

FILED

AUG 8 2005

OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

Larry W. Jones
Law Office of Jones & Garber
An Insurance Company Law Division
700 SW Higgins Avenue, Suite 108
Missoula, MT 59803-1489
(406) 543-2420
(406) 829-3436 (FAX)
Attorney for Liberty Northwest Insurance Corporation

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CATHERINE E. SATTERLEE, et al.,)	WCC No. 2003-0840
)	
Petitioners,)	
)	
vs.)	LIBERTY
)	NORTHWEST'S BRIEF
LUMBERMAN'S MUTUAL CASUALTY CO., et al.)	IN OPPOSITION TO
)	MOTION FOR PARTIAL
)	SUMMARY JUDGMENT
Respondents/Insurers.)	

Petitioners challenged the constitutionality of MCA § 39-71-710 on two grounds: (1) unconstitutional delegation of legislative authority and (2) denial of equal protection of the laws.

SUMMARY JUDGMENT

Administrative Rules of Montana 24.5.329(1)(a)-(b) states as follows:

(1)(a) A party may, at any time after the filing of a petition for hearing, move for a summary judgment in the party's favor upon all or any part of a claim or defense. The time for filing shall be fixed by the court as provided by ARM 24.5.316(1).

(b) Because cases in the workers' compensation court are heard on an expedited basis, a motion for summary judgment may delay trial without any corresponding economies. The time and effort involved in preparing briefs and resolving the motion may be as great or greater than that expended in resolving the disputed issues by trial. For these reasons, summary judgment motions typically will be disfavored. The court may decline to consider individual

summary judgment motions where it concludes that the issues may be resolved as expeditiously by trial as by motion.

Notwithstanding subsection (b), when the facts are as clear as they are in this case, given claimant's liability theory, summary judgment is warranted.

Case law has further interpreted the requirements for summary judgment. In American Alternative Ins. Group v. Sorenson, 2000 MTWCC 60, WCC No. 9906-8268, Order Denying Motions for Summary Judgment filed 9-19-00, the Court summarized those requirements:

Summary judgment is appropriate only where undisputed facts entitle the moving party to judgment as a matter of law. ARM 24.5.329(2). "Summary judgment is an extreme remedy which should never be substituted for a trial if a material factual controversy exists. Montana Metal Bldgs. Inc. v. Shapiro, 283 Mont. 471, 474, 942 P.2d 694, 696 (1997).

American Alternative Ins. Group v. Sorenson at ¶ 22.

STATEMENT OF UNCONTROVERTED FACTS

Liberty adopts the facts as plead by Petitioners in their BRIEF IN SUPPORT at pp. 2-4.

PETITIONERS' BURDEN OF PROOF IN CONSTITUTIONAL CHALLENGE

Montana Supreme Court case law sets forth a roadway for the analysis of petitioners' claims.

¶15 Michael challenges the constitutionality of § 39-71-1107(3), MCA, on two related grounds. First, he contends that the limitation on benefits for 24-hour care violates his right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution and Article II, section 4 of the Montana Constitution because, as a result of his choice to live at home rather than a skilled nursing facility, Mary is significantly under compensated for providing Michael's care. Second, he contends that the limitation on benefits is arbitrary and capricious thereby violating his right to substantive due process under the Fourteenth Amendment to the United States Constitution and Article II, section 17 of the Montana Constitution.

A. Equal Protection

¶16 Both the Fourteenth Amendment to the United States Constitution and Article II, section 4 of the Montana Constitution provide that no person shall be denied

the equal protection of the laws. Indeed, the principal purpose of Montana's Equal Protection Clause is to ensure that Montana's citizens are not subject to arbitrary and discriminatory state action. *Davis*, 282 Mont. at 240, 937 P.2d at 31 (citing *Godfrey v. Mont. State Fish & Game Com'n* (1981), 193 Mont. 304, 306, 631 P.2d 1265, 1267). And, "[n]otwithstanding the deference that must be given to the Legislature when it enacts a law, it is the express function and duty of this Court to ensure that all Montanans are afforded equal protection under the law." *Davis*, 282 Mont. at 240, 937 P.2d at 31.

¶17 We review equal protection challenges to legislation under one of three recognized levels of scrutiny. First, where the legislation at issue infringes upon a fundamental right or discriminates against a suspect class, such as race or national origin, we apply strict scrutiny, the most stringent standard of review. Strict scrutiny requires the government to show a compelling state interest for its action. *See Henry*, ¶ 29; *State v. Renee*, 1999 MT 135, ¶ 23, 294 Mont. 527, ¶ 23, 983 P.2d 893, ¶ 23; *Davis*, 282 Mont. at 241, 937 P.2d at 31.

