**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**2006 MTWCC 42**

**WCC No. 2005-1450**

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**FRANCES BAKER,**
**as Personal Representative**
**of the Estate of Bruce Baker**

**Petitioner**

**vs.**

**TRANSPORTATION INSURANCE COMPANY**

**Respondent/Insurer.**

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ORDER GRANTING PARTIAL SUMMARY JUDGMENT TO RESPONDENT

**Summary:** Petitioner Frances Baker, Personal Representative of the Estate of Bruce Baker, petitioned the Court to receive permanent partial disability benefits in the form of a 100% impairment award. Respondent Transportation Insurance Company moves this Court for summary judgment, arguing that § 39-72-703, MCA, prohibits Petitioner from receiving an impairment award. In the event the Court finds Petitioner is prohibited from receiving an impairment award under the 1985 version of the Occupational Disease Act, Petitioner asks the Court to find § 39-72-703, MCA (1985), unconstitutional.

**Held:** Respondent's motion for summary judgment is granted. Petitioner petitioned the Court for permanent partial disability benefits in the form of an impairment award. Under the 1985 version of the Occupational Disease Act, § 39-72-703, MCA, prohibits occupational disease claimants from receiving partial disability benefits. The Montana Supreme Court has ruled that an impairment award is a component of partial disability benefits under pre-1987 law. *Fellenberg v. Transportation Ins. Co.,* 2005 MT 90, 326 Mont. 467, 110 P.3d 464. Accordingly, Petitioner is barred from receiving an impairment award.

Section 39-72-703, MCA (1985), is constitutional. In *Eastman v. Atlantic Richfield Co.,*[1] the Montana Supreme Court held that, prior to the 1987 amendments to the workers'

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[1] *Eastman v. Atlantic Richfield Co.,* 237 Mont. 332, 777 P.2d 862 (1989).

compensation laws, a rational basis existed for unequal benefit awards to occupational disease claimants as opposed to occupational injury claimants. Though the Court has since questioned the continued validity of *Eastman*, it has not overruled it. Therefore, pursuant to *Eastman*, this Court finds § 39-72-703, MCA, constitutional.

**Topics:**

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-72-703 (1985).** Because an impairment award under pre-1987 law is a partial disability benefit (*see Grimshaw v. L. Peter Larson Co.,* 213 Mont. 291, 691 P.2d 805 (1984), and *Fellenberg v. Trans. Ins. Co.*, 2005 MT 90, 326 Mont. 467, 110 P.3d 464), and Petitioner's claim seeks an occupational disease impairment award, § 39-72-703, MCA (1985), prohibits Petitioner from receiving an impairment award.

**Impairment: Generally.** Because an impairment award under pre-1987 law is a partial disability benefit (*see Grimshaw v. L. Peter Larson Co.,* 213 Mont. 291, 691 P.2d 805 (1984), and *Fellenberg v. Trans. Ins. Co.*, 2005 MT 90, 326 Mont. 467, 110 P.3d 464) and Petitioner's claim seeks an occupational disease impairment award, § 39-72-703, MCA (1985), prohibits Petitioner from receiving an impairment award.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-72-703 (1985).** The Court concludes that the classes at issue in the case are similarly situated because a worker suffering from an on-the-job injury and a worker suffering from an occupational disease contracted in the workplace are "both physically impaired as a result of a work related activity and both in need of wage supplement benefits to compensate for the impairment to their earning capacity." *Stavenjord v. Montana State Fund,* 2003 MT 67, 314 Mont. 466, 67 P.3d 229.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-72-703 (1985).** This Court does not find the differences between the pre-1987 and post-1987 definitions of injury and occupational disease to be particularly remarkable. Nevertheless, *Eastman v. Atlantic Richfield Co.,* 237 Mont. 332, 777 P.2d 862 (1989), holds that a rational basis exists for the differences in benefits provided by the 1985 ODA and WCA, and *Eastman* is controlling in the present case. Therefore, this Court holds that § 39-72-703, MCA (1985), is constitutional.

¶ 1 Petitioner Frances Baker, widow of Bruce Baker and Personal Representative of the Estate of Bruce Baker, petitioned this Court for permanent partial disability benefits in the form of an impairment award. Respondent Transportation Insurance Company moves this Court for summary judgment, arguing that § 39-72-703, MCA,[2] prohibits Petitioner from receiving an impairment award. Petitioner contends § 39-72-703, MCA, does not prohibit an impairment award. Alternatively, if the Court finds § 39-72-703, MCA, does prohibit an impairment award, Petitioner argues the statute is unconstitutional.

