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FILED

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OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT
FOR THE STATE OF MONTANA

CATHERINE E. SATTERLEE, Petitioner,)	WCC No. 2003-0840
v.)	
LUMBERMAN'S MUTUAL CASUALTY COMPANY,)	
Respondent/Insurer)	
_____)	
JAMES ZENAHLIK, Petitioner,)	WCC No. 2003-0840
v.)	
MONTANA STATE FUND, Respondent/Insurer)	
_____)	
JOSEPH FOSTER, Petitioner,)	WCC No. 2003-0840
v.)	
MONTANA STATE FUND, Respondent/Insurer)	
_____)	
DORIS BOWERS, Petitioner,)	WCC No. 2003-0840
v.)	
PUTMAN & ASSOCIATES, Respondent/Insurer)	
_____)	

**LUMBERMAN'S MUTUAL CASUALTY COMPANY'S RESPONSE BRIEF ON
CONSTITUTIONALITY ISSUES RELATING TO § 39-71-710**

I. INTRODUCTION

A. Statement Of The Case

Lumberman's Mutual Casualty Company (Lumberman's Mutual) has been named as a Respondent/Insurer with respect to the claim of Catherine E. Satterlee, WC Claim No. 788CU041791. On behalf of Satterlee and the other Petitioners an Amended Petition for Hearing was filed, dated July 25, 2003. Satterlee has now filed a Motion and Brief in Support thereof, dated February 18, 2005.

With regard to Lumberman's Mutual, Petitioner Satterlee asserts on pages 2 and 3 of her brief that Respondent Lumberman's Mutual, by its Answer to Amended Petition for Hearing, has admitted the following facts:

1. Petitioner Catherine E. Satterlee ("Satterlee") was injured attempting to turn over a 40-45 pound [sic] of dog food on the bottom of a shopping cart on July 25, 1992, while in the course and scope of her employment at Buttrey Food & Drug, an employer under Plan II pursuant to the Montana Worker's Compensation Act.
2. Lumberman's accepted liability for the claim as an industrial injury and paid medical and indemnity benefits for various periods of time.
3. On January 25, 1996, this Court ruled that, although Satterlee was totally disabled on account of her emotional and psychological condition, she was not permanently totally disabled as a result of her July 25, 1992, industrial accident.
4. Satterlee appealed this Court's decision to the Montana Supreme Court. On December 10, 1996, the Montana Supreme Court issued its opinion and reversed this Court's denial of Satterlee's claims for total disability benefits and remanded the case for entry of judgment in Satterlee's favor. *Satterlee v. Lumberman's Mutual Casualty Company* (1996), 280 Mont. 85, 929 P.2d 212.
5. Satterlee turned age 65 on September 30, 1999. On or about that date, Lumberman's ceased paying permanent total disability payments in the amount of \$235.55 pursuant to § 39-71-710, MCA.

By her Motion, Satterlee seeks "an order declaring the age limitation on permanent total disability and rehabilitation benefits set forth in § 39-71-710, MCA, to be unconstitutional" based upon two separate theories. This brief is submitted by

Lumberman's Mutual in opposition to Satterlee's motion. Lumberman's Mutual asserts that Satterlee is not entitled to the relief she seeks and that § 39-71-710, MCA (1991), is constitutional.

B. Satterlee Cites The Wrong Version Of § 39-71-710, MCA

In her brief, Satterlee cites the 1995 version of § 39-71-710, MCA. The 1995 statute is not applicable to her. Satterlee was injured on July 25, 1992. Section 39-71-710, MCA (1991), as it existed on July 25, 1992, as amended by the 1987 Montana Legislature, applies to Satterlee not the 1995 statute Satterlee cited in her brief.

In *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 730 P.2d 380, 384 (1986), it was recognized that the workers' compensation statutes in effect on the date of the injury determined the benefits that the injured worker is entitled to receive. In effect, the Court reaffirmed that the date of injury set the contractual right between the injured worker and employer. The Court stated that the substantive rights between the parties are determined by the law in effect on the date of injury. The Court went on to hold:

"The liability of Montana Deaconess Hospital, employer, to Buckman, employee arises out of the contract between them and the Workers' Compensation statutes in effect on the date of the Buckman injury are part of that contract." *Buckman*, 730 P.2d at 385.

The 1995 statute, with the changes from the 1987 version noted, is as follows:

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 benefits, the claimant is considered to be retired. When the claimant is considered retired, the liability of the insurer is ended for payment of wage supplement, permanent partial disability benefits other than the impairment award, payment of permanent total disability, and 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 ~~social security~~ retirement benefits and is while gainfully employed suffers a work-related injury, the insurer retains liability for temporary total disability benefits, any impairment award, and medical benefits.

The 1987 Montana Session Laws provide in Chapter No. 464, Section 72(2), that the 1987 version of § 39-71-710, MCA, applies "to injuries, diseases, and events occurring after June 30, 1987." Satterlee was injured on July 25, 1992. Section 39-71-710, MCA (1991), was amended again in 1995 by two separate bills. Montana Session Laws 1995 provide amendments to this section in Chapter No. 242, Section 14, and Chapter 516, Section 13. However, neither amendment made the 1995 changes retroactive. The changes made by Chapter No. 242 became effective as of July 1, 1995, while the changes made by Chapter No. 516 became effective October 1, 1995.