¶18 Second, where the right in question has its origin in the Montana Constitution, but is not found in the Declaration of Rights, we employ a middle-tier scrutiny. Middle-tier scrutiny requires the State to demonstrate that its classification is reasonable and that its interest in the classification is greater than that of the individual's interest in the right infringed. *See Henry*, ¶ 30; *Renee*, ¶ 23; *Davis*, 282 Mont. at 241, 937 P.2d at 31-32.

¶19 And, finally, where the right at issue is neither fundamental nor warrants middle-tier scrutiny, we review the challenge under a rational basis test. This test requires the government to show that the objective of the statute was legitimate and bears a rational relationship to the classification used by the Legislature. *See Henry*, ¶ 33; *Renee*, ¶ 23; *Davis*, 282 Mont. at 241-42, 937 P.2d at 32.

....

¶21 While the rights to privacy and liberty are fundamental rights which require a strict scrutiny analysis, *see Gryczan v. State* (1997), 283 Mont. 433, 448-49, 942 P.2d 112, 121-22, what is at issue in this case is Michael's entitlement to certain legislatively created benefits. We have stated:

[T]he right to receive Workers' Compensation benefits is not a fundamental right which would trigger a strict scrutiny analysis of equal protection. Nor does this statute infringe upon the rights of a suspect class.

When a right determined to be less than fundamental is infringed upon by classification, the test applied by this Court is the rational relationship test. That is, does a legitimate governmental objective bear some identifiable rational relationship to a discriminatory classification. [Emphasis added.]

Stratemeyer, 259 Mont. at 151, 855 P.2d at 509 (citing *Cottrill v. Cottrill Sodding Service* (1987), 229 Mont. 40, 42-43, 744 P.2d 895, 897). See also *Henry*, ¶ 29; *Heisler*, 282 Mont. at 279, 937 P.2d at 50.

¶22 Moreover, the first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. *Renee*, ¶ 27 (citing *In re S.L.M.* (1997), 287 Mont. 23, 32, 951 P.2d 1365, 1371). The equal protection clause does not preclude different treatment of different groups or classes of people so long as all persons within a group or class are treated the same. Consequently, when addressing an equal protection challenge, this Court must first identify the classes involved and determine whether they are similarly situated. *Henry*, ¶ 27 (citing *S.L.M.*, 287 Mont. at 32, 951 P.2d at 1371). If the classes at issue are not similarly situated, then the first criteria for proving an equal protection violation is not met and we need look no further.

¶23 Michael argues that there is but a single class consisting of all workers' compensation claimants subject to the restriction. We disagree. As the Workers' Compensation Court pointed out, there are two classes created by § 39-71-1107, MCA; family member caregivers who are subject to the limitation on compensation and non-family member caregivers who are not subject to the limitation on compensation.

¶24 While the care provided by the family member may in some respects be identical to the care provided by a non-family member, it also differs in some important respects. The family member who typically provides care to the claimant is the claimant's spouse who resided with the claimant in the family home prior to the accident. Some of the care needed by the claimant, such as meal preparation, shopping, and cleaning, may have already been provided by the family member prior to the accident. In addition, some of the care provided may be passive supervision which would not preclude the caregiver from carrying on many normal activities during the day or night. It is in this setting that the family member caregiver, unlike a non-family member caregiver, eats, sleeps, fraternizes with family and friends, pursues hobbies, and relaxes. Moreover, family member caregivers provide care on a skill level much lower than that provided by non-family member caregivers in professional licensed nursing facilities.

¶25 The non-family member caregiver, on the other hand, provides care as a full-time job, works away from home, and has the sole task of caring for and watching over claimants. Unlike the family member caregiver, the non-family member caregiver cannot pursue other activities while caring for claimants.

¶26 These differences justify treating the family member caregiver differently from the non-family member caregiver and for limiting payment to the family

member caregiver. Consequently, it is not necessary for us to determine which level of scrutiny, the strict standard as Michael alleges should apply or the rational basis standard as is generally applied to Workers' Compensation cases, or whether § 39-71-1107(3), MCA, would pass muster under either standard. Michael's challenge to the statute must fail because family member caregivers and non-family member caregivers are not similarly situated for purposes of equal protection.

Powell v. State Compensation Insurance Fund, 2000 MT 321.

The Montana Supreme Court decision in Stratemeyer v. Lincoln County, 259 Mont. 147, 855 P.2d 506 (1993) provides additional guidance relevant to this case because of the Court's discussion of the deference to be given the legislature: "The legislature is simply in a better position to develop the direction of economic regulation, social and health issues." Id., 259 Mont. at 153, 855 P.2d at 510.

