

Bradley J. Luck
Malin Stearns Johnson
GARLINGTON, LOHN & ROBINSON, PLLP
199 West Pine • P. O. Box 7909
Missoula, MT 59807-7909
Telephone (406) 523-2500
Telefax (406) 523-2595

Thomas E. Martello
Greg E. Overturf
David Hawkins
Montana State Fund
P. O. Box 4759
Helena MT 59604-4759

Attorneys for Respondent/Insurer, Montana State Fund

FILED

AUG 22 2006

OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CATHERINE E. SATTERLEE, et al.,

Petitioners,

v.

LUMBERMAN'S MUTUAL CASUALTY
COMPANY, et al.,

Respondents/Insurers.

WCC No. 2003-0840

**MONTANA STATE FUND'S RESPONSE
TO SATTERLEE'S MOTION FOR AN
ORDER ALLOWING DISCOVERY**

The Montana State Fund ("State Fund") opposes Satterlee's Motion for an Order Allowing Discovery, as Satterlee's proposed discovery is unnecessary, would be futile and overly-burdensome, and, most importantly, is not relevant to the legal issue at stake in the matters pending before the Court. Accordingly, Satterlee's Motion should be denied. The pending Motions for Summary Judgment presented by Respondents should be granted.

EXHIBIT ITEM NO. 339

I. BACKGROUND

Petitioners filed this matter on July 18, 2003, seeking a determination that Montana Code Annotated § 39-71-710 is unconstitutional. Petition. On February 18, 2005, Petitioners moved for 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." Petrs.' Mot. for Partial Summary Judgment 2. In that Motion, Petitioners represented that, for purposes of this legal issue, "there are no consequential facts which are in dispute." Petrs.' Mot. 5.

On August 8, 2005, the State Fund filed a cross motion for summary judgment, asserting that "it is entitled to summary judgment on the legal issue presented in Satterlee's motion because no issues of material fact are in dispute and the constitutionality of § 710 is a question of law." State Fund's Answer Brief in Opposition to Petrs.' Mot. for Summary Judgment & Brief in Support of Cross-Motion for Summary Judgment 3. The parties were, therefore, in agreement that the legal issues concerning the challenge to § 710 could be decided because there were no material fact issues precluding summary judgment.

This Court denied Petitioners' Motion for Partial Summary Judgment on December 12, 2005, holding "Section 39-71-710, MCA, as applied to PTD benefits is constitutional." Order Denying Mot. for Partial Summary Judgment at 11, 2005 MTWCC 55, WCC No. 2003-0840. The Court certified the denial of partial summary judgment as final for purposes of appeal. Although it would appear to follow as a matter of course, the Court did not rule on whether Respondents were entitled to summary judgment.

On January 3, 2006, Petitioners moved for Reconsideration, asking the Court to remove certification for purposes of appeal and allow discovery regarding the extent of the financial impact the Court's legal decision would have on the workers' compensation system. Apparently, because the Court had denied Petitioners' Motion, and because, in light of this precedent, the Court is now charged with determining whether to grant summary judgment in Respondents' favor on the identical issue, Petitioners changed their position and argued that "there are material facts in dispute," preventing entry of summary judgment in favor of Respondents. Petrs.' Mot. for Reconsideration 3.

On July 12, 2006, the Court granted Petitioners leave to file a motion and brief pursuant to Montana Rules of Civil Procedure 56(f), to address how further discovery would prevent entry of summary judgment in favor of Respondents. Order Granting Petrs.' Mot. for Reconsideration 6-7. In expectation of such a motion, the Court continued Respondents' cross-motion for summary judgment. Order Granting Petrs.' Mot. for Reconsideration 7.

In granting Satterlee the opportunity to brief the discovery issue, the Court directed her to outline the discovery requested and to specifically explain "how the proposed discovery could preclude summary judgment in favor of Respondents." Order Granting Petrs.' Mot. for Reconsideration 6.

