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**FILED**

**FEB 18 2005**

OFFICE OF  
WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

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

**WC COURT NO. 2003-0840**

<p><b>CATHERINE E. SATTERLEE,</b> Petitioner, vs. LUMBERMAN'S MUTUAL CASUALTY COMPANY, Respondent/Insurer for BUTTREY FOOD &amp; DRUG, Employer.</p>	<p><b>WC Claim No.: 788CU041791</b></p>
<p><b>JAMES ZENAHLIK,</b> Petitioner, vs. MONTANA STATE FUND, Respondent/Insurer for EAGLE ELECTRIC, Employer.</p>	<p><b>WC Claim No.: 03-1997-06362-9</b></p>
<p><b>JOSEPH FOSTER,</b> Petitioner, vs. MONTANA STATE FUND, Respondent/Insurer for ALLEN ELECTRIC, Employer.</p>	<p><b>WC Claim No.: 3-95-17425-3</b></p>
<p><b>DORIS BOWERS,</b> Petitioner, vs. PUTMAN &amp; ASSOCIATES, Adjusters for ROYAL &amp; SUNALLIANCE, Respondent/Insurer for TIDYMANS, Employer.</p>	<p><b>WC Claim No.: 290044312000</b></p>

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PETITIONERS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND BRIEF IN SUPPORT

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**MOTION**

COME NOW Petitioners, by and through their attorney of record, and move this Court, pursuant to Rule 24.5.329 of the Workers' Compensation Court Rules, for an order granting partial summary judgment on the issue of whether the termination of permanent total disability and rehabilitation benefits pursuant to §39-71-710, MCA, because the worker receives, or is eligible to receive, social security retirement benefits, is unconstitutional. Specifically, Petitioners respectfully move the Court for an order declaring the age limitation on permanent total disability and rehabilitation benefits set forth in §39-71-710, MCA, to be unconstitutional.

This Motion is based on the pleadings, record and file herein, the brief in support that follows, and upon controlling Montana law.

**BRIEF IN SUPPORT**

**STATEMENT OF UNCONTROVERTED FACTS**

As indicated by the Responses to the Amended Petition for Hearing filed by the Respondent/Insurers, it is uncontroverted that each of the Petitioners herein had benefits terminated or denied pursuant to the age limitation contained in §39-71-710, MCA. Specifically, with respect to each petitioner, the Respondent/Insurers have admitted in their pleadings as follows:

**James Zenahlik**

1. Petitioner James Zenahlik suffers from an injury or occupational disease with an entitlement date of December 28, 1996. His claim for benefits was accepted by the State Fund. Indemnity and medical benefits were paid on the claim. He was accepted for and placed upon social Security Disability benefits as of June 1997. The Petitioner was advised by the State Fund that his total disability benefits would be terminated pursuant to Montana Code Annotated §39-71-710 as of his 65<sup>th</sup> birthday.

*Response to Amended Petition for Hearing, ¶2.a. filed by Respondent/Insurer Montana State Fund.*

**Joseph Foster**

1. Petitioner Joseph Foster made claims for an industrial injury occurring on April 12, 1999. The claim was accepted by the State Fund. Indemnity and medical benefits were paid on the claim. Petitioner was accepted for and placed upon Social Security Disability benefits as of October 1999. The Petitioner was advised by the State Fund that his total disability benefits would be terminated pursuant to Montana Code Annotated §39-71-710 as of his 65<sup>th</sup> birthday.

*Response to Amended Petition for Hearing, ¶2.b. filed by Respondent/Insurer Montana State Fund.*

**Catherine Satterlee**

1. Petitioner Catherine Satterlee (hereinafter "Satterlee") was injured attempting to turn over a 40-45 pound bag of dog food on the bottom of a shopping cart on July 25, 1992, while in the course and scope of her duties as an employee of Buttrey Food and Drug, an employer enrolled under Plan II pursuant to the Montana Workers' Compensation Act.