There are limitations governing a court's ability to declare a statute unconstitutional. We take cognizance of the following cautions: [I]t is our sacred duty to measure the Act by the terms of our constitutional limitations, as we interpret them. "It must be evident to anyone that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility. The legislative and judicial are co-ordinate departments of the government of equal dignity; each is alike supreme in the exercise of its proper functions, and cannot directly or indirectly while acting within the limits of its authority be subjected to the control or supervision of the other without an unwarrantable assumption by that other of power which, by the Constitution, is not conferred upon it. The Constitution apportions the powers of governments but it does not make any one of the three departments subordinate to another when exercising the trust committed to it. The courts may declare legislative enactments unconstitutional and void in some cases, but not because the judicial power is superior in degree or dignity to the legislative. Being required to declare what the law is in the cases which come before them, they must enforce the Constitution as the paramount law, whenever a legislative enactment comes in conflict with it.

State v. Dixon (1923), 66 Mont. 76, 84-85, 213 P. 227, 229.

[1] Additionally:

When a legislative course of action expressed in statutes or budgetary laws is tested for constitutionality under the State Constitution, our review is circumscribed by certain principles. We must give the state constitutional provision a broad and liberal construction consistent with the intent of the people adopting it to serve the needs of a growing state. The constitutional provision should receive a *reasonable* and *practical* interpretation in accord with common

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

Fallon County v. State (1988), 231 Mont. 443, 445-46, 753 P.2d 338, 339- 340. (Citations omitted.) Every possible presumption must be indulged in in favor of the constitutionality of the Act. See State v. Safeway Stores, Inc. (1938), 106 Mont. 182, 199, 76 P.2d 81, 84.

....

[3] However, appellant argues that the Workers' Compensation Court should have sought "any combination of purposes that the Legislature might have been attempting to achieve" in enacting § 39-71-119, MCA. The Ninth Circuit has stated: "[i]n our review of governmental purposes, ... we need not rely only upon those purposes the legislature, litigants, or district court have espoused, but may also consider any other rational purposes possibly motivating enactment of the challenged statute." Mountain Water v. Mont. Dept. of Public Serv. Reg. (9th Cir.1990), 919 F.2d 593, 597. See also; Kadrmaz v. Dickinson Public Schools (1988), 487 U.S. 450, 462-463, 108 S.Ct. 2481, 2490, 101 L.Ed.2d 399; Cottrill v. Cottrill Sodding Service (1987), 229 Mont. 40, 43, 744 P.2d 895, 897; ([a]lthough this Court could speculate as to why the legislature elected to treat these select individuals differently under the Workers' Compensation laws....) (Emphasis added.) 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. In this case, the Workers' Compensation Court expected the legislature to provide the purpose. This, however, is not required of legislation being examined relative to equal protection.

Appellant contends that the Workers' Compensation Court ignored the rule that legislation is presumed to be constitutional. Further, it did not require the respondent to meet *his* burden of proving the statute was unconstitutional. Appellant claims the respondent provided no testimony, no evidence nor any case law to argue that the statute was invalid. Respondent merely argued that the distinction between physical and mental injury claims was nonsensical and unfair.

[4] This Court concludes that the Workers' Compensation Court did not properly apply these rules for analyzing legislation under an equal protection challenge. The Workers' Compensation Court did not presume the statute to be constitutional and look to any possible legitimate purpose for the legislation. However,

resolving doubts in favor of the legislation in minimum level scrutiny cases is the proper approach because:

[i]n the utilities, tax, and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events--self-limitation can be seen to be the path to institutional prestige and stability.

The Court is aware, too, of its own remoteness and lack of familiarity with local problems. Classification is dependent on legislative purpose. Legislative purpose is dependent on the peculiar needs and specific difficulties of the community. The needs and difficulties of the community are constituted out of fact and opinion beyond the easy ken of the Court.

Joseph Tussman and Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Cal.L.Rev. 341, 373 (1949). The legislature is simply in a better position to develop the direction of economic regulation, social and health issues.

....

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."

Id., 259 Mont. at 149-153, 855 P.2d at 508-510.

UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY

Petitioners' argue at the beginning of p. 8 of their Brief that MCA § 39-71-710 somehow delegates Montana's sovereign legislative authority to the federal government. In making this argument petitioners make a crucial assumption to drive their argument and that assumption is completely unsupported by the language in the statute.