Satterlee filed her "Motion and Brief for an Order Allowing Discovery" on August 1, 2006, arguing that "discovery is necessary to show the Court that the financial viability of the workers' compensation system is not at stake," and that "this Court cannot be certain of the economic impact unless Satterlee is allowed discovery." Satterlee's Mot. & Brief for Order Allowing Discovery 2-3. Satterlee failed to explain how the discovery she seeks would preclude a grant of summary judgment in favor of Respondents. See Satterlee's Mot. & Brief for Order Allowing Discovery 4-5.

As discussed below, the reasoning of this Court's prior Order holding that § 39-71-710 passes constitutional muster and the continued absence of genuine issues of material fact conclusively demonstrate Respondents' entitlement to summary judgment. Contrary to Satterlee's recent protestations, nothing has changed since she verified the absence of disputed consequential facts. The facts material to the legal issue whether § 39-71-710 is unconstitutional remain undisputed.

Satterlee's failure to explain how additional discovery would preclude a grant of summary judgment for Respondents – as required to prevail on a Rule 56(f) Motion – is fatal to her current request. Satterlee's false accusations of exaggeration on the part of the State Fund do not create or demonstrate an issue of material fact. Her Motion should be denied, and, because the Court's earlier conclusion that the statute is constitutional effectively determines the Respondents' motions, summary judgment should be entered in favor of such parties.

II. DISCUSSION

This Court has held, as a matter of law, that "Section 39-71-710, MCA, as applied to PTD benefits is constitutional." Order Denying Mot. for Partial Summary Judgment 11. In reaching this conclusion, the Court considered the financial impact a holding of unconstitutionality would have on the workers' compensation system, but only, in the Court's words, to the extent "the Court recognized that providing PTD benefits to injured workers beyond the time they were eligible for retirement benefits had a general negative economic impact on the workers' compensation system." Order Denying Mot. for Partial Summary Judgment 8, 9; Order Granting Petrs.' Mot. for Reconsideration 6. This is the sole fact regarding financial viability of the workers' compensation system the Court need consider in deciding whether to grant summary judgment in favor of Respondents, and this fact is not in dispute. See Satterlee's Mot. & Brief for Order Allowing Discovery 3 ("Satterlee concedes that the financial impact [of providing Satterlee claimants PTD benefits] would be significant[.]"). Because the material facts are not in dispute, and because this Court has already properly decided

the critical legal issue, Satterlee's Motion should be denied and summary judgment should be entered in favor of Respondents.

A. As explained in the Court's Orders, and as demonstrated by Satterlee's Motion for Discovery, the facts material to the legal issue whether § 39-71-710 is unconstitutional are not in dispute, and Respondents are entitled to judgment as a matter of law.

In denying Petitioners' Motion for Partial Summary Judgment, this Court held that Montana Code Annotated § 39-71-710 is constitutional. Order Denying Mot. for Partial Summary Judgment 11. To reach this decision, the Court properly applied the rational basis test, pursuant to which a law or state action need be only rationally related to furthering a legitimate state purpose in order to survive constitutional scrutiny. Order 11-12; *see also Gulbrandson v. Carey* (1995), 272 Mont. 494, 503, 901 P.2d 573, 579. Under the rational basis test, a statute will be upheld if the court can conceive of *any* possible legitimate purpose to which the statute might be rationally related. The purpose of the legislation does not have to appear on the face of the legislation or in the legislative history, but may be any possible purpose of which the court can conceive. *Stratemeyer v. Lincoln County* (1993), 259 Mont. 147, 52, 855 P.2d 506, 509-510 (citations omitted); *see also State v. Sanders* (1984), 208 Mont. 283, 289, 676 P.2d 1312, 1315 ("Generally, a classification will not be held to be invidious if *some* rational basis can be found to support it.") (citations omitted) (emphasis added).

Under the rational basis test, it is the legitimacy of the legislative purpose to preserve the financial stability of the system, rather than the actual potential effect on the system, that must inform the Court's inquiry into the constitutionality of Montana Code Annotated § 39-71-710. Applying rational basis review, this Court found a rational purpose supporting the constitutionality of § 39-71-710's PTD limitation:

The Legislature's decision to terminate an insurer's liability for PTD benefits when a claimant receives or is eligible to receive retirement benefits is rationally related to the government's valid interest in ensuring that employers are able to provide workers' compensation coverage at reasonable rates, thus maintaining the financial viability of the workers' compensation system.

