John E. Bohyer
Paul Sharkey
PHILLIPS & BOHYER, P.C.
283 West Front, Suite 301
Post Office Box 8569
Missoula, Montana 59807-8569
Telephone: (406) 721-7880
Facsimile: (406) 549-2253

Attorneys for Amici Montana Chamber of Commerce, Montana Contractors' Association, Inc. and National Federation of Independent Business Legal Foundation

IN THE WORKERS' COMPENSATION COURT

FOR THE STATE OF MONTANA

CATHERINE E. SATTERLEE, et al., Petitioners, - vs. - LUMBERMAN'S MUTUAL CASUALTY COMPANY, et al., Respondents/Insurers.	WCC No. 2003-0840

AMICI CURIAE BRIEF OF MONTANA CHAMBER OF COMMERCE, MONTANA CONTRACTORS' ASSOCIATION, INC. AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION

INTRODUCTION

The Montana Chamber of Commerce, the Montana Contractors' Association, Inc. and the National Federation of Independent Business Legal Foundation (Amici), submit this *amici curiae* brief in response to Petitioners' motion for partial summary judgment dated February 18, 2005. Petitioners' motion raises constitutional challenges to Mont. Code Ann. § 39-71-710, a statute providing for termination of certain worker's compensation benefits once a claimant becomes eligible to receive social security retirement benefits. Because resolution of the issues raised in Petitioners' motion may have a direct financial impact on all businesses in Montana, and all other Montana taxpayers, Amici offer this brief for purposes of providing the viewpoint of their membership on these important matters.

STATEMENT OF INTEREST OF AMICI

1. The Montana Chamber of Commerce

The Montana Chamber of Commerce is a private, not-for-profit 501(c)(6) organization that represents and promotes the interests of business at the national and state levels. It is dedicated to building Montana's economy through business success. Its 700 plus members throughout Montana range from retired business people to large corporations, from high-tech manufacturers to multi-generational ranches.

2. The National Federation of Independent Business Legal Foundation

The National Federation of Independent Business Legal Foundation ("NFIB Legal Foundation"), is a nonprofit, public interest law firm established to protect the rights of America's small-business owners. It is the legal arm of the National Federation of Independent Business (NFIB), the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all 50 states. The approximately 600,000 members of NFIB, including over 6,000 in Montana, own a wide variety of America's independent businesses from restaurants to manufacturing firms to bowling alleys. NFIB represents small employers who typically have about 5 employees and net $40,000 - $60,000 annually.

3. The Montana Contractors' Association

The Montana Contractor's Association is a voluntary trade association representing approximately 250 commercial construction companies and readymix concrete producers throughout Montana that build highways, commercial and public buildings, municipal utility systems, and other public infrastructure projects. Member companies employ approximately 6,000 people in the State of Montana.

STATEMENT OF FACTS

Amici are aware of no facts contradicting those set forth in Petitioners' Statement of Uncontroverted Facts. Since the facts are not in dispute, the Court need only decide whether or not Petitioners are entitled to judgment as a matter of law.

SUMMARY OF ARGUMENT

In December, 2004, the Montana Supreme Court ruled in the case of *Reesor v. Mont. St. Fund*, 2004 MT 370, 325 Mont. 1, 103 P.3d 1019, that the age limitation on permanent partial disability benefits under Mont. Code Ann. § 39-71-710 violates the equal protection clause of the Montana Constitution. In a deeply divided 4-3 decision, the majority in *Reesor* held that the statute's age classification bears no rational relationship to any legitimate governmental interest, and thus violated the equal protection clause of the Montana Constitution, art. II, § 4.

Relying on *Reesor*, Petitioners seek a partial summary judgment declaring that the age limitations on permanent total disability benefits and rehabilitation benefits under Mont. Code Ann. § 39-71-710 likewise violate the equal protection clause of the Montana Constitution. Petitioners further seek a partial summary judgment declaring that § 39-71-710

unconstitutionally delegates legislative power by adopting by reference future changes in the federal social security laws or regulations.