Specifically, petitioners assume that the legislature intended the language in § 710 to authorize insurers (MCA § 39-71-116 (14) (2003)) to adjust PTD claims based on **changes** in

Social Security law since the enactment of the statute in 1981. What is the basis for that assumption? The question is answered by petitioners when they cite Lee v. State, 195 Mont. 1, 635 P.2d 1282 (1981).

Examine carefully the language of the challenged statute in Lee:

The full text of section 61-8-304, MCA, 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."

Lee, 195 Mont. at 3, 635 P.2d at 1283 (emphasis added).

The emphasized language reveals the legislature intended to authorize the attorney general to change Montana's speed limits **up or down** according to changes in federal law. This language reveals the legislature knows how to draft language to convey this authority to an entity to shift standards up or down.

Role of the judge -- preference to construction giving each provision meaning. In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

MCA § 1-2-101.

Intention of the legislature -- particular and general provisions.

In the construction of a statute, the intention of the legislature is to be pursued if possible. When a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it.

MCA § 1-2-102.

Construction of words and phrases. Words and phrases used in the statutes of Montana are construed according to the context and the approved usage of the language, but technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law or are defined in chapter 1, part 2, as amended, are to be construed according to such peculiar and appropriate meaning or definition.

MCA § 1-2-106.

Comparing the language in MCA § 39-71-710 as enacted in 1981 and amended thereafter there is no language remotely similar to that in the statute challenged in Lee.

When the basic rules of statutory construction are applied to § 710 the legislature's intent, as gleaned from the plain meaning of the language the legislature used, is that the eligibility criteria for Social Security benefits on the effective date of the 1981 version of § 710 provides the cut off for payment of permanent total disability benefits then **and into the future**.

If the legislature had not used the phrase "or is eligible to receive" Social Security benefits, then petitioners reliance on Lee might be appropriate. If the cut off point were receipt of Social Security retirement benefits (or benefits from a system that is an alternative to Social Security) then the historical changes since 1981 in Social Security law governing actual receipt of Social Security retirement benefits would be similar to the effect of the statute challenged in Lee.

"Second, where there is doubt about the meaning of a phrase in a statute, the statute is to be construed in its entirety and the phrase must be given a reasonable construction which will enable it to be harmonized with the entire statute." McClanathan v. Smith, 186 Mont. 56, 61, 606 P.2d 507, 510 (1980).

As the Lee Court noted, "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 exempt from that right any adoption of changes in the federal laws or regulations to occur in the future." Lee, 195 Mont. at 9, 635 P.2d at 1286. This statement is our Supreme Court's endorsement of the right of our legislature to adopt as part of its enactment existing federal laws. That is all § 710 does.

The unsupported assumption the petitioners make is that the language in § 710 grants insurers the same authority the legislature granted the attorney general to move speed limits up or down based on changes in federal law. There is no similar grant in § 710. It simply locks in the 1981 federal eligibility criteria for Social Security retirement benefits.

Not only did the legislature choose not to incorporate the Lee language in MCA § 39-71-710, it knows how to insert language in the Workers' Compensation Act that directs an insurer to use the latest version of a document or statutory scheme. See MCA § 39-71-711(1)(b) directing an insurer to use "the current edition of the Guides to Evaluation of Permanent Impairment published by the American medical association" to determine an impairment rating.

As set forth above, "every possible presumption must be indulged in favor of the constitutionality of a legislative act. The party challenging a statute bears the burden of proving that it is unconstitutional beyond a reasonable doubt and, if any doubt exists, it must be resolved in favor of the statute." Powell v. Montana State Fund, *supra*.

This interpretation offered by Liberty at a minimum creates reasonable doubt about the petitioners' interpretation of the statute and; Liberty urges the Court to find its interpretation that PTD petitioners lose eligibility for PTD benefits when they are eligible to receive full Social Security retirement benefits under the 1981 Social Security laws.

EQUAL PROTECTION — DIFFERENT CLASSES

The Reesor decision on which petitioners rely begs to be examined closely by all parties and it should be reconsidered by the Montana Supreme Court. That said, it does not dictate the outcome of this case.

The Reesor Court framed the issue before it thusly (emphasis added):

¶ 7 Whether the **age limitation** on PPD benefits, set forth in § 39-71-710, MCA, violates Article II, Section 4 of the Montana Constitution.

Having stated the issue was the age limitation in its framing of the issue, the Reesor Court then refers to the claimant's age as the determinative factor for the loss of eligibility for PPD benefits when eligible to receive Social Security retirement benefits as follows:

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.**

Id. at ¶ 12 (emphasis added).

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.

Id. at ¶ 19 (emphasis added).