Order Denying Mot. for Partial Summary Judgment ¶ 21.

[T]he statute places a reasonable limitation on PTD benefits in order to contain the cost of the system for employers while ensuring that PTD claimants are compensated commensurately with the wages they were earning when they left the workforce for what otherwise would have been their remaining "work life."

Order Denying Mot. for Partial Summary Judgment ¶ 22. Thus, the Court found legitimate governmental interests in providing workers' compensation benefits to injured claimants during their work life and simultaneously maintaining an affordable rate structure.

Contrary to Petitioners' protests that "[o]ther than cost, there is no difference between PPD and PTD for equal protection purposes," the Court explained the legal and factual distinction between permanent partial and permanent total disability benefits, and why, correspondingly, the Montana Supreme Court's holding in *Reesor v. Montana State Fund*, 2004 MT 370, 325 Mont. 1, 103 P.3d 1019, does not control the present case. See Satterlee's Mot. & Brief for Order Allowing Discovery 5.

In finding cost containment a proper legislative purpose, this Court reviewed *Stratemeyer*, in which the Supreme Court recognized the legitimacy of a legislative purpose to "improve the financial viability of the system" and "provide for injured workers at a reasonable cost." *Stratemeyer*, 855 P.2d at 510, 511. In *Stratemeyer*, the Montana Supreme Court reversed this Court because "[t]he Workers' Compensation Court did not presume the statute to be constitutional and look to any possible legitimate purpose for the legislation" and because "[t]he legislature is simply in a better position to develop the direction of economic regulation, social and health issues." *Stratemeyer*, 855 P.2d at 510. The *Stratemeyer* court's reasoning relative to the concerns at issue in the present case bears repeating:

Even a cursory glance at the legislative history and statute indicates a concern over the high cost of the Workers' Compensation program to the State of Montana and the employers involved in the program. It is evident that this was the primary purpose for the legislative changes in the Workers' Compensation Act. "[P]romoting the financial interests of businesses in the State or potentially in the State to improve economic conditions in Montana constitutes a legitimate state goal." *Meech v. Hillhaven West, Inc.* (1989), 238 Mont. 21, 48, 776 P.2d 488, 504. (Citation omitted.) A purpose would be to provide for injured workers at a reasonable cost.

Stratemeyer, 855 P.2d at 510; see also *Ingraham v. Champion Intl.* (1990), 243 Mont. 42, 48, 793 P.2d 769, 772 ("The power of the legislature to fix the amounts, time and manner of payment of workers' compensation benefits is not doubted."); *Cunningham v. Nw. Improvement Co.* (1911), 44 Mont. 180, 119 P. 554 (affirming the legislature's right to regulate and provide for benefits in cases of injury or death).

In its Order granting Petitioners' Motion for Reconsideration and Granting Leave to File a Motion for Discovery, the Court explained that, in its Summary Judgment Order, it considered the financial impact a holding of unconstitutionality would have on the workers' compensation system, but only, in the Court's words, to the extent "the

Court recognized that providing PTD benefits to injured workers beyond the time they were eligible for retirement benefits had a general negative economic impact on the workers' compensation system." Order Denying Mot. for Partial Summary Judgment 8, 9; Order Granting Petrs.' Mot. for Reconsideration 6.¹

The significance of this clarification cannot be overstated: According to that Order, Petitioners would have to show that a factual dispute exists regarding whether "providing PTD benefits to injured workers beyond the time they were eligible for retirement benefits had a general negative economic impact on the workers' compensation system." Petitioners, however, far from creating a dispute on this issue of fact, properly acknowledge the glaringly obvious point, stating that "Satterlee concedes that the financial impact [of providing Satterlee claimants PTD benefits] would be significant." Satterlee's Mot. & Brief for Order Allowing Discovery 3.