As set forth above, the 1987 version of § 39-71-710, MCA, as it remained unchanged by the 1991 legislature, is the statute that applies to Satterlee and Lumberman's Mutual with respect to Satterlee's motion.

II. LAW AND ARGUMENT

A. Satterlee Has Waived Any Right To Make A Constitutional Challenge

Satterlee's argument that Section 39-71-710, MCA is unconstitutional is based upon Article II, § 4 and Article III, § 1 of the 1972 Montana Constitution. Those provisions have not been amended since 1972.

Satterlee was injured on July 25, 1992. If Section 39-71-710, MCA (1991) is unconstitutional for any reason, it was just as unconstitutional on July 25, 1992, as it allegedly is today. Satterlee recognizes in her brief that on January 25, 1996, this Court ruled that she was not permanently totally disabled as a result of her July 25, 1992, industrial accident and that she appealed that decision to the Montana Supreme Court. Satterlee further recognizes that on December 10, 1996, the Montana Supreme Court issued its opinion and reversed this Court's denial of Satterlee's claims for total disability benefits and remanded the case for entry of judgment in Satterlee's favor. *Satterlee v. Lumberman's Mutual Casualty Company* (1996), 280 Mont. 85, 929 P.2d 212.

Constitutional issues should generally be raised at the earliest opportunity. *In Re Savings and Loan Activities in the State of Montana by Gate City Savings and Loan Association of Fargo, North Dakota*, 182 Mont. 361, 597 P.2d 84, 88 (Mont. 1979), citing *Johnson v. Doran*, 167 Mont. 501, 511, 540 P. 2d 306, 311 (Mont. 1975). In *Johnson*, supra., 540 P.2d at 311, the Montana Supreme Court stated:

As to Doran's contention that section 66-1940(c), R.C.M.1947, is unconstitutional, this issue was raised for the first time on appeal. This Court has consistently ruled that a constitutional issue is waived if not presented at the earliest opportunity. *Union Interchange, Inc. v. Allen*, 140 Mont. 227,

370 P.2d 492. While Doran argues the issue was raised on the motion for new trial, we have examined the language of the motion and find it does not raise the question of the constitutionality of this statute, and therefore decline to rule upon such contention.

Satterlee was before this Court once before and appealed her claim to the Montana Supreme Court. A review of the Montana Supreme Court's decision shows that Satterlee never raised any constitutional challenges over eight years ago although that would have been the earliest opportunity to do so. Satterlee had the ability and the obligation to raise any constitutional challenges in her first go-round with this Court and the Montana Supreme Court. Since she failed to do so, Satterlee has waived any right to make this constitutional challenge and her claim should be dismissed.

B. Section 39-71-710, MCA (1991) Is Constitutionally Sound

1. History of Section 39-71-710, MCA (1991)

Prior to 1981, there was no limitation on permanent total disability benefits. Section 39-71-702, MCA (1973), provided that "total permanent disability benefits shall be paid for the duration of the worker's total permanent disability." To be considered permanently totally disabled, an injured worker had to suffer "a condition resulting from injury as defined in this chapter that results in the loss of actual earnings or earning capability that exists after the injured worker is as far restored as the permanent character of the injuries will permit and which results in the worker having no reasonable prospect of finding regular employment of any kind in the normal labor market." § 39-71-116(13), MCA (1975). Pursuant to these provisions, permanent total disability benefits did not cease once a worker reached the age of retirement. *Skrurud v. Gallatin Laundry Co., Inc.*, 171 Mont. 217, 557 P.2d 278 (1976).

In 1981, however, the Montana Legislature enacted Senate Bill 64 which provided the original version of § 39-71-710, MCA. (See 1981 Mont. Session Laws, Chapter 386.)

Section 39-71-710, MCA (1981), originally provided as follows:

39-71-710. Termination of total disability benefits upon retirement.

If a claimant is receiving total disability compensation benefits, and the claimant receives retirement social security benefits or disability social security benefits paid to the claimant are converted by law to retirement benefits, the claimant is considered to be retired and no longer in the open labor market. When the claimant is considered retired, the liability of insurer is ended for payment of such compensation benefits. This section does not apply to permanent partial disability benefits. Medical benefits are expressly

reserved to the claimant.

In the legislative history supporting Senate Bill 64, proponents of the bill stated that the purpose of the amendment to the Workers' Compensation Act was that the Workers' Compensation Act was meant to provide benefits to those who suffered a loss in their earning capacity, but it should not become a "pension program." (Minutes of Senate Bill 64--Labor and Relations--January 13, 1981--page 2, attached hereto as Exhibit 1).

The legislative history of § 39-71-710, MCA, (1981) reflected the legislature's recognition that injured workers were deemed to have retired are no longer in the labor market. The legislative history further recognized that at the age of retirement, social security disability benefits were converted to social security retirement benefits. (See MEMORANDUM BY THE WORKERS' COMPENSATION DIVISION REGARDING SENATE BILL NO. 64 . . . , Exhibit 2 to the Montana Legislative History, attached hereto as Exhibit 1.) When § 39-71-710, MCA (1981) was first enacted, it recognized that it had no effect on an injured worker's right to temporary total or permanent partial disability benefits. Likewise, the injured worker remained entitled to medical benefits, as well.