Reesor contends § 39-71-710, MCA, contravenes the WCA's public policy because it departs from analysis based on wage loss, and instead hinges its denial of benefits based upon an injured worker's **age alone**--being eligible for social security benefits at the age of 65.

Id. at ¶ 21 (emphasis added).

As the Reesor Court noted at ¶ 10 "When addressing an equal protection challenge, this Court must first identify the classes involved, and determine if they are similarly situated." There is no need to go to the remainder of the equal protection analysis under the facts of this case.

The petitioners in the instant case identify the two classes as follows:

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 correspondence 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.

Brief at p. 7.

Remember in Reesor the case turned on the age distinction in the hypothetical the Court put forward at ¶ 23 (emphasis added) of its decision:

We see no reason why a forty-year-old injured worker should receive full PPD benefits pursuant to § 39-71-703, MCA, and a sixty-five-year-old worker with an identical injury should receive only an impairment award due to the fact he has reached social security retirement age. There is no rational basis to deny a class of injured workers a category of benefits **based upon their age**.

But the Reesor Court had already made the following statement at ¶ 22 (emphasis added).

Once a recipient qualifies to receive social security retirement by working **the requisite number of quarters**, the triggering event to receive benefits is reaching the retirement age as specified by the federal statute.

This quoted passage reveals the second precondition to receipt of Social Security retirement benefits — working the requisite number of quarters to qualify. See generally 20 CFR Part 404 and § 404.310 specifically.

The Reesor Court, without any citation to the record or authority apparently assumed that every injured worker has worked the requisite number of quarters and is eligible to receive Social Security retirement benefits. If a person has not worked the requisite number of quarters, then he is not considered to be retired and is eligible for all classes of benefits under § 710.

The Court then concludes in ¶ 23 “There is no rational basis to deny a class of injured workers a category of benefits based upon their age.” Having acknowledged in ¶ 22 that more than reaching the requisite age required to be eligible to receive Social Security retirement benefits is necessary to disqualify a retired claimant from eligibility for PPD benefits, the Court in ¶ 23 returns to its earlier refrain that age and age alone disqualifies retired petitioners from receiving retirement benefits.

What is the significance of this additional requirement of the requisite number of quarters in the instant case? The distinction helps to identify the classes that are similarly situated for equal protection analysis.

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.

Reesor at ¶ 12 (in part).

The dispositive issue in this case is whether there are two similarly situated classes that are treated in an unequal manner.

“Moreover, the first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. *Renee*, ¶ 27 (citing *In re S.L.M.* (1997), 287 Mont. 23, 32, 951 P.2d 1365, 1371). The equal protection clause

does not preclude different treatment of different groups or classes of people so long as all persons within a group or class are treated the same. Consequently, when addressing an equal protection challenge, this Court must first identify the classes involved and determine whether they are similarly situated. *Henry*, ¶ 27 (citing *S.L.M.*, 287 Mont. at 32, 951 P.2d at 1371). If the classes at issue are not similarly situated, then the first criteria for proving an equal protection violation is not met and we need look no further.”

Powell, *supra* at ¶22

In the instant case are PTD petitioners eligible to receive Social Security retirement benefits and those who are not (**even though they are the same age under Social Security law that satisfies the first criterion of eligibility - - age**) similarly situated? No. The two classes are different because the first has worked the requisite number of quarters to be eligible to receive Social Security retirement. Therefore, what you have are two different classes which are treated differently under § 710.

Those eligible to receive Social Security retirement benefits because of their age **and** having worked the requisite number of quarters are all treated the same - - they lose their eligibility for workers' compensation PTD benefits.

Those not eligible to receive Social Security retirement benefits **only** because they have not worked their requisite number of quarters all get treated the same - - lifetime PTD benefits.

In the instant case it is not age that leads to the loss of eligibility for PTD benefits. Instead it is eligibility to receive Social Security retirement benefits which in turn is based on age and having worked the requisite number of quarters. You do not have persons of different ages getting different classes of benefits, as the Reesor Court claimed, simply because one claimant is of retirement age and the other is not.

There are the two relevant classes for equal protection analysis and they are not similarly situated because they have different eligibility requirement for the continued receipt of PTD benefits under § 710. The Montana Supreme Court has approved this distinction. “Further, again unlike PPD benefits, PTD benefits are paid continuously over the life of the claimant, subject only to termination at the claimant’s retirement age. *See* § 39-71-710, MCA (1987 and 1989).” Rausch, et al. v. State Compensation Insurance Fund, 2005 MT 140 at ¶ 24.