When this Court addresses the State Fund's Motion for Summary Judgment, this Court must once again apply rational basis review to the identical question previously considered; i.e., this Court must again inquire whether it can conceive of any rational purpose that possibly motivated the legislature to deny PTD benefits to persons who are eligible to receive Social Security or other retirement benefits. The Court has already found the legislature has properly exercised its prerogative to set benefits for workers' compensation benefits. It previously considered extensive briefing and oral argument and concluded that a rational relationship between § 39-71-710's limitation on benefits and the two legitimate governmental goals of cost containment and reasonable wage replacement specifically enumerated in the Workers' Compensation Act. The Court has conducted the only analysis needed to grant judgment for Respondents.²

¹ The total disability benefit weekly compensation rate has been over \$300 since 1987 and is presently \$545 per week, equating to approximately \$15,600 to \$28,340 per year in additional benefits for any claimant with injuries during the 19 year period who is granted total disability benefits for life. Satterlee's expert accountant notes an 81.7 year life expectancy for persons age 50 in 2005. A simplistic estimation of additional cost for lifetime benefits for one person after age 65 during this entitlement period (1987 to date) would range from \$260,520 to \$473,278 per person. One need not engage in academic present value discussions nor have to be an expert to verify a very substantial cost detriment to the workers' compensation system in this state if workers were judicially awarded lifetime permanent total disability benefits. One need not be an expert to consider the detriment to the system of retroactively paying benefits for which no premium was collected or the necessary future increase in premium necessary to fund the new lifetime benefit and rebuild required surplus lost in paying the new benefit.

² The Court has previously reviewed and applied the legal concepts applicable to the pending motions for summary judgment. Satterlee seeks discovery on the basis that the "sky is falling" argument is overstated, but admits that the financial impact is

B. Petitioners have failed to demonstrate, as they must under Montana Rules of Civil Procedure 56(f) and the direction of this Court, that their proposed discovery has the potential to reveal evidence that would preclude a grant of summary judgment in favor of Respondents.

In its Order Granting Petitioners' Motion for Reconsideration, this Court recognized its "wide discretion to order discovery in certain circumstances pursuant to ARM 24.5.329(8), which is identical to Rule 56(f), Mont. R. Civ. P." Order Granting Petrs.' Mot. for Reconsideration, Continuing Respondents' Cross-Motion for Summary Judgment, & Granting Petrs. Leave to File a Mot. & Brief Pursuant to Mont. R. Civ. P. 56(f) at 5. Rule 56(f) provides a mechanism by which a party opposing summary judgment may petition the Court to hold a summary judgment motion in abeyance because she cannot overcome summary judgment without conducting further discovery. In pertinent part, Rule 56(f) provides:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Mont. R. Civ. P. 56(f) (2005).

Courts have inherent discretionary power to control discovery. *Environmental Contractors, LLC v. Moon*, 1999 MT 178, ¶ 19, 295 Mont. 268, ¶ 19, 983 P.2d 390, ¶ 19. This discretionary power extends to deciding whether to deny or to continue a motion for summary judgment pursuant to Montana Rules of Civil Procedure 56(f) when a party claims a need for further discovery. *Howell v. Glacier Gen. Assurance Co.* (1989), 240 Mont. 383, 386, 785 P.2d 1018, 1019. The court does not abuse its discretion where it denies a Rule 56(f) motion because the party opposing summary judgment fails to establish, by affidavit or otherwise, how the particular facts it expects

"significant". As discussed, this is a matter of degree and does not create a factual issue of sufficient moment to preclude summary judgment. "Material issues of fact are identified by looking to the substantive law governing the proceedings." *Carelli v. Hall* (1996), 279 Mont. 202, 926 P.2d 756, 760 (citations omitted). A "material" fact is one that "involve[s] the elements of the cause of action or defenses at issue to the extent that necessitates resolution of the issues by the trier of fact." *Mt. W. Bank, N.A. v. Mine & Mill Hydraulics, Inc.*, 2003 MT 35, ¶ 28, 314 Mont. 248, ¶ 28, 64 P.3d 1048, ¶ 28 (citation omitted). Given the record of this cause to date, factually and legally, the requested discovery will not create a material issue of fact.

to uncover would preclude summary judgment. *Environmental Contractors*, ¶ 19 (citing *Howell*, 240 Mont. at 386, 785 P.2d at 1020).