¶ 2 The parties agree to the basic facts of the case. Bruce Baker was employed by W.R. Grace & Co. between 1969 and 1985. W.R. Grace was insured by Respondent during Mr. Baker's employment. Mr. Baker filed a claim for occupational disease benefits under the Occupational Disease Act (ODA) on September 9, 1986. The claim was denied. Bruce Baker died on February 4, 2002. Frances Baker brought the present claim as Personal Representative of his estate.

## SUMMARY JUDGMENT

¶ 3 In a motion for summary judgment, the moving party must establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[3]

## ANALYSIS

¶ 4 Respondent argues that § 39-72-703, MCA, bars Petitioner from receiving partial disability benefits in the form of an impairment award. The statute states, "No compensation as provided in 39-72-701 is payable to an employee who is partially disabled from an occupational disease."[4] No equivalent restriction exists in the 1985 Workers' Compensation Act (WCA).

¶ 5 Respondent argues that an impairment award is a component of partial disability benefits. Respondent relies on the Montana Supreme Court's holdings in *Holton v. F.H.*

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[2] This case is governed by the 1985 statutes since that was the law in effect on Bruce Baker's last day of work at W.R. Grace & Co. *Grenz v. Fire and Casualty of Connecticut,* 278 Mont. 268, 271, 924 P.2d 264, 266 (1996).

[3] ARM 24.5.329; *Farmers Union Mut. Ins. Co.* v. *Horton,* 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

[4] § 39-72-703, MCA.

*Stoltze Land and Lumber Co.,*[5] *Grimshaw v. L. Peter Larson Co.*,[6] and *Fellenberg v. Trans. Ins. Co*.[7]

¶ 6 The Supreme Court first recognized the existence of an immediately payable impairment award in *Holton.* In that case, the physician retained by the insurer agreed that the claimant had a ten percent whole-body impairment rating. The Supreme Court required the insurer to immediately pay the amount of undisputed compensation.[8]

¶ 7 In *Grimshaw*, the Supreme Court noted that the context of *Holton* suggested that a physical impairment is a component of partial disability benefits, holding, "If the claimant is not presently entitled to receive partial disability benefits, *Holton* does not apply."[9]

¶ 8 The Montana Supreme Court recently emphasized that *Grimshaw* is still good law in regard to claims for impairment awards that fall under pre-1987 law. In *Fellenberg,* the claimant sought benefits under the 1985 ODA, including payment of an impairment award. This Court held, *inter alia,* that the claimant was not entitled to an impairment award.[10] The Montana Supreme Court agreed and held:

> The WCC concluded that *Grimshaw* expressly prohibited a non-PPD qualified claimant under pre-1987 law from receiving a *Holton* impairment award. The court further opined that while *Rausch* had adopted another rule as to post-1991 claims, *Rausch* had not overturned *Grimshaw* and it was not the role of the WCC to overrule Supreme Court decisions. We agree with the WCC that *Grimshaw* controlled in the case at bar and under *Grimshaw,* Fellenberg is not entitled to a *Holton* impairment award.[11]

¶ 9 Petitioner argues that *Grimshaw* and *Fellenberg* are distinguishable from the case at bar because they interpret and apply the 1983 statutes. Petitioner expends much effort

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[5] 195 Mont. 263, 637 P.2d 10 (1981).

[6] 213 Mont. 291, 691 P.2d 805 (1984).

[7] 2005 MT 90, 326 Mont. 467, 110 P.3d 464.

[8] *Holton,* 195 Mont. at 269-70, 637 P.2d at 268-69.

[9] *Grimshaw,* 213 Mont. at 296, 691 P.2d at 807.

[10] *Fellenberg,* ¶ 12.

[11] *Id.*, ¶ 25.

explaining the differences between the 1983 and 1985 versions, specifically the definitions of "Disability" and "Impairment"[12] and the similarity of the present case and *Rausch v. State Compensation Ins. Fund.*[13] Although Petitioner presents a compelling argument, this Court remains bound by the fundamental holding of *Grimshaw* which unambiguously drew a demarcation line between the pre-1987 and post-1987 statutes.