EQUAL PROTECTION — RATIONAL BASIS

If the Court finds there are similarly situated classes that are being treated differently, there is a rational basis for the treatment. The attached Affidavit of Paul Polzin, Ph.D., shows the percentage of persons working while receiving Social Security retirement payments. After a peak at age 66, there is a steady decline in their labor force of participation. At no time are even a

majority of persons receiving Social Security retirement benefits in the labor force. These facts are important in light of the following passage from Reesor.

We see no reason why a forty-year-old injured worker should receive full PPD benefits pursuant to § 39-71-703, MCA, and a sixty-five-year-old worker with an identical injury should receive only an impairment award due to the fact he has reached social security retirement age. There is no rational basis to deny a class of injured workers a category of benefits based upon their age.

Reesor at ¶ 23.

Again, the distinction is not age; it is eligibility to receive or receipt of Social Security retirement benefits (or an alternative to Social Security retirement benefits). The above-quoted passage has an implication that gives an intuitive appeal to the majority's decision. The implication arises from the common sensical understanding that the 40 year old is working because he needs the money to pay his living expenses. That implication is carried over in this quotation into the reference to the 65 year old worker.

For those PTD claimants who are not eligible to receive Social Security retirement benefits, they have a lifetime entitlement to PTD benefits. Therefore if the 40 year old becomes permanent totally disabled and is not eligible for Social Security retirement benefits, he will receive lifetime PTD benefits.

For the 65 year old, or older worker, who is working and not eligible to receive Social Security retirement benefits, he too will get lifetime PTD benefits if a work related injury renders him permanently totally disabled.

What rational basis is there for the legislature to disqualify a PTD claimant from receipt of PTD benefits when eligible to receive Social Security retirement? There does not appear to be **any** if you assume, as did the majority in Reesor, that the 40 year old and the 65 year old are similarly situated, i.e., all or most 40 year olds are in the workforce to pay their living expenses and all or most 65 year olds **remain in the workforce** even after eligible to receive Social Security retirement to pay living expenses **and remain indefinitely in the work force**. Dr. Polzin's affidavit with attached exhibits shows that the vast majority of those receiving Social Security retirement benefits have exited the civilian labor force. Exhibit 3.

The second assumption on which the majority in Reesor have relied is that the 65 year old is working because he has to work, i.e., needs the money to pay living expenses. The undersigned does not know of any data that could prove or disprove this assumption. But relying on and assumption that is idle, i.e., incapable of proof or disproof, is contrary to the rules the Supreme Court has directed this Court to follow.

- The Petitioner's must prove the statute unconstitutional beyond a reasonable doubt.
- This Court must presume the statute is constitutional.
- This Court must not look for reasons to condemn the statute but instead must search for those reasons to uphold its constitutionality.
- The Court must give the statute a broad and liberal construction consistent with the intent of the legislature adopting it to serve the needs of a growing a state.
- This Court must give the statute a reasonable and practical interpretation in accord with common sense.
- This Court must answer the question whether it is possible to uphold the statute rather than question whether it is possible to condemn it.
- This Court must give the statute every possible presumption in favor of its constitutionality.
- This Court must consider any possible rational purpose motivating enactment of the challenged statute.
- This Court to find the statute constitutional does not have to have the rational basis on which it was enacted appear on the face of the legislation or in the legislative history.
- The rational basis may be any possible purpose of which the Court can conceive.

There are at least four compelling rational bases for the loss of permanent total disability benefits when eligible to receive Social Security retirement.

- Those eligible for Social Security retirement have a source of income to pay living expenses and work comp benefits are therefore unnecessary.
- The cost of workers' compensation premiums to employers should not be increased by the redundant payment of those benefits (PTD) to those receiving Social Security retirement and who are increasingly likely to leave the workforce irrespective of a work-related injury.
- Montana consumers should not have to bear the cost of a windfall to injured workers who, irrespective of the injury, were very likely to exit the workforce irrespective of the injury.

- The legislation is to prevent double payment to an employee out of two different government programs, both of which are funded by the employer. *Larson, Workers' Compensation (2000) § 157.01; McClanathan v. Smith*, 186 Mont. 56, 66, 606 P.2d 507, 513 (1980).

CONCLUSION

While the majority in *Reesor* may, as the dissent points out, begin its analysis by looking for reasons to undermine the constitutionality of a statute, this Court is bound by the interpretive rules set forth above. If this Court follows those rules there is only one conclusion that can be reached — the statute is clearly constitutional under an equal protection challenge.

For the reasons stated above, Liberty requests that the Court find MCA § 39-71-710 constitutional.

DATED this 8 day of August, 2005.