In a Rule 56(f) dispute, the burden is on the party seeking to conduct additional discovery to put forth sufficient facts to show that evidence exists that could preclude summary judgment. *Environmental Contractors*, ¶ 21; *Stanley v. Holms*, 1999 MT 41, ¶ 20, 293 Mont. 343, ¶ 20, 975 P.2d 1242, ¶ 20 (“[N]either Holms’ briefs nor the supporting affidavits in the District Court establish how the proposed discovery could preclude summary judgment.”).

When it granted leave to Petitioners to file a Motion for Discovery, this Court explained:

Petitioners should bear in mind that this Court’s analysis of the constitutionality of § 39-71-710, MCA, as it relates to PTD benefits was not based on the specific economic analyses proffered by Respondents. In fact, the specific economic figures were neither considered nor referenced in the Court’s Order. Rather, insofar as the financial impact of the constitutionality factored into the Court’s analysis, the Court recognized that providing PTD benefits to injured workers beyond the time they were eligible for retirement benefits had a general negative economic impact on the workers’ compensation system. Against that framework, the Court will entertain Petitioners’ arguments that the disputed economics may preclude summary judgment.

Order Granting Petrs.’ Mot. for Reconsideration ¶ 15.

From this statement, and under Rule 56(f) standards, it is apparent that the burden is on Petitioners to show their proposed discovery has the potential to demonstrate that provision of PTD benefits after retirement eligibility would not have a general negative economic impact on the workers’ compensation system. In other words, even if the Court chose to revisit its legal conclusion as to the constitutionality of § 710, Petitioners could not defeat summary judgment for Respondents simply by quibbling over the extent of the negative impact on the workers’ compensation system; to defeat summary judgment, Petitioners would have to show that there is no possibility of a general negative economic effect on the system.

Petitioners have not demonstrated, nor made any real attempt to demonstrate, how any of the requested discovery would preclude entry of judgment for Respondents. Petitioners seek only to discover facts relevant to the potential *extent* of the detriment a holding of unconstitutionality would cause, not the potential existence of the detriment. The potential existence of the detriment is undisputed. See Satterlee’s Mot. & Brief for Order Allowing Discovery 3 (“Satterlee concedes that the financial impact [of providing Satterlee claimants PTD benefits] would be significant[.]”).

Further, regardless of what Petitioners discover regarding the *extent* of potential detriment to the system, such facts are not relevant to whether Montana Code Annotated § 39-71-710's termination of PTD benefits upon a claimants' eligibility for retirement is rationally related to the dual legislative goals of providing workers' compensation benefits at reasonable costs to employers while simultaneously assisting the worker with compensation that bears a reasonable relationship to actual wages lost due to injury.

Under the rational basis test, it is not relevant whether the statute perfectly, efficiently or completely accomplishes a legitimate governmental purpose. Rather, when the rational basis test is applied to a statute that creates classifications, the statute will be upheld if it *could have been* rational for the legislature to have believed that the statute would advance a legitimate governmental objective. See *McClanathan v. Smith* (1980), 186 Mont. 56, 67-68, 606 P.2d 507, 513 (“[W]here the goals of a classification are legitimate, and the classification is rationally related to the achievement of those goals, the statute should be constitutionally upheld.”); *State v. Shook*, 2002 MT 347, ¶ 18, 313 Mont. 347, ¶ 18, 67 P.3d 863, ¶ 18 (“[Appellant] further asserts that [the legislative] purposes could be accomplished by other legitimate means. While there may be other means to [accomplish such purposes]..., we simply disagree this invalidates the regulation. When a law is assessed for a rational basis, exact precision or efficiency is not necessary.”) (citations omitted).

