compensation, the prior use of the common fund doctrine had been in cases benefitting claimants. *Murer III*. That fact may have obscured this Court's own perspective when I determined, incorrectly, that the common fund doctrine did not apply in this case. There is nothing in *Murer III*, or in other Montana common fund cases, limiting the application of the doctrine to specific classes of beneficiaries. As the Supreme Court concluded on appeal in this case, the common fund shoe fits here since the State Fund shared, by way of the social security offset, in the benefits secured by claimant through litigation.

¶29 Both parties therefore have good arguments concerning foreshadowing. Since I find the other two factors determinative, I am spared the difficult job of judging between the two.

### Furtherance of the Rule

¶30 One of the principal purposes of the Workers' Compensation Act is

to provide, without regard to fault, wage supplement and medical benefits to a worker suffering from a work-related injury or disease. Wage-loss benefits are not intended to make an injured worker whole; they are intended to assist a worker at a reasonable cost to the employer. Within that limitation, the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease.

§ 39-71-105(1), MCA. Social security disability benefits provide supplemental income to totally disabled workers, thereby bringing their income closer to what they were earning when injured. The social security offset, §§ 39-71-701(5) and 39-71-702(4), MCA, reflects the interplay between the two types of benefits and establishes the claimant's total entitlement. The Supreme Court's decision in this case makes it clear that the total entitlement is eroded by the failure of an insurer to credit the claimant with a pro-rata share of attorney fees incurred in obtaining social security benefits. Thus, the purpose of compensating claimants to the full extent of the Workers' Compensation Act is served by retroactive application of *Flynn*.

¶31 Moreover, the failure to provide a pro-rata credit against the offset results in two classes of claimants: those claimants who obtained their benefits without incurring attorney fees and those who incurred the fees in obtaining their benefits. The former get fully one-half of their social security benefits. The latter get one-half less the attorney fees they incur. Retroactive application will promote fuller equality among totally disabled claimants receiving social security disability benefits.

¶32 Further, unless *Flynn* is applied to them, claimants who have incurred attorney fees in the past but who continue to receive total disability and social security benefits after *Flynn*, will receive less in the future than they are entitled to under *Flynn*. That is because the offsets taken by the State Fund will continue to fail to take the attorney fees into account. If application of *Flynn* to those claimants is a *prospective* application, then such application creates another disparity among claimants. Only those claimants who continue receiving social security disability benefits after the *Flynn* decision would be entitled to the pro-rata credit for attorney fees, while others who incurred fees at the same time but who are no longer receiving social security benefits would not.

¶33 Finally, and importantly, retroactive application is consistent with the absence of a general statute of limitations in the Workers' Compensation Act. While the Act provides a one-year claim filing requirement, § 39-71-601, MCA, once a claim is filed the only limitations period for seeking specific benefits is a requirement that a petition in the Workers' Compensation Court be filed within two years after benefits have been denied. That limitation was inserted in 1997. Thus, where a claim has been accepted or adjudicated compensable, there is no limitation period for seeking specific benefits until

the benefits are requested and denied. As a consequence, it is not unusual for the Court to receive petitions with respect to benefits that were allegedly due many years ago.

### Equity of Retroactive Application

¶34 The State Fund bears the burden of convincing the Court "that retroactive application would result in substantial inequitable results." *LaRoque* at 320, 583 P.2d at 1062.

¶35 The State Fund urges that the retroactive application of Flynn would be inequitable initially because it would impose a great administrative burden upon it in locating and reviewing files for claimants who may benefit from the decision. (State Fund's Answer Brief Regarding Retroactivity at 7.) Second it argues that the "cost of paying the common fund attorneys' fees would be passed on to current insureds in the form of increased premium." Since any common fund fees would be assessed against the benefitted claimants, the Court assumes that the State Fund meant to refer to additional benefits it would have to pay by absorbing its pro-rata share of attorney fees.

¶36 The list of potential administrative difficulties proffered by the State Fund include:

¶36a Difficulty locating old files. Closed files were microfilmed until 1977 and thereafter microfilmed until 1995. (Since 1995 files have been imaged and are available by computer.)

¶36b Files would have to be manually reviewed.

¶36c Payment of attorney fees in connection with social security proceedings would have to be verified, presumably through the social security administration.

¶37 The Court is not persuaded that the administrative burden is too high. Certainly, there is no indication, as in *Florida v. Long*, 487 U.S. 223 (1988), that retroactive application would cause financial instability of the State Fund or other insurers, or that it would jeopardize benefits due other claimants. The administrative difficulties identified certainly amounts to an inconvenience and will add to increased administrative costs. But the difficulties are surmountable. Similar difficulties in administration were encountered in post-remand proceedings in both *Murer* and *Broeker*, and there is no indication that the burdens in this case would be any greater. Computer queries were structured in both *Murer* and *Broeker* to identify potential claimants and limit the amount of manual file review necessary. In *Broeker*, the State Fund was able to identify those claimants whose benefits were reduced by the social security offset, information which should be available for use in this case. In *Broeker*, difficulties in identifying benefitted claimants from the late 1970s and early 1980s were dealt with by publishing notices in Montana newspapers of general circulation. In *Murer* and *Broeker*, deadlines were set to take into account the State Fund's resources. The Court has not and will not require the impossible or impractical.

¶38 With respect to the financial burden of applying Flynn retroactively, the claimant points out without contradiction that the State Fund has paid out \$31,000,000 in dividends to policy holders in recent years. If policy holders must absorb the costs of

complying with Flynn, they have already reaped the benefits of the State Fund's failure to take a pro-rata share of attorney fees into account when computing the social security offset. The inequities of applying the decision retroactively are offset by financial gain the State Fund has previously reaped.

¶39 I am unpersuaded that it is inequitable to apply Flynn retroactively.

#### Retroactivity

¶40 The State Fund has failed to persuade me that Supreme Court decision in this case should not be applied retroactively.

#### ORDER

¶41 The Supreme Court decision in this case - *Flynn v. State Compensation Ins. Fund*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397 - is retroactive and the claimant is entitled to common fund attorney fees from claimants who benefitted from the decision. Common fund fees are limited to claimants whose benefits were improperly offset prior to the date of the Supreme Court decision.

DATED in Helena, Montana, this 5<sup>th</sup> day of August, 2003.

(SEAL)

\s\ Mike McCarter  
JUDGE

c: Mr. Rex Palmer  
Mr. Bradley J. Luck  
Mr. Geoffrey C. Angel - Courtesy Copy  
Mr. James G. Hunt - Courtesy Copy  
Mr. Lucas J. Foust - Courtesy Copy  
Mr. Laurie Wallace - Courtesy Copy  
Submitted: July 11, 2003

1. The statute in question allowed attorney fees in will contests. The statute provided:

**72-12-206. Fees and expenses -- by whom paid.** When the validity or probate of a will is contested through court action, the attorney fees and costs, as provided in 25-10-201, incurred in defending the validity or probate of the will must be paid by the party contesting the validity or probate of the will if the will in probate is confirmed. If the probate is revoked, costs, as provided in 25-10-201, but not attorney fees, must be paid by the party who resisted the revocation or out of the property of the decedent, as the court directs.

2. If the issue had been previously decided, then that decision might be the law of the case but not *res judicata*.

3. *Richardson v. Corvallis Public School District No. 1*, 286 Mont. 309, 950 P.2d 748 (1997).