In 1987, there were significant changes to the Workers' Compensation Act. Governor Schwinden commissioned the Workers' Compensation Advisory Council which studied the workers' compensation system for a period of two years to make recommendations to the governor given the extreme deficits faced by workers' compensation insurance carriers, self insureds and the Montana State Fund. After serious debate and careful consideration, significant changes were made to the Workers' Compensation Act.

One of the significant changes made by the 1987 Montana Legislature to the Workers' Compensation Act pertains to § 39-71-710, MCA (1987). The amended version provided as follows:

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 full social security retirement benefits, the claimant is considered to be retired. When the claimant is considered retired, the liability of the insurer is ended for payment of wage supplement, permanent total and 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 to receive social security retirement benefits and is gainfully employed suffered a work-related injury, the insurer retains liability for temporary total disability benefits, any impairment award, and

medical benefits.

The policy behind this amendment was similar to the policy of those changes made in 1981. The change in the law recognized that once a worker is considered retired, he is no longer in the labor market. Therefore, an injured worker's right to permanent total disability benefits should end when he receives or is eligible to receive social security retirement benefits. Likewise, the injured worker's entitlement to rehabilitation benefits ends because there would no longer be a need for vocational rehabilitation as the worker is no longer in the labor market. The injured worker's right to wage supplement benefits ends, but he retains his right to an impairment award and continued medical benefits. § 39-71-710, MCA (1987). This policy is consistent with *Rausch II*, where it is recognized that PTD benefits were meant for the "work life" of the injured worker. *Rausch v. State Compensation Ins. Fund*, 2005 MT, ¶ 24, ___ Mont. ___, ___ P. 3d ___ (2005) (hereinafter *Rausch II*). Subsection (2) of § 39-71-710, MCA (1987), specifically addresses the situation and identifies an injured worker's entitlement when the injured worker is eligible to receive social security benefits and was gainfully employed at the time the worker suffers a work-related injury. The 1987 version of the statute, unchanged by the 1991 legislature, remained in effect at the time Satterlee was injured. (*See* § 39-71-710, MCA (1991)).

2. Constitutionality Is Presumed

Satterlee asserts that § 39-71-710, MCA violates Article III, § 1, of the 1972 Montana Constitution and violates the equal protection clauses of the Fourteenth Amendment to the United States Constitution and Article II, Section 4 of the Montana Constitution. In simplest terms, these constitutional provisions require that the law treat persons alike under like circumstances. *Heisler v. Heinz Motor Co.*, 282 Mont. 270, 278, 337 P.2d 45, 50 (1997).

The Montana Supreme Court has recognized that a court must act cautiously in analyzing the constitutionality of a statute. 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 impossible to condemn, but whether it is possible to uphold the legislative action which will not be declared invalid unless it conflicts with the Constitution, and the judgment of the Court, beyond a reasonable doubt. *Stratemeyer v. Lincoln County*, 259 Mont. 147, 150, 850 P.2d 506, 508-09 (1993) (citing *Fallon County v. State of Montana*, 231 Mont. 443, 445-46, 753 P.2d 338, 339-40 (1989)).

Every possible presumption must be indulged in favor of the constitutionality of a legislative act. *Davis v. Union Pacific R.R. Co.*, 282 Mont. 233, 240, 937 P.2d 27, 31 (1997) (citing *State v. Safeway Stores*, 106 Mont. 182, 199, 76 P.2d 81, 84 (1938)). The

party challenging a statute bears the burden of proving it is unconstitutional beyond a reasonable doubt and, if any doubt exists, it must be resolved in favor of the statute. *Grooms v. Ponderosa*, 283 Mont. 459, 467, 942 P.2d 699, 703 (1997) (citing *Heisler*, 282 Mont. at 278, 937 P.2d at 50.)

Accordingly, this Court shall construe § 39-71-710, MCA (1991), so as to render it valid "unless its violation of the fundamental law is clear and palatable." *State ex rel. Berthot v. Gallatin County High School*, 102 Mont. 256, 58 P.2d 264, 267 (1936).

3. Constitutional Analysis Of A Statute Is A Three-Step Process

The first step of constitutional analysis requires the identification of a class or classes. As the Court explained in *Powell*, "when addressing an equal protection challenge, this Court must identify the classes involved and determine whether they are similarly situated. If the classes at issue are not similarly situated, then the first criteria of proving an equal protection violation is not met and we need look no further." *Powell*, ¶ 22 (citing *Henry*, ¶ 27).

The second step in the constitutional analysis of a statute is to determine the appropriate level of scrutiny to apply to the challenged legislation. Clearly, the rational basis test is the proper test, as the provisions of the Montana Workers' Compensation Act neither infringe upon the rights of a suspect class nor involve fundamental rights. *Reesor v. Montana State Fund*, 104 MT. 370, 325 Mont. 1, _____ P.3d _____, at ¶ 15.; *Henry v. State Compensation Ins. Fund*, 199 MT. 126, 294 Mont. 449, 982 P.2d, § 33; *Powell* at ¶ 21 (citing *Stratemeyer*, 855 P.2d at 509).