The discovery Petitioners seek will have no relevance to this Court's rational basis analysis. Petitioners say they “believe...discovery is necessary to show the Court that the financial viability of the workers' compensation system is not at stake.” Satterlee's Mot. & Brief for Order Allowing Discovery 2. Of course, the viability of the workers' compensation system is not the appropriate inquiry under the rational basis test. The appropriate inquiry is whether there is a rational relationship between § 39-71-710's limitation on PTD benefits and the objectives of cost containment and reasonable wage replacement. The Court has noted the obvious significant effect, and Satterlee has been forced to admit the obvious in that regard. Quibbling over degree of “significant” will not detract from the legal or factual analysis that led to the Court's constitutional approval of §710.

In this case, hinging as it does on a rational basis analysis, further discovery would be futile. There is nothing Satterlee can discover that will sever the rational connection between § 710's PTD limitations and the proper objectives of the Workers' Compensation Act and the exercise of the legislature's prerogative in social legislation. Therefore, further discovery will accomplish nothing more than delaying this case at great cost to all parties. Petitioners have failed to demonstrate otherwise, and this Court should exercise its discretion and deny its Motion under Rule 56(f).

C. Although it is irrelevant to the present legal issue, since the material facts are not in dispute, Petitioners' attempts to undermine the State Fund's factual references are laden with inaccuracies.

Having admitted the obvious significant financial harm to the system by invalidating § 710 and having been advised by the Court that the specific dollar totals regarding increased benefits were not material, Satterlee persists in her quest for discovery to argue the degree of harm is less than claimed by the State Fund. As shown above, she failed to present any factual or legal basis to meet the requirements of Rule 56(f) and this Court's specific direction in that regard. Moreover, the alleged "factual disputes" raised by Satterlee are not material, as resolving these disputes would have no impact on § 710's constitutionality. See *Mountain West Bank*, ¶ 28 (explaining a fact is not material unless it "involve[s] the elements of the cause of action or defenses at issue to the extent that necessitates resolution of the issues by the trier of fact"). However, lest the Court be distracted by Satterlee's accusations of exaggerations, some discussion of Satterlee's erroneous factual posture is appropriate.³

Satterlee claims that the State Fund overstated the cost of lifetime permanent total disability, failed to reduce benefit figures to present value for accounting purposes, improperly utilized values of settled cases and failed to utilize life expectancies for males in making calculations. The claims regarding settled cases and life expectancies are factually incorrect and immaterial.⁴ The position on cost and accounting presentations are simply inapplicable.

The factual basis of Satterlee's accounting arguments is founded upon an affidavit of a CPA. Although apparently very well qualified in traditional accounting areas such as business valuation and auditing, the "expert" does not indicate any experience, training or expertise in insurance, actuarial accounting, underwriting, claims or any other recognized specialty area applicable to considering the financial impact of negating the direction of § 710. See Ex. B to Petrs.' Reply Brief in Support of Mot. for Partial Summary Judgment.

³ See Third Affidavit of David Gengler, for specific factual verification of the position taken by the State Fund and rebuttal of the most recent "factual" assertions made by Satterlee and her accountant.

⁴ The State Fund appropriately utilized weighted averages between male and female life expectancies in its calculations. Third Aff. Gengler ¶ 10. Settled claims were properly excluded in considering retrospective costs. No settlements were taken into account in estimating prospective costs since it is presumed that, with a change in the entitlement period, settlements would be consistent with the new expanded entitlement. Third Aff. Gengler ¶¶ 11-12.

The Second Affidavit of Daniel Gengler graphically illustrates the point that general business accounting prowess does not translate into an understanding of the intricacies of actuarial review. In that document, Gengler explained why the CPA's claim of overstatement of State Fund loss calculations resulted from a flawed analysis on his part which missed a critical step in considering the data. As it turned out, with the inclusion of that step, the estimates of the CPA would have been consistent with those of the State Fund. Second Aff. Gengler ¶¶ 5-7 (Oct. 5, 2005). Satterlee's present reliance on the CPA's after-the-fact assertions is similarly flawed, and similarly clarified by Mr. Gengler's expert actuarial input.