*Answer to Amended Petition for Hearing, ¶2.a. filed by Respondent/Insurer Lumberman's Mutual Casualty Company.*

2. Lumberman's accepted liability for the claim as an industrial injury and paid medical indemnity benefits for a various period of time.

*Answer to Amended Petition for Hearing, ¶2.c. filed by Respondent/Insurer Lumberman's Mutual Casualty Company.*

3. On January 25, 1996, this Court ruled that although Satterlee was totally disabled on account of her emotional and psychological condition, she was not permanently totally disabled as a result of July 25, 1992 industrial accident.

*Answer to Amended Petition for Hearing, ¶2.d. filed by Respondent/Insurer Lumberman's Mutual Casualty Company.*

4. Satterlee appealed this decision to the Montana Supreme Court. On December 10, 1996, the Montana Supreme Court issued its opinion and reversed this Court's denial of Satterlee's claim for total disability benefits and remanded the case for entry of judgment in Satterlee's favor.

*Satterlee v. Lumberman's Mutual Casualty Co., 280 Mont. 85, 929 P.2d 212 (1996).*

*Answer to Amended Petition for Hearing, ¶2.e. filed by Respondent/Insurer Lumberman's Mutual Casualty Company.*

5. Satterlee turned age 65 on September 30, 1999. On or about that date, Lumberman's ceased paying permanent total disability payments in the amount of \$170.54.

*Answer to Amended Petition for Hearing, ¶2.f. filed by Respondent/Insurer Lumberman's Mutual Casualty Company.*

**Doris Bowers**

1. Petitioner, Doris Bowers, was injured on January 4, 2002 while in the scope and course of her employment for Tidyman's. At the time of Petitioner's injury, Tidyman's was enrolled under Plan II of the Montana Workers' Compensation Act and was insured for purposes of workers' compensation by Royal.

*Response to Amended Petition for Hearing, ¶2.A. filed by Respondent/Insurer Royal and SunAlliance.*

2. Petitioner's claim for benefits was accepted by Royal and it has paid indemnity and medical benefits to Petitioner.

*Response to Amended Petition for Hearing, ¶2.B. filed by Respondent/Insurer Royal and SunAlliance.*

3. Petitioner was born on August 8, 1928 and was 73 years old on the date of her injury on January 4, 2002. Petitioner has been advised by Royal that the only benefits to which she is entitled pursuant to the provisions of Montana Code Annotated §39-71-710 are benefits for her impairment and medical benefits.

*Response to Amended Petition for Hearing, ¶2.C. filed by Respondent/Insurer Royal and SunAlliance.*

4. Pursuant to the provisions of Montana Code Annotated §39-71-710, Royal denies any liability for the payment of permanent total disability benefits or for rehabilitation benefits.

*Response to Amended Petition for Hearing, ¶2.D. filed by Respondent/Insurer Royal and SunAlliance.*

**The Stipulation to Await a Decision in Reesor v. Montana State Fund**

It is also uncontroverted that on June 9, 2004, the State Fund filed a status report with this Court that stated, in relevant part, as follows:

Lastly, the parties believe judicial economy is best served by awaiting the Montana Supreme Court's decision in *Reesor v. Montana State Fund*, Montana Supreme Court Case No. 03-639, because *Reesor will likely determine whether Petitioners are entitled to receive additional benefits in this matter*. Therefore, the parties are presently in a position to request the Court to have another Scheduling Order entered.

(Emphasis added.)

Then on January 21, 2005, the State Fund reversed itself and filed a status report which attempted to repudiate the binding effect of *Reesor*. In short, the State Fund claimed this case was not controlled by *Reesor* because, (1) the petitioners herein had filed a Second Amended Petition that raised additional arguments concerning the unconstitutionality of Montana Code Annotated §39-71-710, and (2) the specific holding of *Reesor* involved only PPD claimants and, therefore "...a legal issue exists as to whether *Reesor* extends to permanently totally disabled claimants."