The third step involves whether the government's stated objective bears a rational relationship with the statutory classification adopted by the legislature. *Reesor*, 204 MT. 370, ¶ 15, 325 Mont. 1, ¶ 15 _____ P.3d _____, ¶ 15. The constitutional challenge is defeated if the statute which causes the unequal treatment bears a rational relationship to a government interest. *Henry*, ¶ 13 (citing *Heisler v. Heinz Motor Co.* (1997), 282 Mont. 270, 937 P.2d 45-50; *Matter of S.L.M.* (1997), 287 Mont. 23, 951 P.2d 1365, 1371.

4. The Classes Are Not Similarly Situated And There Is No Equal Protection Violation

One of the most significant steps in constitutional analysis is to properly identify the classes at issue. In her brief, Satterlee identified two classes as follows: "(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 benefits."

(Petitioner's brief, ¶7.) The classes identified by Petitioner are virtually identical to those identified in *Reesor* except she has interchanged PTD or rehabilitation benefits for permanent partial benefits. Petitioner's attempt to piggy-back the *Reesor* decision is not helpful or warranted here. The issue in *Reesor* was whether it was "fair to deny men and women full PPD benefits simply because their age makes them eligible to receive social security retirement or similar benefits." *Reesor*, 2004 MT. 370, ¶ 10, 325 Mont. 1, ¶ 10, ____ P.3d ____, ¶ 10. Here, permanent partial disability benefits are not at issue.

In *Reesor*, there were two distinct classes, those who were permanently totally disabled and were not entitled to permanent partial disability benefits, and those who were not permanently totally disabled and were entitled to permanent partial disability benefits. In *Reesor*, the Court found it was in violation of equal protection to deny permanent partial disability benefits because a person may be able to receive, or is eligible to receive, social security retirement benefits. Importantly, a claimant who is permanently totally disabled is not denied benefits as in *Reesor*. Under § 39-71-710, all injured workers are entitled to permanent total disability benefits until they receive or become eligible for social security retirement benefits.

The legislature, using its broad powers, simply identified when an injured worker's entitlement to permanent total disability benefits ceases. This is no different than the legislature deciding that temporary total disability benefits end at a point of maximum medical healing. This is no different than the legislature determining that there are limits on permanent partial disability benefits. This is similar to the legislature determining that after a certain point in time, death benefits end for beneficiaries. By simply identifying a particular point in time when the entitlement to a particular type of benefit ceases, the statute does not violate equal protection. All persons within that class who are entitled to permanent total disability benefits are treated similarly. They are all entitled to permanent total disability benefits until they receive or become eligible to receive social security benefits. In *Powell*, the Court found that the classes were not similarly situated; therefore, it determined that the unequal compensation scheme was constitutional. *Powell*, ¶ 24-26.

Here, there is no proof that § 39-71-710, MCA (1991) adopts a classification which affects two or more similarly-situated classes in an unequal way. The equal protection clause does not preclude different treatment of different groups or classes of people so long as all persons in a group or class are treated the same. *S.L.M.*, 287 Mont. 23, 32, 951 P.2d, 1365, 1371 (1997). A change in the amount of entitlement to a benefit does not create a different class for equal protection purposes.

As held in *Shea v. North-Butte Mining Co.*, (1919), 55 Mont. 522, 179 P. 499, an act of the legislature should not be declared invalid unless it is repugnant "and invalidity is made to appear beyond a reasonable doubt." *Shea*, 179 P. at 501. To follow the reasoning of Petitioner, any time there is a change in an entitlement to a particular type of

benefit under the Workers' Compensation Act, or whenever the legislature limits benefits as compared to previous statute, an equal protection violation has occurred. This is not the holding in *Reesor* and, in fact, would essentially mean that on the many occasions the Montana Legislature has amended the Workman's Compensation Act over the years to change the amounts of benefits, its actions were unconstitutional.

In *Reesor*, the Court found there was no rational basis to deny a class of injured workers a category of benefits based on their age. *Reesor* at ¶ 23. The *Reesor* decision recognized that eligibility for social security retirement was contingent upon working the requisite number of quarters and reaching the retirement age as specified by federal statute. *Reesor* at ¶ 22. The *Reesor* Court concluded:

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 this situation, Petitioner cannot prove she is similarly situated to all claimants who are permanently disabled and is denied permanent total disability benefits or rehabilitation benefits solely because of her age. Petitioner's entitlement to permanent total disability benefits ended because she became eligible to receive social security retirement benefits. The Petitioner's entitlement to permanent total disability benefits is determined by the statute in effect at the date of her injury. *Buckman, supra*. Every injured worker's entitlement to permanent total disability benefits is determined by the law in effect on the date of their injury. *Buckman, supra*.

Respondent asserts that if the Court follows Petitioner's argument regarding different classes, it must recognize Petitioner's argument is flawed. While Respondent believes § 39-71-710 treats those similarly situated the same, if the Court determines there are classes within the statute, it must recognize that there are three classes that are not similarly situated. The first class contains those permanently totally disabled claimants who receive or are eligible to receive social security retirement benefits. The second class contains those permanently totally disabled workers who are not eligible to receive social security benefits. The third class contains those workers who work past the age they become eligible to receive social security benefits and then are injured.