It is important to note that Satterlee does not challenge the facts and conclusions supported by the affidavit of economist Paul Polzin or the positions of any of the other Respondents. In addition, she does not challenge the record in terms of the significant increased premium required to fund lifetime total disability benefits. Likewise, she does not challenge the total increased dollars the State Fund estimates are at issue. She simply believes that accounting principles override industry accepted actuarial practices.

Satterlee would like to prove that the "highly likely range" from an actuarial standpoint of increased State Fund obligations incident to lifetime permanent total disability benefits ranging from \$228 million to \$302 million should be reduced to present value and presented on paper as something less. First of all, even assuming, *arguendo*, that the State Fund overstated the cost by as much as 100%, that the range was really \$114 million to \$151 million, we still have a dramatic effect on the system, enough to effectively negate the surplus of the State Fund. No insurance regulator would allow any carrier to operate in such shaky financial condition. As discussed below, the condition would also be contrary to specific legislative direction.

The overstatement claim, based as it is on an accounting concept, also fails to consider the fact that present value considerations mean absolutely nothing if the fund is not present and available to grow over time. The time value of money is pie in the sky if there is no money to increase in value over the years. Here, the increased benefits for those injured between 1981 and today have no ready pot of gold that springs into existence with the creation of lifetime benefits. There is no fund that can increase over time as we wait for persons to become entitled to the new benefit. Therefore, any calculation of the amount needed to grow over time is just a fiction. The true cost is the amount of benefits that would have to be paid. There is no material dispute over that figure.

Satterlee's present value discussion does not differentiate between accrued and future benefits. If she were successful in her effort to create lifetime permanent total disability benefits for those injured from 1981 forward, the discount considerations would be vastly different for the older claims since many would be entitled significant payments immediately and most would become so entitled much sooner than those injured today and considered prospectively. The insinuation of gross overstatement

based on the calculations presented, which is misplaced in any event, fails to take into account the breadth of entitlement dates at issue.

Satterlee does not mention, much less suggest a need to review, the State Fund's estimates of future premium increases, which have been properly reduced to present value because they will generate a fund over time as new claims are made and paid in the future. The documented necessary increase in premium to cover lifetime benefits, in and of itself, creates a significant impact on the system and the citizens and businesses of the state sufficient for constitutional justification.

The Legislature, as directed by Montana Code Annotated § 39-71-2351, has "determined that it is necessary to the public welfare to make workers' compensation insurance available to all employers through the state fund as the insurer of last resort." It also acknowledges that the Old Fund has a recurrent unfunded liability that has, to date, not been rectified by "legislation and other methods".⁵ It specifically sought to "prevent the creation of a new unfunded liability with respect to claims for injuries for accidents that occur on or after July 1, 1990" and set out specific legislative oversight measures to guard against such statewide dilemma.

The Legislature requires the maintenance of a required minimum surplus and the taking of steps to "amass and maintain an excess of surplus over the amount . . . risk-based capital requirements" of industry standards. Mont. Code Ann. § 39-71-2330. That minimum amount of surplus is in the area of \$95 million. Third Aff. Gengler ¶ 17. The specific statutory purpose behind these mandatory additional funds to be maintained by the State Fund – in excess of reserves and minimum statutory surplus – is "to secure the state fund against various risks inherent in or affecting the business of insurance and not accounted for or only partially measured by the risk-based capital requirements." Mont. Code Ann. § 39-71-2330(2).