¶ 10 In *Fellenberg*, the Montana Supreme Court affirmed *Grimshaw*, holding: "*Grimshaw* expressly prohibited a non-PPD qualified claimant under ***pre-1987*** law from receiving a *Holton* impairment award."[14] Regarding the Supreme Court's holding in *Grimshaw,* Petitioner in the present case admits, "The Court ultimately determined that impairment benefits were a type of partial disability benefit . . . ."[15]

¶ 11 This Court is bound by *Grimshaw*. Because an impairment award under pre-1987 law is a partial disability benefit, and Petitioner's claim seeks an occupational disease impairment award, § 39-72-703, MCA (1985), prohibits Petitioner from receiving an impairment award.

Constitutional Analysis

¶ 12 Having found that Petitioner is prohibited from seeking an impairment award under the 1985 version of the ODA, the Court turns its attention to Petitioner's constitutional challenge to § 39-72-703, MCA.

¶ 13 The party challenging the constitutionality of a statute bears the heavy burden of proving the statute unconstitutional beyond a reasonable doubt.[16]

> The constitutionality of a legislative enactment is prima facie presumed, and every intendment in its favor will be presumed, unless its unconstitutionality appears beyond a reasonable doubt. The question of constitutionality is not whether it is possible to condemn, but whether it is possible to uphold the

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[12] *See* § 39-71-121, MCA, and § 39-71-122, MCA, (1985).

[13] 2002 MT 203, 311 Mont. 210, 54 P.3d 25.

[14] *Fellenberg,* ¶ 25 (emphasis added).

[15] Petitioner's Response to Respondent's Motion for Summary Judgment at 3.

[16] *Henry v. State Compensation Ins. Fund,* 1999 MT 126, ¶ 11, 294 Mont. 449, 982 P.2d 456.

> legislative action which will not be declared invalid unless it conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt.[17]

¶ 14 In this case, Petitioner argues that § 39-72-703, MCA, violates her right to equal protection. Article II, section 4, of the Montana Constitution provides that "[n]o person shall be denied the equal protection of the laws."

¶ 15 When addressing an equal protection challenge, the Court must first identify the classes involved and determine whether they are similarly situated.[18] If the classes are not similarly situated, the Court's analysis ends there.[19] If the classes are similarly situated, the Court must determine what level of scrutiny applies.[20] With respect to equal protection challenges to workers' compensation statutes, it is well settled that the Court utilizes the rational basis test[21] and, indeed, the parties in the present case agree that the rational basis test applies here. Finally, the Court must apply the appropriate level of scrutiny in determining whether the statute at issue passes constitutional muster.[22]

¶ 16 Four principal cases guide this Court's equal protection analysis in the present case: *Eastman v. Atlantic Richfield Co.,*[23] *Henry v. State Compensation Ins. Fund,*[24] *Schmill v. Liberty Northwest Ins. Corp.,*[25] and *Stavenjord v. Montana State Fund.*[26] Each of these cases dealt with an equal protection challenge to a statute that treated injury claimants differently than occupational disease claimants. Of these four cases, however, *Eastman* is the only case that addressed an equal protection challenge to the pre-1987 ODA.

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[17] *Stratemeyer v. Lincoln County,* 259 Mont. 147, 150, 855 P.2d 506, 508-09 (1993), citing *Fallon County v. State,* 231 Mont. 443, 445-46, 753 P.2d 338, 339-40.

[18] *Henry,* ¶ 27.

[19] *Powell v. State Compensation Ins. Fund,* 2000 MT 321, ¶ 22, 302 Mont. 518, 15 P.3d 877.

[20] *Henry,* ¶ 29.

[21] *Reesor v. Montana State Fund,* 2004 MT 370 ¶ 14, 325 Mont. 1, 103 P.3d 1019.

[22] *Henry,* ¶¶ 32-33.

[23] 237 Mont. 332, 777 P.2d 862 (1989).

[24] 1999 MT 126, 294 Mont. 449, 982 P.2d 456.

[25] 2003 MT 80, 315 Mont. 51, 67 P.3d 290.

[26] 2003 MT 67, 314 Mont. 466, 67 P.3d 229.

¶ 17 In determining whether the classes in the present case are similarly situated, *Eastman* provides this Court with little guidance as the *Eastman* Court failed to analyze whether the classes were similarly situated. This Court presumes the *Eastman* Court found the classes similarly situated, however, since it went on to address the merits as to whether a rational basis existed for the disparate treatment of the two classes.

