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IN THE WORKERS' COMPENSATION COURT
FOR THE STATE OF MONTANA

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

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.
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> 2. Lumberman's accepted liability for the claim as an industrial injury and paid medical and indemnity benefits for various periods of time.
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> 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.
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> 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.
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> 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. *Skrukrud 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