Larry W. Jones
Attorney for Liberty Mutual Insurance Group

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of August, 2005, I served the original of the foregoing LIBERTY NORTHWEST'S BRIEF IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT, 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:


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

David M. Sandler
Hammer, Hewitt & Sandler, PLLC
P. O. Box 7310
Kalispell, MT 59904-0310

Greg Overturf
Montana State Fund
P. O. Box 4759
Helena, MT 59604-4759

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

Bradley J. Luck
Garlington, Lohn & Robinson, PLLP
P. O. Box 7909
Missoula, MT 59807-7909


Kathleen A. Smith

COPY

Bradley J. Luck
Thomas J. Harrington
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, Esq.
Greg E. Overturf, Esq.
David Hawkins, Esq.
Montana State Fund
P. O. Box 4759
Helena MT 59604-4759

Attorneys for Respondent/Insurer, Montana State Fund

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

AFFIDAVIT OF PAUL E. POLZIN

STATE OF MONTANA)
 :ss
County of Missoula)

PAUL E. POLZIN, being first duly sworn upon his oath, deposes and says:

1. I am currently the Director of the Bureau of Business and Economic Research at The University of Montana. I have held this position since 1988. I have extensive work experience and academic credentials in the area of economics and economic research. In 1964, I received a B.A. in Economics from the University of

Michigan. In 1968, I received an M.A. and Ph.D. in Economics from Michigan State University. I have authored 21 peer reviewed publications which focused on different aspects of economics. I have also authored many other publications which dealt with economics. A copy of my Curriculum Vitae is attached hereto as Ex. "6."

2. In preparing this Affidavit, I examined the labor force status of persons age 62 and older, and I also examined their sources of retirement income. I paid particular attention to the changes in the labor force status as persons grow older. I also made gender comparisons and comparisons between those people who receive Social Security retirement benefits versus those people who do not.

3. My opinions are based on my review and interpretation of the data discussed below as well as my education, training and experience in the field of economics. The methodology and unbiased sources I used to gather my data are recognized as authoritative sources in the field of economics and the data are generally accepted and reasonably relied upon by other economists in forming opinions. Lastly, my opinions are provided on a more probable than not basis.

4. In my opinion, the best available data are from the Current Population Survey ("CPS"), which is conducted nationally by the United States Bureau of the Census and the United States Bureau of Labor Statistics. CPS is the primary source of information concerning labor force characteristics of the United States population. CPS is a monthly survey of about 50,000 households and has been conducted for more than 50 years. The sample is scientifically selected to represent the non-institutional population. Respondents are interviewed to obtain information about the employment status of each member of the household 15 years of age and older. CPS data are used by government policymakers and legislators as reliable indicators of our nation's economic situation and for planning and evaluating many government programs. They are also used by the press, students, academics, and the general public.

5. The information concerning labor force status came from the Annual Demographic Survey, which is the March Supplement to CPS. The March Supplement is designed to gather information on more than 50 different sources of income as well as employment status and work patterns.

6. There are no equivalent data for Montana. There is no data source that brings together information concerning the income sources, retirement payments and labor force status of Montanans age 62 and older. It is unlikely that appropriate information will ever be available for Montana. The CPS analyses utilized information gathered from approximately 24,600 individuals age 62 or older. In Montana, there were about 159,400 persons in 2000 who were 60 years of age or older. Therefore, more than 15% of all elderly Montanans would have to be surveyed in order to provide

an equivalent sample. A smaller sample would not be sufficient to analyze the detailed concepts that will be examined later.

7. The analyses utilized CPS data derived from respondents throughout the United States. The national data are appropriate for analyzing labor force status in Montana because: (1) they are the best data available; and (2) statistical measures for analysis were chosen to be least impacted by the differences between the United States and Montana labor markets.

8. Montana does differ from the United States in a number of important attributes. For example, Montanans have lower wages and income than the national average, no matter how wages and income are measured. The following analyses do not use dollar values but percentages or rates specifically to avoid these problems. Furthermore, in one case where comparable state and national data was available, Montana was not consistently above or below the corresponding United States values.

9. The appropriateness of the CPS data for Montana may be evaluated by looking at labor force participation data reported in the 2000 Census of Population. The Census does not report labor force participation by single year of age nor does it identify Social Security recipients, but comparable figures are presented for Montana and the United States. I examined information from the 2000 Census of Population to insure that the national data labor force data are appropriate for Montana. The data from CPS accurately represents, in my opinion, the labor and workforce situation which exists in Montana.