Amici submit that *Reesor* was wrongly decided, and that should the opportunity be presented for the Montana Supreme Court to revisit the issue, it will choose to overrule rather than follow *Reesor*. In concluding that § 39-71-710 bears no rational relationship to any legitimate governmental interest, the majority in *Reesor* failed to fully consider and apply the appropriate standards under Montana's equal protection jurisprudence. When the appropriate standards are applied, it is clear that the statute passes equal protection muster. The statute is rationally related to promoting the financial interests of businesses and improving economic conditions in the State, both of which are well-recognized legitimate governmental interests.

There is no merit in Petitioners' argument that § 39-71-710 unconstitutionally delegates legislative power to the federal government by adopting by reference future changes in the federal social security laws or regulations. § 39-71-710 makes no reference to future changes in federal law or regulations. Neither does it hand over any power to the federal government, or contain any mandatory directions to follow federal law in its implementation.

SUMMARY JUDGMENT STANDARDS

Amici agree that Petitioners' brief sets out the correct standards for summary judgment. Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show 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." *Patten v. Raddatz,* 271 Mont. 276, 895 P.2d 633 (1995). Petitioners, as the moving parties, bear a two-prong burden of establishing both the absence of any genuine issue of material fact and that they are entitled to judgment as a matter of law. *Moore v. Does,* 271 Mont. 162, 895 P.2d 209 (1995). If Petitioners fail to establish either prong, summary judgment must be denied. *Mathews v. Glacier Gen. Assur. Co.*, 184 Mont. 368, 603 P.2d 232 (1979).

ARGUMENT

A. MONT. CODE ANN. § 39-71-710 DOES NOT VIOLATE EQUAL PROTECTION BECAUSE IT IS RATIONALLY RELATED TO LEGITIMATE GOVERNMENTAL INTERESTS

The text of Mont. Code Ann. § 39-71-710 provides:

> **39-71-710. 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.

In the more than twenty years since § 39-71-710 was first enacted by the Montana Legislature in 1981, its constitutionality had apparently never been challenged until Dale Reesor did so in the case of *Reesor v. Mont. St. Fund*, 2004 MT 370, 325 Mont. 1, 103 P.3d 1019. Dale Reesor began receiving social security retirement benefits when he turned 65 on May 24, 1999. The following year, on January 13, 2000, Reesor hurt his right shoulder in the course and scope of his employment with Northwest Equipment in Cascade County. Reesor applied for and began receiving workers' compensation benefits. He received TTD benefits for approximately two and one-half years, from January 22, 2000 through August 2, 2002.

Reesor reached maximum medical improvement on May 10, 2002, at which time he was given a 4% permanent partial impairment rating. Reesor received fourteen weeks of PPD benefits, from June 10, 2002 through September 15, 2002, representing an impairment award in the amount of $2,975. He received no other PPD benefits beyond this impairment award.

Pursuant to § 39-71-710, Reesor's age made him ineligible to receive additional benefits under Mont. Code Ann. § 39-71-703, which expands PPD benefits based on certain enumerated factors such as age, education, lifting restrictions, and wage loss. If not for the age limitation of § 39-71-710, Reesor would have been entitled to receive an additional sum of $20,081.25 in PPD benefits.

Reesor filed a petition in the Workers' Compensation Court claiming that § 39-71-710 unconstitutionally denied him equal protection of the laws by lowering the amount of his PPD benefits because of his age. After the Worker's Compensation Court rejected his claim, Reesor appealed to the Montana Supreme Court.

By a 4-3 vote, the majority of the Court agreed with Reesor in an opinion authored by Justice Regnier and joined in by Justices Leaphart, Cotter and Nelson. The majority correctly observed that in accordance with Montana law, the appropriate level of scrutiny to be applied to equal protection claims brought by injured workers is the rational basis test. *Reesor*, ¶ 14, citing *Henry v. St. Compen. Ins. Fund*, 1999 MT 126, ¶ 10, 294 Mont. 449, ¶ 10, 982 P. 2d 456, ¶ 10.