## SUMMARY OF ARGUMENT

As set forth below, this Court is bound by *Reesor v. Montana State Fund*, 2004 Mont. 370, 325 Mont. 1, \_\_\_ P.3d \_\_\_ which is totally dispositive of the legal issue presented by the this motion. Specifically, *Reesor* mandates the legal conclusion that the age limitation on permanent total disability and rehabilitation benefits set forth in §39-71-710, MCA, is an unconstitutional violation of the Equal Protection Clause found in Article II, §4 of the Montana Constitution. It cannot be reasonably disputed that the analysis, reasoning, and holding of *Reesor* with respect to PPD benefits applies equally to PTD and rehabilitation benefits. There is no legal or factual basis for a constitutional distinction between how those benefits should be administered.

The fact that petitioners, in their Second Amended Petition, pleaded other constitutional defects in the statute does not in any way effect the binding, precedential, impact of *Reesor*. To the contrary, considering the clear holding in *Reesor*, Petitioners are entitled to partial summary judgment on that basis alone. There is second legal reason that §39-71-710, MCA, is unconstitutional. It impermissibly delegates the legislative power of the state in violation of §1, Article III, Montana Constitution (1972) by adopting by reference changes in the federal social security laws or regulations to occur in the future.

## SUMMARY JUDGMENT STANDARD OF REVIEW

Subsection (1)(a) of Rule 24.5.329 of the Workers' Compensation Court Rules specifically provides that, a "party may... move for a summary judgment in the party's favor upon all *or any part of a claim* or defense." (*Emphasis added.*) Summary judgment on any such part of a claim is appropriate whenever it is determined that there are no material facts in dispute and that the moving party is entitled to judgment as a matter of law. *Ritland v. Rowe* (1993), 260 Mont. 453, 861 P.2d 175; *Minnie v. City of Roundup* (1993), 257 Mont. 429, 849 P.2d 212. Here, there are no consequential facts which are in dispute and this matter is ripe for summary judgment.

## ARGUMENT

### *Reesor and Equal Protection*

Montana Code Annotated §39-71-710, provides as follows:

**Termination of benefits upon retirement.** (1) If a claimant is receiving disability or rehabilitation compensation benefits and the claimant receives social security retirement benefits or is eligible to receive or is receiving full social security retirement benefits or retirement benefits from a system that is an alternative to social security retirement, the claimant is considered to be retired. *When the claimant is retired, the liability of the insurer is ended for payment of permanent partial disability benefits other than the impairment award, payment of permanent total disability benefits, and payment of rehabilitation compensation benefits.* However,

the insurer remains liable for temporary total disability benefits, any impairment award, and medical benefits.

(2) If a claimant who is eligible under subsection (1) to receive retirement benefits and while gainfully employed suffers a work-related injury, the insurer retains liability for temporary total disability benefits, any impairment award, and medical benefits.

(Emphasis added.)

In *Reesor*, the Petitioner received no PPD benefits other than his impairment award because he was over 65 years of age. Petitioner brought suit and contended that "...§39-71-710, MCA, unconstitutionally denied him equal protection under the laws; specifically, he received lower permanent partial disability (PPD) benefits because of his age." *Reesor*, 2004 MT 370, ¶1, 325 Mont. 1, ¶1, \_\_\_ P.3d \_\_\_, ¶1. This Court held that §39-71-710, MCA was constitutional and Petitioner appealed.

According to the Montana Supreme Court, "the only issue on appeal is whether the age limitation on PPD benefits, set forth in §39-71-710, MCA, violates Article II, §4 of the Montana Constitution." *Reesor*, 2004 MT 370, ¶2, 325 Mont. 1, ¶2, \_\_\_ P.3d \_\_\_, ¶2. The Supreme Court then made a detailed analysis of the constitutionality of the age limitation found in §39-71-710, MCA, as it applied to the termination of PPD benefits. Because this analysis is equally applicable to PTD and rehabilitation benefits, it deserves detailed discussion and quotation here.