10. Attached hereto as Exhibits 1 and 2 are true and correct copies of CPS documents which present overall characteristics of the 2004 Current Population Survey March Supplement. Exhibit 1 indicates that 24,571 persons age 62 or older were included in the sample. Of those, 10,641 were males and 13,930 were females. As expected, the number of persons in each category declines as age increases. The number of males and females age 80 to 84 are combined in one category, as was the number of persons age 85 and older.

11. The extent of Social Security coverage is presented in Exhibit 2. This exhibit reports the number of persons receiving Social Security retirement benefits (excluding supplemental or disability payments) by age and gender. The number of persons eligible for Social Security must be obtained from the Social Security Administration, and this data may not include information concerning demographic characteristics and/or other sources of income.

12. At age 62, approximately 28% of the males and 37% of the females reported receiving Social Security payment. These percentages rise quickly, and more than one-half of males and females report receiving Social Security payments when

they are 64 years old. About the same percentage of males and females report receiving Social Security payments at 65 years old, and this equality continues throughout the remaining age categories.

13. The percentage of males and females reporting Social Security payments continue to gradually rise after age 65. By their late 70s, about 91% to 92% of both males and females report receiving Social Security retirement payments.

14. With respect to labor force status, persons are classified in the labor force if they are employed, unemployed but seeking employment or in the Armed Forces during the week the survey is conducted. The "civilian labor force" includes all civilians classified as employed or unemployed. The actual determination of a respondent's labor force status was determined by the Bureau of the Census and is reported by a code in the data.

15. Attached hereto as Exhibit 3 is a true and correct copy of a CPS document which presents the labor force status of persons age 62 and older. Looking first at males receiving Social Security retirement payments, among 62 year olds, approximately 16.3% were in the civilian labor force. The corresponding figure for 62-year-old females is about 21%. Exhibit 3 confirms that as the age of the retired person increases, there is a corresponding decrease in the amount of retired workers who earn income from working. For example, for people age 67 who receive Social Security retirement benefits, over two-thirds of them do not earn annual income from working. By age 70, over three-fourths of people who receive Social Security retirement benefits do not earn annual income from work.

16. The highest figures for labor force participation were reported for both males and females age 66. This reflects the fact that the earnings limitations for Social Security recipients does not apply after a person reaches their 65th birthday. The maximum labor force participation is approximately 31% for males and about 25% for females who are 66 years old.

17. Even though males tend to have higher labor force participation rates at every age than females, the trend in the rates is similar for both. The rates for males decline almost every year until reaching about 3% for those age 85 and older. For females, the rates also decline steadily reaching approximately 1% for those age 85 and older.

18. The labor force participation rates are generally higher than for those persons not receiving Social Security retirement payments, but the trends are very similar. The participation rates for both males and females not receiving Social Security decline steadily with age. At age 62, about 70% of the males and roughly 63% of the females not receiving Social Security were in the labor force. For those age 85 or older,

about 9% of the males and roughly 7% of the females were in the labor force. There are no peaks in labor force participation at age 65 or 66 in the percentages of males or females persons in the labor force.

19. Attached hereto as Exhibit 4 is a true and correct copy of a CPS document setting forth labor force participation for broad age categories in Montana and the United States. All of the important features of the CPS data also appear in the Census figures for Montana. Namely, males have higher labor force participation than females, and labor force participation declines with age. In addition, the Montana figures are nearly identical to those for the United States with no tendency for the Montana rates to be consistently above or below the corresponding national rates.

20. After collecting and examining the data discussed above, I have formed the following opinions:

- a. Labor force participation is higher for persons not receiving Social Security retirement payments;
- b. Males have higher labor force participation than females;
- c. After a peak at age 66, there is a steady decline in labor force participation for males receiving Social Security. For those 85 and older, only about 3% are in the labor force;
- d. For females receiving Social Security, after a peak at age 66, there is also a steady decline in labor force participation. For those 85 and older, only about 1% are in the labor force; and
- e. The above trends in the CPS figures are also present in Montana.

21. Attached hereto as Exhibit 5 is a true and correct copy of a CPS document which details the sources of retirement income for persons age 62 and older. For males receiving Social Security payments, approximately 40% of those age 62 and older also receive retirement income from another source. Company or union retirement payments were the largest single source, followed by government and military pensions. Among females receiving Social Security, the percent receiving other pensions were generally lower than for males, but company/union pensions and government/military pensions were still the two largest sources.

22. For persons not receiving Social Security, the overall percentages having retirement income are lower, perhaps reflecting the fact that they are still in the labor force. For males not receiving Social Security, approximately 18% of those age 62 to 65 reported another retirement income source, and this percentage rose to about 25%