The rational basis test is the lowest of the three levels of judicial scrutiny applied to a constitutional challenge to a statute, the highest level being the "strict scrutiny" standard, and the intermediate level the "middle-tier scrutiny" standard. *Reesor*, ¶ 13. The rational basis test is employed when analyzing workers' compensation statutes because the Workers'

Compensation Act does not infringe on the rights of a suspect class, and the right to receive workers' compensation benefits is not a fundamental right. *Bustell v. AIG Claims Serv., Inc.*, 2004 MT 362, ¶ 19, 324 Mont. 478, ¶ 19, 105 P.3d 286, ¶ 19. The *Reesor* Court noted that under the rational basis test, the state must illustrate that the objective of the statute is legitimate and that the objective is rationally related to the classification. *Reesor*, ¶ 13, citing *Powell v. St. Compen. Ins. Fund*, 2000 MT 321, ¶ 19, 302 Mont. 518, ¶ 19, 15 P.3d 877, ¶ 19.

The majority in *Reesor* next determined that ". . . the primary goal of workers' compensation benefits is to establish a wage replacement for injured workers, certainly a legitimate and appropriate governmental interest." *Reesor*, ¶ 18. The majority then concluded that ". . . the disparate treatment of partially disabled claimants based upon their age, because the are receiving or are eligible to receive social security retirement benefits, is not rationally related to that legitimate governmental interest." *Reesor*, ¶ 19. The majority accordingly held as follows:

> Therefore, we conclude that providing PPD benefits to a younger person in Reesor's situation in the amount of $23,056.25 under the WCA, but limiting Reesor's benefit, based on his age, to only $2,975 pursuant to § 39-71-710, MCA, violates the Equal Protection Clause found in Article II, Section 4 of the Montana Constitution. There has been a failure to demonstrate a rational basis for the infringement of such a constitutionally protected right, therefore, we hold that § 39-71-710, MCA, is unconstitutional.

Reesor, ¶ 25.

As noted in the dissenting opinion in *Reesor*, authored by Justice Rice and joined in by Chief Justice Karla Gray and Justice Warner, the majority failed to fully consider and properly apply the appropriate standards under Montana's equal protection jurisprudence. *Reesor*, ¶ 27 (Rice, J., dissenting). When those standards are properly considered and applied, it is clear that the constitutionality of § 39-71-710 must be upheld.

The party challenging the constitutionality of a statute bears the heavy burden of proving the statute unconstitutional beyond a reasonable doubt. *Henry v. St. Compen. Ins. Fund*, 1999 MT 126, ¶ 11, 294 Mont. 449, ¶ 11, 982 P.2d 456, ¶ 11. "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." *Reesor*, ¶ 27 (Rice, J., dissenting) (quoting *Powell v. St. Compen. Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, ¶ 13, 15 P.3d 877, ¶ 13). "The question of constitutionality is not whether it is possible to condemn, but whether it is possible to uphold the legislative action which will not be declared invalid unless it conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt." *Id.* Any doubts regarding constitutionality must be resolved in favor of the statute. *Powell*, ¶ 13.

It is also an axiom of equal protection law that "the invidious quality of a law claimed to be discriminatory must ultimately be traced to an impermissibly discriminatory purpose." *Reesor*, ¶ 28, quoting *St. v. Price*, 2002 MT 229, ¶ 41, 311 Mont. 439, ¶ 41, 57 P.3d 42, ¶ 41.

In applying a rational basis review, which requires the greatest amount of deference be accorded to the Legislature, "a discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Reesor*, ¶ 29, quoting*Johnson v. Sullivan,* 174 Mont. 491, 498, 571 P.2d 798, 802 (1977).

In *Meech v. Hillhaven West, Inc.* , 238 Mont. 21, 776 P.2d 488 (1989), the Montana Supreme Court applied these overriding principles of constitutional law to properly find that statutory limitations on a discharged employee's recovery of damages under the Montana Wrongful Discharge Act, Mont. Code Ann. § 39-2-901 et. seq., such as a provision limiting damages for lost wages to four years, did not violate the equal protection clause. The Court found that adherence to these well-settled constitutional law principles required it to uphold the constitutionality of the statute because:

> The legislative history of the Act demonstrates that lawmakers perceived an unreasonable financial threat to Montana employers from large judgments in common-law wrongful discharge claims. Testimony in legislative hearings also indicated to legislators that large judgments in common-law wrongful discharge cases could discourage employers from locating their businesses in Montana. The Act's limitation on damages is intended to alleviate these threats. Therefore, the Act passes muster on this leg of the test because promoting the financial interests of businesses in the State or potentially in the State to improve economic conditions in Montana constitutes a legitimate state goal. *Buckman v. Deaconess Hospital* (Mont.1986), 730 P.2d 380, 386, 43 St.Rep. 2216, 2223.
>
> We also conclude that the Act relates rationally to promoting Montana's economic interests. Some awards for common-law wrongful discharge have included wages which extend far into the claimant's employment future. See *Stark v. Circle K Corp.* (Mont.1988), 751 P.2d 162, 45 St.Rep. 371. The effect of the Act's limitations on damages to four years lost wages rationally relates to reducing this potential liability. Moreover, the limit itself is not irrational or so arbitrary that the classification it creates violates equal protection. As a matter of policy, the legislature determined that four years should be the maximum period for consideration of wage loss reasoning that claimants could generally be expected to find similar employment by the end of this period. The time period in any given claim is necessarily speculative. However, statistics before the legislature supported the conclusion that most wrongful discharge claimants with reasonable diligence will obtain other employment within the four year period. Therefore, judicial deference for the time period at issue is appropriate. See e.g., *Duke Power*, 438 U.S. at 91, 98 S.Ct. at 2640. The same sort of analysis applies to the Act's limitations on damages for pain and suffering and emotional distress; the restriction on recovery rationally relates to the legislature's legitimate purpose of limiting employers' liability for wrongful discharge.

Meech, 238 Mont. at 48; 776 P.2d at 504.

The goals of § 39-71-710 and of the limitation on damages under the Wrongful Discharge Act are analogous. Contrary to the majority's conclusion in *Reesor*, it is evident from the plain language of § 39-71-710 that its purpose is not to establish a wage replacement for injured workers. *Reesor*, ¶ 18 (majority). Rather, the statute's clear purpose is ". . . to prevent double payment to an employee out of two separate government programs (i.e. social security retirement and workers' compensation), both of which are funded by the employer." *Reesor*, ¶ 31 (Rice, J., dissenting). The obvious goal of terminating payment of certain workers' compensation benefits to workers who are receiving or are eligible to receive social security retirement benefits is to promote Montana's economic and business interests by lowering the tax burden of everyone who contributes to the funding of the workers' compensation system, including every employer, employee and self-employed person in Montana. Reducing the financial burden of every Montana taxpayer is both a legitimate and laudable governmental interest.

Only a very short memory is needed to recall the Old Fund Liability Tax (OFLT). Sudden and unanticipated changes in worker's compensation law by decisions of the Montana Supreme Court, including changes which accelerated payment of certain benefits from installments into lump sums, created hundreds of millions of dollars in unfunded liability. To fund the liability the legislature enacted Mont. Code Ann. §§ 39-71-2503 and 39-71-2505, which required every employer, employee and self-employed person in Montana to pay an old fund liability tax. As of December 31, 1998, the OFLT is no longer levied, upon determination that the liabilities had then been adequately funded. However, the amount of taxes collected to pay off the unfunded liability was enormous. In each of the fiscal years 1996 and 1997, the amount exceeded 45 million dollars. In fiscal year 1998, the amount exceeded 50 million dollars*Biennial Rpt. of the Mont. Dept. of Revenue*, July 1, 1998 to June 30, 2000, at p. 28.

If *Reesor* is followed in this case, it stands to reason this will lead to the creation of another unfunded liability, and to the passage of yet another OFLT. While the amount of the new and unanticipated liability that would result may not be currently ascertainable, it is undeniable that this sum has the potential to be staggering, and that the cost would be borne by the taxpayers of Montana. Hardest hit will be those least able to afford it, the large number of low wage earners in Montana.