With these three classes, all claimants within each class are treated similarly. There is no requirement that the members of the three separate and distinct classes must be treated similarly for purposes of equal protection.

In this case, Satterlee falls within the class of permanently totally disabled claimants who receive or are eligible to receive social security benefits. Satterlee has been treated

the same as everybody else in her class. She was an injured worker who was covered under the Workers' Compensation Act. As a result of her injuries, she was found to be permanently totally disabled. She received permanent total disability benefits until she became eligible to receive social security retirement benefits. On the date she became eligible for social security retirement benefits, her entitlement to permanent total disability benefits ceased. In her brief, Satterlee has not established that anybody else who is in her class is treated differently.

The second class are those who are not eligible or who do not receive social security retirement benefits. These workers are not eligible because they have not worked the requisite number of quarters or have been in a labor market that is not required to pay social security taxes. All claimants in this class are not eligible to receive social security retirement benefits. Therefore, everybody in this class is treated the same. Members of this class receive life-time permanent total disability benefits.

The third class contains those injured workers who are eligible to receive social security retirement benefits but are gainfully employed and become permanently totally disabled. Since the workers in this class are injured after they are eligible for social security retirement benefits, they are entitled to benefits set forth in Section 39-71-710(2), MCA (1991). Section 39-71-710(2), MCA, specifically provides the benefits that each person in this class is entitled to receive. In essence, the statute recognizes some workers may work past the age they are entitled to social security retirement benefits. With the holding in *Reesor*, a worker who is eligible to receive social security retirement benefits, and who is injured and becomes permanently totally disabled, is entitled to receive his permanent partial disability benefits. All persons who fall within this class are treated similarly. But as to the three classes involved, they are not similarly situated and § 39-71-710, MCA (1991) is constitutionally sound.

5. Even If The Classes Were Similarly Situated, There Is A Rational Basis To Limit Permanent Total Disability Benefits

As previously set forth, Respondent contends there are three classes that are not similarly situated. If, however, the Court is inclined to accept the classes as identified in Petitioner's brief and determines that the classes are similarly situated, the Court should still conclude § 39-71-710, MCA (1991) is constitutional.

a. Legislative History.

In the early 1900s, Montana, along with other states, adopted a statutory scheme for the compensation of workers who were injured in the course and scope of their employment. Montana first enacted the Montana Workers' Compensation Act in 1915. The constitutionality of Montana's Workers' Compensation Act was upheld in *Shea v.*

North-Butte Min. Co., 55 Mont. 522, 179 P.2d 99 (1919).

Historically, it was recognized that the purpose of workers' compensation law was to limit the burden of work-related injury on the injured worker and shift it to the employer. It was realized that an employer could pass the increased costs of the workers' compensation insurance to customers. In theory, the public and commerce would help finance the cost of work-related injuries. *Murray Hosp. v. Angrove*, 92 Mont. 101, 10 P.2d 577 (1932); *Kerns v. Anaconda Copper Min. Co.*, 87 Mont. 546, 289 P. 563 (1930); *Betor v. National Biscuit Co.*, 85 Mont. 481, 28 P. 641 (1929); *Dawson v. East Butte Copper Min. Co.*, 78 Mont. 579, 254 P.2d 880 (1927).

It is within the power of the legislature to enact workers' compensation laws. *Shea*, 55 Mont. at 534, 179 P.2d at 509. Likewise, it has been recognized that it has always been left to the Montana legislature to determine the entitlement that an injured worker is entitled to receive under the Workers' Compensation Act. *Ingraham v. Champion Int'l*, 243 Mont. 42, 793 P.2d 772 (1990).

The Montana Supreme Court has consistently applied the rational basis test to equal protection challenges in workers' compensation cases. *Reesor*, 204 Mont. 370, 370 ¶ 14, 325 Mont. 1, ¶ 14, _____ P.3d _____, ¶ 14; *Powell v. State Compensation Ins. Fund*, 302 Mont. 518, 15 P.3d 877 (2000); *Henry v. State Compensation Ins. Fund*, 294 Mont. 449, 982 P.2d (1999); *Grooms v. Ponderosa Inn*, 283 Mont. 459, 942 P.2d 699 (1997); *Zempel v. Uninsured Employers' Fund*, 282 Mont. 424, 938 P.2d 658 (1997); *Heisler v. Heinz Motor Co.*, 282 Mont. 270, 937 P.2d 45, 50 (1997); *Stratemeyer v. Lincoln County*, 259 Mont. 147, 151, 855 P.2d 506, 509 (1993). To pass the rational-basis test, the challenged legislative enactment "must implicate legitimate goals, and the means chosen by the legislature must bear rational relationship to those goals." *Heisler*, 282 Mont. at 937 P.2d at 50 (quoting *Lyng v. Automobile Workers*, 485 U.S. 360, 375, 108, S.Ct. 1184, 1194, 99 Legal Ed. 2d 380, 394 (1988)).