The State Fund does not operate in a vacuum. Its surplus is required to guard against unforeseen "risks" and obligations caused by factors as varied as increased administrative and support costs, medical care cost inflation, court benefit interpretations and the unexpected expansion of liabilities by way of retroactive holdings from the common fund cases. As documented, the Fund's surplus meets Montana State Fund statutory requirements but would not be considered financially strong if scrutinized by a national rating agency. Third Aff. Gengler ¶ 21. The combined costs of just the pending common fund cases put the surplus at material risk. Lifetime

⁵ Nothing in Satterlee's motion speaks to the documented unfunded liability already existing with the Old Fund, the dramatic and unquestioned increase of the unfunded liability if these old claims were retroactively entitled to lifetime benefits or the fact that this liability is one owed by the Montana General Fund. This is another consideration sufficient in and of itself to demonstrate § 710's constitutionality.

permanent total benefits not only will erase the surplus statutorily required in excess of minimum standards, but will compound the need to dramatically increase premium to not only cover ongoing expanded benefit costs and past due amounts but fund the required reformulation of a surplus. Again, these are factors sufficient in themselves to support constitutional approval of the legislature's efforts in differentiating the Workers' Compensation Act from a pension system through the passage of § 710.

Satterlee simplistically claims that, because the State Fund paid dividends and has a surplus, there is therefore no concern about paying out an unexpected – and unquestioned – few hundred million dollars for lifetime permanent total disability benefits. It appears she yearns for the days of several digit unfunded liabilities, resulting dramatic legislative reform, and increased taxes upon all Montana workers and businesses.

It does not take an expert to know that negating the legislative limitation on benefits found in § 710 would have a significant financial effect on the workers' compensation system in the State of Montana. That undisputed fact precludes any need for the discovery requested and, when combined with the Court's previous constitutional analysis, compels the granting of Respondents' pending motions.

III. CONCLUSION

Satterlee inexplicably claimed that the State Fund was attempting to reduce its inevitable lifetime permanent total disability obligations by delaying the determination of issues in this proceeding with the hope that claimants would die before securing the right to increased benefits. Just as inexplicably, she seeks to delay finality of the Court's well-reasoned determination, and its logical extension to the State Fund's motion, to pursue discovery that she admits will relate only to the degree of significant harm to the system caused by negating the direction of § 710, a non-factor in the overall picture.

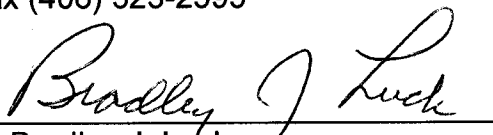
It would appear that Satterlee really seeks a substantive reconsideration of the initial decision of this Court, hoping the passage of time since the original determination of the Court might allow for a change of heart on the fundamental considerations involved. See Satterlee's Mot. & Brief for Order Allowing Discovery 5 (Conclusion Section). It is respectfully submitted that there is no reason for additional discovery, just as there is no reason to revisit the Court's constitutional analysis finding § 710 an appropriate exercise of the legislative prerogative. Satterlee's Motion for Discovery should be denied and, under this Court's prior holding that § 710 is constitutional, summary judgment should be entered for Respondents.

///
DATED this 21st day of August, 2006.

Attorneys for Respondent/Insurer, Montana
State Fund:

GARLINGTON, LOHN & ROBINSON, PLLP
199 W. Pine • P. O. Box 7909
Missoula, MT 59807-7909
Telephone (406) 523-2500
Telefax (406) 523-2595

By


Bradley J. Luck

CERTIFICATE OF MAILING

I, the undersigned, of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for Respondent/Insurer, Montana State Fund, hereby certify that on this 21st day of August, 2006, I mailed a copy of the foregoing Montana State Fund's Response to Satterlee's Motion for an Order Allowing Discovery, postage prepaid, to the following persons:

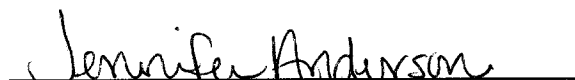
Mr. James G Hunt
Hunt Law Firm
310 Broadway
Helena, MT 59601

Mr. Bryce R. Floch
P.O. Box 7310
Kalispell, MT 59904-0310

Mr. Michael P. Heringer
Brown Law Firm, P.C.
P. O. Box 849
Billings, MT 59103-0849

Mr. Thomas Murphy
P.O. Box 3226
Great Falls, MT 59403-3226

Mr. Larry W. Jones
700 SW Higgins Avenue, Suite 108
Missoula, MT 59803-1489


Jennifer Anderson