¶ 18 In *Henry,* the Montana Supreme Court defined the classes as, "(1) workers who suffered a work-related injury on one work shift; and (2) workers who suffered a work-related injury on more than one work shift."[27] In so doing, the Supreme Court explained:

> Regardless of the number of days or the mechanism by which a worker incurs an affliction, the fact remains that both classes of individuals have suffered work-related injuries, are unable to perform their former jobs, and need rehabilitation benefits to return to work. Both workers have as their sole source of redress the WCA or the ODA. . . . We conclude that the classes are similarly situated for equal protection purposes.[28]

¶ 19 In *Stavenjord,* the Montana Supreme Court defined the two classes as follows:

> [T]hose workers whose benefits are provided for pursuant to the Workers' Compensation Act and those workers whose benefits are provided for pursuant to the Occupational Disease Act. However, ***since 1987***, they are distinguished merely by the number of work shifts over which their work-related affliction is sustained. Therefore, as in *Henry*, the two classes on appeal remain "(1) workers who suffer a work related injury on one shift; and (2) workers who suffered a work related injury on more than one work shift." *Henry*, ¶ 27. We conclude that they are similarly situated because regardless of the number of days over which their condition occurs or the mechanism which causes their affliction, they are, for purposes of the facts in this case, both physically impaired as a result of work related activity and both in need of wage supplement benefits to compensate for the impairment to their earning capacity.[29]

¶ 20 Although the Montana Supreme Court cited the changed definitions of "injury" and "occupational disease" found in the 1987 amendments to the ODA and WCA as part of its

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[27] *Henry,* ¶ 27.

[28] *Id.,* ¶ 28.

[29] *Stavenjord,* ¶ 46 (emphasis added). (*See also Schmill*, ¶ 17.)

reason for defining the classes the way it did, this Court fails to appreciate any distinction in defining these classes pre- or post-1987. Therefore, this Court concludes that the classes in the present case are similarly situated because a worker suffering from an on-the-job injury and a worker suffering from an occupational disease contracted in the workplace are "both physically impaired as a result of a work related activity and both in need of wage supplement benefits to compensate for the impairment to their earning capacity."[30] For this reason, and because the Montana Supreme Court implicitly found a worker that suffered an injury and a worker suffering from an occupational disease were similarly situated in *Eastman,* this Court finds the classes similarly situated in the case at bar.

¶ 21 Where two classes are similarly situated and there is unequal treatment of the classes, a rational basis must be demonstrated in order to justify the unequal treatment. In order to demonstrate that a rational basis exists, it must be shown that (1) the statute's objective is legitimate; and (2) the statute's objective bears a rational relationship to the classification used by the Legislature. If the statute which causes the unequal treatment bears a rational relationship to a legitimate governmental interest, then the constitutional challenge is defeated.[31]

¶ 22 The 1985 version of the WCA does not have a statute similar to § 39-72-703, MCA, which limits partial disability benefits. As noted above in determining that the classes at issue in this case were similarly situated, this Court fails to appreciate any distinction in defining these classes whether their entitlement to benefits falls pre- or post-1987. Similarly, this Court fails to appreciate how a rational basis could exist for allowing disparate treatment in the case of pre-1987 occupational disease claimants and not post-1987 occupational disease claimants notwithstanding the 1987 amendments. However, the Montana Supreme Court noted just such a distinction in *Eastman*.

¶ 23 In *Eastman,* the issue was whether a provision in the 1985 ODA limiting partial disability benefits to $10,000 violated equal protection because it did not provide the same benefits as the parallel provision in the WCA. The Supreme Court held that occupational disease claimants historically were not entitled to any benefits and therefore, a rational basis existed to enact legislation giving such claimants benefits and replacing common law remedies.[32] In that regard, the Supreme Court noted:

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[30] *Stavenjord*, ¶ 46.

[31] *Henry,* ¶ 33.

[32] *Eastman,* 237 Mont. at 338-339, 777 P.2d at 866.