First, the Supreme Court had to identify the classes involved and determine whether they were similarly situated. The two classes, as delineated by the Petitioner, were: "(1) PPD eligible claimants who receive or are eligible to receive social security retirement benefits; and (2) PPD claimants who do not receive and are not eligible to receive social security retirement benefits." *Reesor*, 2004 MT 370, ¶10, 325 Mont. 1, ¶10, \_\_\_ P.3d \_\_\_, ¶10. The State Fund challenged this classification scheme by arguing that social security serves the same purpose as replacing lost wages and that worker's compensation benefits and social security benefits are part of an integrated system of restoring wage loss benefits regardless of cause. The Supreme Court rejected the State Funds argument and upheld the proposed classifications as follows:

We agree with *Reesor*, however, when he asserts that both classes are similarly situated because both classes have suffered work-related injuries, are unable to return to their time of injury jobs, have permanent physical impairment ratings and must rely on §39-71-703, MCA, as their exclusive remedy under Montana law. The claimant's age, as a result of eligibility to receive social security retirement benefits, is the only identifiable distinguishing factor between the two classes. Furthermore, chronological age and the corresponding eligibility for social security retirement benefits is unrelated to a person's ability to engage in meaningful employment. Therefore, we conclude the classes are similarly situated for equal protection purposes.

*Reesor*, 2004 MT 370, ¶12, 325 Mont. 1, ¶12, \_\_\_ P.3d \_\_\_, ¶12.

Accordingly, the two classes in this case would be properly defined as: (1) PTD or rehabilitation compensation benefits eligible claimants who receive or are eligible to receive social security retirement benefits; and (2) PTD or rehabilitation compensation benefits claimants who do not receive and are not eligible to receive social security retirement benefits. The Supreme Court's analysis that "chronological age and the corresponding eligibility for social security retirement benefits is unrelated to a person's ability to engage in meaningful employment" is as applicable to PTD claimants as it is PPD claimants.

Next, the Supreme Court determined the appropriate level of scrutiny to apply to the challenged legislation. After reviewing the three possible levels, the Court concluded that "...we see no need to depart from our analysis set forth in *Henry* wherein we stated that equal protection claims brought by an injured worker are generally reviewed pursuant to the rational basis test." *Reesor*, 2004 MT 370, ¶14, 325 Mont. 1, ¶14, \_\_\_ P.3d \_\_\_, ¶14. (Citations omitted.)

Finally, the Supreme Court turned to "...the heart of equal protection analysis, that is, whether the government's stated objective bears a rational relationship to the statutory classification adopted by the Legislature and set forth in §39-71-710, MCA" *Reesor*, 2004 MT 370, ¶15, 325 Mont. 1, ¶15, \_\_\_ P.3d \_\_\_, ¶15. The State Fund argued that there was a rationale basis because social security retirement benefits and state disability benefits serve the same purpose. The Supreme Court rejected this argument. The following lengthy quote contains the Court's core analysis, which is also critical to granting of summary judgment on behalf of the Petitioners herein:

As clearly pronounced in §39-71-105(1), MCA, the primary goal of workers' compensation benefits is to establish a wage replacement for injured workers, certainly a legitimate and appropriate governmental interest.

The issue in this case is whether it is fair to deny men and women full PPD benefits simply because their age makes them eligible to receive social security retirement or similar benefits. We conclude that the disparate treatment of partially disabled claimants based upon their age, because they are receiving or are eligible to receive social security retirement benefits, is not rationally related to that legitimate governmental interest.

*Reesor*, 2004 MT 370, ¶¶18-25, 325 Mont. 1, ¶¶18-19, \_\_\_ P.3d \_\_\_, ¶¶18-25. (Emphasis added.)