As previously shown, when § 39-71-710, MCA, was first enacted in 1981, the proponents of the bill stated that the purpose of the amendment was to further the purpose of the Workers' Compensation Act which was meant to provide benefits to those who suffer a loss in their earning capacity, but that it should not become a "pension program." (Minutes of Senate Bill 64 - Labor and Relations - January 13, 1981, attached hereto as Exhibit 1). The legislative history further recognized that at the age of retirement, social security disability benefits were converted to social security retirement benefits. While government statistics show that a small minority of workers may continue to work past the age of retirement, the statistical evidence shows that a high percentage of workers are retired by age 65. Therefore, by and large, most workers retire by the age they are entitled to social security retirement benefits. The availability of the social security retirement benefits was certainly considered by the legislature when it decided that permanent total

disability benefits should end and not become a pension program.

In *Rausch II*, the Court fully recognized that permanent total disability benefits were meant to replace wages for the "work life" not the "life" of an injured worker. *Rausch II*, ___ Mont. ___, ¶ 24, 25. To allow benefits to continue until death, as argued by Petitioner in this case, would contradict a purpose of the Worker's Compensation Act and would create a pension program for those who are permanently totally disabled. The Montana Legislature carefully considered and debated the issue and decided that permanent total benefits should end when a worker receives or becomes eligible for social security retirement benefits. This is well within the Montana Legislature's power and authority.

b. Financial Interest.

As held in *Stratemeyer*, this Court can rely on any rational basis, not just legislative history, to determine whether there is a reasonable basis to support the governmental interest in enacting a particular statute. Beyond the legislative history, there is a financial interest in having permanent total disability benefits cease at the point in time a person receives or is eligible to receive social security benefits. It has been held on numerous occasions and recognized that it is a legitimate state goal to have a viable workers' compensation program for the State of Montana. *Stratemeyer, supra*. And, while cost control alone cannot justify disparate treatment, it must be recognized as a factor supporting a rational basis behind terminating permanent total disability benefits as described in § 39-71-710, MCA *Heisler, supra, Powell, supra*. Certainly, requiring the payment of permanent total disability benefits for the "life" of a worker would create an enormous unfunded liability for employers and workers' compensation insurers.

c. Public Policy.

The expressed public policy of the Workers' Compensation Act with regard to wage loss benefits provides a rational basis to support § 39-71-710, MCA. In the declaration of public policy for "interpreting and implying the Workers' Compensation Act, the legislature clearly identified its 'legitimate government interests'." In § 39-71-105, MCA (1999), the legislature declared:

For the purposes of interpreting and applying Title 39, Chapters 71 and 72, the following is the public policy of this state:

- [1] It is an objective of Montana's workers' compensation system to provide, without regard to fault, wage supplement and medical benefits to a worker suffering from a work-related injury or disease.
Wage-loss benefits are not intended to make an injured worker

whole; they are intended to assist a worker at a reasonable cost to the employer. Within that limitation, the wage loss benefits should bear a reasonable relationship to actual wage lost as a result of a work-related injury or disease.

* * *

- [3] Montana's workers' compensation and occupational disease insurance systems are intended to be primarily self-administering. Claimant should be able to speedily obtain benefits, and employers should be able to provide coverage at **reasonable constant** rates. .

* * *

- [5] . . . it is within the legislature's authority to define the limits of the workers' compensation and occupational disease system . . . (emphasis added.)

As set forth in the declaration of public policy for the Workers' Compensation Act, wage loss benefits have been considered and recognized as not being intended to make an injured worker whole. Rather, these benefits are intended to assist a worker at a reasonable cost to the employer. Moreover, it is the expressed policy of the legislature to define the limits of workers' compensation benefits. With regard to wage loss benefits at issue here, the legislature after debate and careful consideration and through its proper authority, enacted legislation identifying when permanent total disability benefits would cease. This public policy is fully supported by *Rausch II*, which recognized that PTD benefits were meant to be paid for the "work life," not the "life" of the injured worker as argued by Satterlee. *Rausch II*, ¶ 24, 25. Therefore, an expressed public policy provides a rational basis for the legislature to identify when permanent total disability benefits should cease under § 39-71-710, MCA.

Furthermore, statutes have been upheld which provide different amounts of benefits to similarly-situated persons where there is a rational basis supporting the legislation. *Gulbranson v. Kerry*, 272 Mont. 494, 503-505, 901 P.2d 573, 579-580 (1995). If Petitioner's reasoning is followed, the legislature's authority to set the amount and manner of payment of benefits would be undermined. *Ingraham*, 243 Mont. 42, 793 P.2d at 772. Such a result would ignore the well-established principle that imperfection in classification relating to benefits does not, in and of itself, render a legislative enactment unconstitutional on equal protection grounds. *Gulbranson*, 272 Mont. at 503-505, 901 P.2d at 579-580. As held in *Stratemeyer*, "[T]he legislature is simply in a better position to develop the direction of economic regulation, social and health issues." 259 Mont. at 153, 855 P.2d at

510. Moreover, if Satterlee's argument is adopted, once a PTD claimant's social security benefits switch from disability to retirement benefits, theoretically the workers' compensation insurer would no longer be entitled to offset benefits as allowed in § 39-71-702, MCA (1991) resulting in a windfall for the claimant.