> Montana created a statutory remedy for work-related diseases in 1959 by the enactment of the Occupational Disease Act, § 92-1301 RCM (1947) et seq., now §§ 39-72-101 to 714, MCA. In the workers' compensation field, this Court upheld the power of the legislature to enact workers' compensation which replaced common law remedies. *Shea v. North-Butte Mining Co.* (1919), 55 Mont. 522, 534, 179 P.2d 499, 503. We conclude that the same rationale properly can be applied to the Occupational Disease Act. We conclude there is a rational basis for the enactment of the Occupational Disease Act by the legislature.
>
> Claimant argues that the benefits payable under both workers' compensation and the Occupational Disease Act should be the same. We recognize the fairness of an argument for equal compensation for similar disabilities. However, the equal protection clause does not require that all aspects of occupational disease and occupational injury be dealt with in the same manner. . . .[33]

The Supreme Court accordingly held that the provision in the 1985 ODA limiting partial disability benefits to $10,000 was constitutional.[34]

¶ 24 In *Stavenjord,* the Supreme Court recounted the reasons it departed from *Eastman* in deciding *Henry.* The Supreme Court stated:

> We distinguished *Henry* from *Eastman* for two reasons. The first was that in *Eastman*, the Court was concerned with the degree of benefits awarded to a similarly situated claimant while in *Henry* one group of similarly situated claimants was totally denied a type of benefit. It is on that language that the State Fund now relies for its argument that this case is more similar to *Eastman* than to *Henry.*[35]

¶ 25 Taken alone, the above paragraph might well lead this Court to conclude that § 39-72-703, MCA, is unconstitutional because it totally denies a benefit to an occupational disease claimant that is available to an injury claimant. However, the *Stavenjord* Court went on to state:

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[33] 237 Mont. at 339, 777 P.2d at 866.

[34] *Id.*

[35] *Stavenjord,* ¶ 42.

> Second, Eastman filed his claim for compensation benefits in 1985, prior to the 1987 amendments to the WCA and the ODA. As pointed out earlier, after the 1987 amendments to the WCA and the ODA, the definitions of "injury" and "occupational disease" no longer focus on the nature of the medical condition, but rather focus on the number of work shifts over which the worker incurs an injury. Thus, the historical justification for treating workers differently under the WCA and the ODA no longer exists. ***Indeed, the entire underpinnings of Eastman have evaporated, rendering its continued validity questionable.***[36]

¶ 26 The Court emphasizes the last line in the above paragraph to underscore this Court's dilemma. Although the *Henry* Court questioned the continued validity of *Eastman,* it conspicuously did ***not*** overrule it despite the clear opportunity to do so. Therefore, this Court must apply the analysis set forth in *Eastman* to the present case.

¶ 27 Under the 1985 WCA, "injury" was defined as, "a tangible happening of a traumatic nature from an unexpected cause . . . excluding disease not traceable to injury . . . ."[37] "Occupational disease" was, "all diseases arising out of or contracted from and in the course of employment."[38]

¶ 28 In 1987, the definition of "injury" was amended to read, in pertinent part, "internal or external physical harm to the body," and further stated:

> (2) An injury is caused by an accident. An accident is:
> (a) an unexpected traumatic incident or unusual strain;
> (b) identifiable by time and place of occurrence;
> (c) identifiable by member or part of the body affected; and
> (d) caused by a specific event on a single day or during a single work shift.[39]

¶ 29 In 1987, "occupational disease" was defined as, "harm, damage, or death as set forth in 39-71-119(1) [defining "injury" under the WCA] . . . caused by events occurring on more than a single day or work shift."[40]

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[36] *Id.* (citing *Henry*, ¶ 43) (emphasis added).

[37] § 39-71-119(1), MCA.

[38] § 39-72-102(11), MCA.

[39] § 39-71-119, MCA (1987).

[40] § 39-72-102(10), MCA (1987).

¶ 30 This Court does not find the differences between the pre-1987 and post-1987 definitions of injury and occupational disease to be particularly remarkable. Nevertheless, *Eastman* holds that a rational basis exists for the differences in benefits provided by the 1985 ODA and WCA, and *Eastman* is controlling in the present case. Therefore, this Court holds that § 39-72-703, MCA (1985), is constitutional.

ORDER

¶ 31 Respondent is **GRANTED** partial summary judgment.[41]

¶ 32 Any party to this dispute may have twenty days in which to request reconsideration from this Order Granting Partial Summary Judgment to Respondent.

DATED in Helena, Montana, this 21st day of December 2006.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Jon L. Heberling
Laurie Wallace
Todd A. Hammer
Submitted: March 1, 2006

[41] Although Respondent styled its motion as a "Motion For Summary Judgment," it did not move for summary judgment on the issues of funeral benefits and medical benefits, which Petitioner is also seeking. Therefore, the Court's Order is limited to the issue of Petitioner's entitlement to an impairment award and, accordingly, is for partial summary judgment only.