There is absolutely no factual or legal distinction that would make the analysis and holding of *Reesor* applicable only to claimants eligible for PTD but not those eligible for PPD or rehabilitation benefits. Patently, the same age limitation, in the same sentence (in the conjunctive), in the same statute, cannot be constitutional with respect to PTD or rehabilitation claimants and unconstitutional for PPD claimants. Such would be an absurd result under the law.

As originally predicted in the stipulation agreed to by the parties in this case, *Reesor* determined that Petitioners are "entitled to receive additional benefits in this matter."

### **Unconstitutional Delegation of Legislative Authority**

The age limitation on permanent total disability and rehabilitation benefits set forth in §39-71-710, MCA, is keyed to an unspecified retirement age that is defined as that time when the claimant "...receives social security retirement benefits or is eligible to receive or is receiving full social security retirement benefits or retirement benefits from a system that is an alternative to social security retirement...". Therefore, whenever the federal government changes the social security retirement age, Montana's age limitation on permanent total disability and rehabilitation benefits also changes without any input or control by the Montana legislature. It is well settled in Montana that such a delegation of legislative authority is unconstitutional.

Moreover, under the present social security scheme a worker's retirement age varies depending on his or her date of birth. For example, worker "A" born in 1937 is eligible for full retirement benefits at age 65, but worker "B" born six years later in 1943 must wait until 66 to receive full retirement benefits. Thus, as presently written, §39-71-710, MCA, would provide an extra year of permanent total disability and rehabilitation benefits to worker B as compared to worker A. Under the current provisions of §39-71-710, MCA, such disparate treatment may be further exacerbated as result of future changes in the federal social security laws, which would occur without any consent or input from the Montana legislature.

As noted above, it is well settled that incorporating future federal statutory changes into Montana law is unconstitutional. The leading case on this issue is *Lee v. State* (1981), 195 Mont. 1, 635 P.2d 1282, cert. denied 456 U.S. 1006, 73 L. Ed. 2d 1300, 102 S. Ct. 2295, 1982 U.S. LEXIS 2331, 50 U.S.L.W. 3947 (1982). In *Lee*, the plaintiff brought an action seeking a declaratory judgment that §61-8-304, MCA, which attempted to impose speed limits according to federal law, was unconstitutional. The District Court held the statute to be constitutional, and entered judgment against Lee. On appeal the Montana Supreme Court reversed the District Court and held the statute unconstitutional.

Section 61-8-304, MCA, provided as follows:

Declaration of speed limits -- exception to the basic rule. The attorney general shall declare by proclamation filed with the secretary of state a speed limit for all motor vehicles on all public streets and highways in the state *whenever the establishment of such a speed limit by the state is required by federal law as a condition to the state's continuing eligibility to receive funds authorized by the Federal Aid Highway Act of 1973 and all acts amendatory thereto or any other federal statute. The speed limit may not be less than that required by federal law, and the attorney general shall by further proclamation change the speed limit adopted pursuant to this section to comply with federal law.* Any proclamation issued pursuant to this section becomes effective at



midnight of the day upon which it is filed with the secretary of state. A speed limit imposed pursuant to this section is an exception to the requirements of 61-8-303 and 61-8-312, and a speed in excess of the speed limit established pursuant to this section is unlawful notwithstanding any provision of 61-8-303 and 61-8-312.