6. Despite Reesor, § 39-71-710 Is Constitutional.

The *Reesor* decision should be limited to its holding. In its decision, the Court was very careful to state the only issue on appeal is "Whether the age limitation of PPD benefits set forth in § 39-71-710, MCA, violates Article II, Section 4, of the Montana Constitution." *Reesor*, 204 MT. at 373, ¶ 7, 323 Mont. 1, ¶ 7, _____ P.3d _____, ¶ 7. The Court believed that it violated equal protection where a whole class of benefits, permanent partial disability benefits, were denied to those who were entitled to permanent total disability benefits. This Court can still follow *Reesor* and find the remainder of § 39-71-710, MCA, constitutional. For example, Chapter 464, Section 71, Mont. Session Laws of 1987, provides a severability clause which states:

Section 71. Severability.

If a part of this act is invalid, all valid parts are severable from the invalid parts and remain in effect. If a part of the act is invalid in one or more of its applications, the parts remain in effect and all valid applications are severable from the invalid applications.

Unlike *Reesor*, no injured worker who is entitled to PTD benefits is precluded from obtaining permanent total disability benefits. All persons who meet the definition of permanently totally disabled are entitled to benefits under the Act. Furthermore, with the *Reesor* decision, those people who are permanently totally disabled will now be entitled to permanent partial disability benefits at the point they become eligible to receive social security retirement benefits. Therefore, the economic impact upon persons reaching the age of eligibility for social security retirement benefits will be softened as they will be entitled to permanent partial disability benefits once they become eligible for social security retirement benefits and their permanent total disability benefits end.

C. § 39-71-710, MCA, Does Not Impermissibly Delegate Legislative Powers

Article III, Section 1, provides as follows:

Section 1. Separation of Powers. The power of the government of this state is divided into three distinct branches -- legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or

permitted.

In support of her claim that § 39-71-710, MCA is an unconstitutional delegation of legislative authority, Satterlee cites only one case, *Lee v. State* (1981), 195 Mont.1, 635 P.2d 1282, cert. denied 456 U.S. 1006, 73 L. Ed. 1300, 102 S. Ct. 2295, 1982 U.S. LEXIS 2331, 50 U.S.L.W. (1982). In *Lee*, the statute at issue, § 61-8-304, MCA, provided in pertinent part:

The attorney general shall declare . . . a state speed limit . . . whenever the establishment of such a speed limit by the state is required 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 . . .

As to the unconstitutionality of § 61-8-304, MCA, the Montana Supreme Court stated:

Thus we come to the essential invalidity of section 61-8-304, MCA. The authority conferred upon the attorney general in that statute is clearly an impermissible delegation of legislative authority. 1972 Mont. Const., Art. III, § 1; *Matter of Auth. to Conduct Sav. & Loan Act. Etc.* (1979), Mont. 597 P.2d 84, 36 St. Rep. 1207; *Bacus v. Lake County* (1960), 138 Mont. 69, 354 P. 2d 1056.

Lee concedes that the legislature has the authority to adopt existing federal statutes or regulations in its enactments. We agree. See *Wallace v. Commissioner of Taxation* (1971), 289 Minn. 220, 184 N.W. 2d 588 (the statute adopted the federal definition of adjusted gross income for state income tax purposes.)

The constitutional infirmity of section 61-8-304, MCA, arises out of its mandatory directions to the attorney general to proclaim a speed limit "not . . . less than that required by federal law," "whenever the establishment of such a speed limit by the state is required by federal law" to receive highway funds. Under the 1974 act, and under the act as it now exists, the attorney general is also required to terminate such proclaimed speed limit "whenever such a speed limit is not longer required by federal law." Section 61-8-305 (2), MCA. A more blatant handover of the sovereign power of this state to the federal jurisdiction is beyond our ken.

Almost without exception, the cases which recognize the right of a legislature to adopt as a part of its enactments existing federal laws and regulations also

except from that right any adoption of changes in the federal laws or regulations to occur in the future. *Wallace v. Commissioner of Taxation*, supra: *People v. DeSilva* (1971), 32 Mich.App. 707, 189 N.W.2d 362 (statute upheld on ground of severability); *Cheney v. St. Louis Southwestern Railway Co.* (1965), 239 Ark. 870, 394 S.W.2d 731; *Idaho Savings & Loan Association v. Roden* (1960), 82 Id. 128, 350 P.2d 225; *Seale v. McKennon* (1959), 215 Or. 562, 336 P.2d 340; *Dawson v. Hamilton* (Ky. 1958), 314 S.W.2d 532; *State v. Urquhart* (1957), 50 Wash.2d 131, 310 P.2d 261; *Brock v. Superior Court* (1937), 9 Cal.2d 291, 71 P.2d 209, among others.

Three states have upheld legislation similar to Montana's and denied constitutional challenges to statutes incorporating federal speed limits. *Masquelette v. State* (Tex. Crim. 1979), 579 S.W.2d 478; *State v. Dumler* (1977), 221 Kan. 386, 559 P.2d 798; *State v. Padley* (1976), 195 Neb. 358, 237 N.W.2d 883. All three can be distinguished from this case by the terms of the Montana statute. In the other three cases, either the legislature pegged the speed limit, or the power granted to a state official or body to adopt speed limits was couched in permissive instead of mandatory terms. No state that we can find has approved a delegation of sovereign power involved here for mandatory action in the future, based upon the federal law. *Lee*, 635 P.2d at 1286-87.