The inquiry under the rational basis test is very simple. The only question is whether the statute, in this case § 39-71-710, is rationally related to a legitimate government interest. What a court may think about the wisdom or fairness of a statute is not relevant. Instead, the Court must assume that the Legislature was in a position and had the power to pass upon the wisdom of the enactment, and in the absence of an affirmative showing that there was no valid reason behind the classification in the statute, the Court is powerless to disturb it. *McClanathan v. Smith*,186 Mont. 56, 66, 606 P.2d 507, 513 (1980). In applying the equal protection clause to economic legislation, such as § 39-71-710, great latitude must be afforded to the legislature in making classifications. *Id.*

It is undeniable that § 39-71-710 furthers the legitimate state interest of lowering the tax burden of Montana taxpayers. Under the rational basis test that is the end of the inquiry. The Court is not permitted to go further and test the validity of the state's interest, as this is a matter exclusively within the province of the legislature. *Burton v. St. Farm Mut. Auto Ins. Co.*, 30 MFR 173 (D. Mont. 2002, *aff'd in part, rev'd in part* 2004 U.S. App. LEXIS 12405 (9th Cir. 2004).

B. MONT. CODE ANN. § 39-71-710 DOES NOT UNCONSTITUTIONALLY DELEGATE LEGISLATIVE AUTHORITY

Relying on *Lee v. State,* 195 Mont. 1, 635 P.2d 1282 (1981), cert. denied 456 U.S. 1006 (1982), Petitioners assert that Mont. Code Ann. § 39-71-710 is unconstitutional as an impermissible delegation of the legislative power of the State of Montana to the federal government. Petitoners' reliance on *Lee* is misplaced however.

The full text of the statute in question in *Lee,* Mont. Code Ann. § 61-8-304 (now repealed) 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 *Lee* Court found that the foregoing bold-typed language of § 61-8-304 amounted to an unconstitutional delegation of legislative powers to the federal government because ". . . of its mandatory directions to the attorney general to proclaim a speed limit not less than that required by federal law . . ." and because it also required the attorney general ". . . to terminate such proclaimed speed limit whenever such a speed limit is no longer required by federal law." *Lee*, 195 Mont. at 9, 635 P.2d at 1286. The Court concluded that "[a] more blatant handover of the sovereign power of this state to the federal jurisdiction is beyond our ken." *Id.*

For purposes of our case, it is important to note that the *Lee* Court acknowledged that the case law ". . . recognizes the right of a legislature to adopt as a part of its enactments existing federal laws and regulations. . . ." *Id.* The Court noted that the cases which recognize

this right ". . . except from that right any adoption of changes in the federal laws or regulations to occur in the future." *Id.*

Unlike the language of § 61-8-304, the language of § 39-71-710 makes no reference to future changes in federal law or regulations. Neither does the statute hand over any power to the federal government, or contain any mandatory directions to follow federal law in its implementation. Rather, the language of § 39-71-710 merely adopts existing federal laws and regulations as a part of its enactment. In this regard the statute does nothing more that authorize insurers to terminate payment of certain workers' compensation benefits to workers who are receiving or are eligible to receive social security retirement benefits in accordance with federal laws and regulations. This is not an unconstitutional delegation of legislative powers to the federal government.

CONCLUSION

The equal protection clause of the Montana Constitution, art. II, § 4, provides that "[n]o person shall be denied the equal protection of the laws." The purpose of the equal protection clause is to ensure that Montana citizens are not subject to arbitrary and discriminatory state action. *Bustell,* ¶ 19.

Mont. Code Ann. § 39-71-710 does not violate the equal protection clause of the Montana Constitution. It does not arbitrarily discriminate against any of Montana's citizens. The statute passes the test of equal protection under the law because it is rationally related to the legitimate governmental interests of promoting the financial interests of Montana businesses and improving economic conditions in Montana.

Mont. Code Ann. § 39-71-710 does not unconstitutionally delegate legislative power to the federal government. It does not delegate any power to the federal government, nor does it contain any mandatory directions to follow federal law in its implementation.

Businesses are entitled to the same equal protection of the law as are individuals. *Mont. Power Co. v. Pub. Serv. Commn.*, 206 Mont. 359, 364, 671 P.2d 604, 607 (1983). Similarly, all workers, injured or uninjured, are entitled to equal protection of the law. Should the Court choose to adopt Petitioners' argument, and to declare Mont. Code Ann. § 39-71-710 to be unconstitutional under the facts of this case, equal protection of the law should in like manner be extended to the businesses and uninjured workers of the State of Montana. Another OFLT should not be forced upon them.

For the reasons stated above, Petitioners' motion for partial summary judgment should be denied.