(Emphasis added)

The Montana Supreme Court, in holding this statute unconstitutional, analyzed and reasoned as follows:

The constitutional infirmity of §61-8-304, MCA, arises out of its mandatory directions to the attorney general to proclaim a speed limit "not . . . less than that required by federal law" "whenever the establishment of such a speed limit by the state is required by federal law" to receive federal highway funds. Under the 1974 act, and under the act as it now exists, the attorney general is also required to terminate such proclaimed speed limit "whenever such a speed is no longer required by federal law." Section 61-8-305(2), MCA. *A more blatant handover of the sovereign power of this state to the federal jurisdiction is beyond our ken.*

Almost without exception, the cases which recognize the right of a legislature to adopt as a part of its enactments existing federal laws and regulations *also except from that right any adoption of changes in the federal laws or regulations to occur in the future.*

Three states have upheld legislation similar to Montana's and denied constitutional challenges to statutes incorporating federal speed limits. All three can be distinguished from this case by the terms of the Montana statute. In the other three cases, either the legislature pegged the speed limit, or the power granted to a state official or body to adopt speed limits was couched in permissive instead of mandatory terms. *No state that we can find has approved a delegation of sovereign power involved here for mandatory action in the future, based upon the federal law.*

The state further argues that in any event, if we were to determine that the ability of the attorney general in the future to change the maximum speed limits is unconstitutional, nonetheless, the statute can be saved by declaring that portion severable so as to preserve the constitutional validity of the rest of the act. However, there is no severability clause either in Ch. 60, Laws of Montana (1974), or in Ch. 421, Laws of Montana (1979), §66, where this statute was enacted and reenacted. Moreover, the power of the court to sever an unconstitutional portion cannot be effectively exercised in this

case because the attorney general's proclamation must issue "whenever" the federal law changes, and must terminate whenever the federal requirement ceases. There is no comfort for the state therefore in severability.

We want to state clearly that had the legislature itself established the speed limit originally or at any subsequent session, we should then have found such enactment constitutional, even though it may have been in response to the federal requirements. Moreover, we see no constitutional infirmity, if an emergency of the sort presented here arose, in granting such proclamation power to a state official, if it were only for the interim between legislative sessions. *The evil we find in the present legislation is the permanent delegation of the legislative sovereign power.*

*Lee*, 195 Mont. at 9-10, 635 P.2d at 1286-1287. (Citations omitted and emphasis added.)

Clearly §39-71-710, MCA, has the same constitutional infirmity as §61-8-304, MCA, because §39-71-710, MCA, impermissibly adopts and incorporates changes in the federal laws or regulations to occur in the future. The reasoning and analysis of *Lee*, which led the Supreme Court to hold that §61-8-304, MCA, was unconstitutional, also militates to the inescapable conclusion that §39-71-710, MCA, is similarly unconstitutional. There is no question that the operation of §39-71-710, MCA, is inextricably tied to, and dependent on, an unspecified social security retirement age that may be changed in the future by Congress and not by the Montana legislature. Such delegation, as held in *Lee*, is unconstitutional pursuant to §1, Article III, Montana Constitution (1972).

### CONCLUSION

This Court is bound by the reasoning, analysis, and holding of *Reesor*. Consequently, this Court should grant partial summary judgment on behalf of Petitioners and rule that the age limitation on permanent total disability and rehabilitation benefits set forth in §39-71-710, MCA, is an unconstitutional violation of the Equal Protection Clause found in Article II, §4 of the Montana Constitution.

In addition, the reasoning, analysis, and holding of *Lee* dictates that §39-71-710, MCA, is also unconstitutional because it impermissibly delegates the legislative power of the state in

violation of §1, Article III, Montana Constitution (1972) by adopting by reference changes in the federal social security laws or regulations to occur in the future.

DATED this 18 day of February, 2005.

HUNT LAW FIRM

BY: 

JAMES G. HUNT, Attorney for  
Petitioners

**CERTIFICATE OF SERVICE**

I hereby certify that on the 18 day of February, 2005, I served the original of the foregoing **MOTION FOR PARTIAL SUMMARY JUDGMENT AND BRIEF IN SUPPORT** first-class mail, postage prepaid, on the following:

Ms. Patricia J. Kessner  
Clerk of Court - Workers' Compensation Court  
P. O. Box 537  
Helena, MT 59624-0537

and a copy of the same to the following:

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