With regard to the delegation of powers, the decision in *Lee* is distinguishable from Satterlee's situation. In *Lee* the Montana Supreme Court recognized that the legislature has the authority to adopt existing federal statutes or regulations in its enactments. The constitutional problem in *Lee*, however, was that § 61-8-304, MCA, essentially gave the federal government the power to direct the activities of the executive branch of Montana government by requiring the Montana Attorney General to proclaim a certain speed limit as dictated by the federal government. *Lee* was thereby aggrieved by the actions of the Montana executive branch being dictated by the federal government.

There has been no such delegation of power by § 39-71-710, MCA with respect to Satterlee. The cases cited in the *Lee* decision explain the application of the separation of powers doctrine and how it may be violated. It takes only a review of a few of those cases to see that Satterlee has misconstrued the application of the separation of powers doctrine, and, in fact, there has been no unconstitutional delegation of authority under Section 39-71-710, MCA (1991).

In *Matter of Authority to Conduct Sav. & Loan Act., Etc.* (1979) Mont. 597 P.2d 84, 36 St. Rep. 1207, the constitutionality of § 32-2-231, MCA was questioned as being an unconstitutional delegation of power under Article III, Section 1, of the 1972 Montana Constitution. Under that statute, the legislative branch of Montana government gave authority to the executive branch of Montana government, through the Department of

Business regulation, to determine whether two savings and loans could consolidate and merge into one. The language of the statute provided no criteria for making the determination, but rather only said “. . . Any two (2) or more building and loan associations, by and with the consent and approval of the superintendent of banks, (now known as the Director of the Department of Business Regulation) . . .” This delegation was so overly broad as to provide unascertainable limits of legislative power to the Department of Business Regulation in the executive branch, in violation of the separation of powers doctrine.

In *Bacus v. Lake County*, 138 Mont. 69, 354 P.2d 1056 (1960), the statute in question provided power to county and district boards of health (the executive branch) to enact rules and regulations “pertaining to the prevention of disease and the promotion of public health.” The Montana Supreme Court held that the quoted language impermissibly gave legislative authority to a part of the executive branch because the statutory language provided arbitrary or uncontrolled discretion as to health matters. *Bacus*, 138 Mont. 354 P.2d at 81.

In *People v. DeSilva*, 32 Mich. App. 707, 189 N.W. 2d 362 (Mich. App. 1971), the legislature conferred authority upon the Michigan Department of Agriculture, in the executive branch, to adopt rules and regulations necessary for the enforcement of weights and measures. The statute directed the department to use the specifications and regulations of the national bureau of standards. The Court had no problem with the constitutionality of this part of the statute, noting that it has been consistently held that statutes which incorporate existing federal statutes, rules, and regulations by reference are valid and constitutional. However, the Michigan Court did have a problem with the statutory language requiring the department adopt handbook 44 “and supplements thereto, or in any publication revising or superseding handbook 44 . . .” The court noted that it has been the majority holding “that adoption by reference of future legislation and rules are unconstitutional.” *People*, 189 N.W. 2d at 365.

Section 39-71-710, MCA (1991) in no way delegates any legislative function to the executive branch as occurred in *Lee* and *Bacus*. Section 39-71-710, MCA (1991) merely incorporates by reference federal law as it existed at the time of Satterlee’s injury. This is acceptable under *Lee*.

Quite unlike *People v. DeSilva* and *Lee*, § 39-71-710, MCA (1991), does not require the incorporation of any future changes in the social security laws to the applicability of a claim governed by § 39-71-710, MCA (1991). There simply is no language in § 39-71-710, MCA (1991), which empowers the federal government to change Satterlee’s status. In fact, there is no language in § 39-71-710, MCA (1991), which requires any branch of Montana government to do anything as it relates to Satterlee.

Finally, Lumberman’s Mutual is not a branch of government and plainly is not listed

in Article III, Section 1, of the Montana Constitution. Any action Lumberman's Mutual took pursuant to that statute was not at the direction of the federal government to Mrs. Satterlee's detriment, but was merely the permissible use of a lawfully enacted statute of the Montana Legislature. As the *Lee* decision clearly states, a legislature is free to adopt as a part of its enactments existing federal laws and regulations. That is all that § 39-71-710, MCA (1991), does. Section 39-71-710, MCA (1991) does not violate Article III, Section 1 of the Montana Constitution.


III. CONCLUSION

In conclusion, § 39-71-710, MCA (1991), is constitutional. The basic premise for permanent total disability benefits was to provide benefits for loss of earning capacity for the "work life" of an injured worker. The purpose for permanent total disability benefits was not to create a "pension program" for those who are permanently totally disabled. Clearly, there is a rational basis for setting forth a time frame when permanent total disability benefits will end.

This situation is not similar to the facts presented in *Reesor* in which the legislative statute denied an entire class of benefits to all permanently totally disabled workers. Certainly, the Montana Legislature has legal authority to determine when an injured worker's entitlement to permanent total disability benefits ends. The Legislature has also determined the circumstances under which each and every other type of workers' compensation benefits ends as well. By doing so, the legislature enacted law that provides benefits to assist a worker at a reasonable cost to the employer. Accordingly, Respondent respectfully requests that the Court find that § 39-71-710, MCA (1991), does not violate the Montana or United States Constitution.

DATED this 8th day of August, 2005.

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CERTIFICATE OF SERVICE

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