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OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

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ATTORNEYS FOR RESPONDENT/INSURER

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA
WC COURT NO. 2003-0840

CATHERINE E. SATTERLEE, Petitioner, vs. LUMBERMAN'S MUTUAL CASUALTY COMPANY, Respondent/Insurer for BUTTREY FOOD & DRUG, Employer.	**WC Claim No.: 788CU041791**
JAMES ZENAHLIK, Petitioner, vs. MONTANA STATE FUND, Respondent/Insurer for EAGLE ELECTRIC, Employer.	**WC Claim No.: 03-1997-06362-9**
JOSEPH FOSTER, Petitioner, vs. MONTANA STATE FUND, Respondent/Insurer for ALLEN ELECTRIC, Employer.	**WC Claim No.: 3-95-17425-3**
DORIS BOWERS, Petitioner, vs. PUTMAN & ASSOCIATES, Adjusters for ROYAL & SUNALLIANCE, Respondent/Insurer for TIDYMANS, Employer.	**WC Claim No.: 290044312000**

MONTANA MUNICIPAL INSURANCE AUTHORITY, MONTANA ASSOCIATION OF COUNTIES AND MONTANA SCHOOLS GROUP INSURANCE AUTHORITY'S AMICI BRIEF IN SUPPORT OF THE RESPONDENT'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO PETITIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT

DOCKET ITEM NO. 213

INTRODUCTION

The MONTANA MUNICIPAL INSURANCE AUTHORITY, MONTANA ASSOCIATION OF COUNTIES AND MONTANA SCHOOLS GROUP INSURANCE AUTHORITY (hereinafter "the Cities, Counties and Schools") are self-insured entities relying on tax dollars to fund workers' compensation coverage for hundreds of cites, counties and schools and thousands of employees. The Cities, Counties and Schools have a significant stake in the outcome of this case. The self-insured entities were initially formed because of a crisis in obtaining reasonably priced insurance services for governmental entities. The formation of self-insured entities and the passage of legislation like §39-71-710, MCA, has allowed governmental entities to retain reasonably priced workers compensation coverage without overburdening the taxpayers ultimately responsible for the payment of the insurance premiums while providing the injured worker with reasonable compensation for wage loss during their work life. If Petitioners in this case are successful in overturning the very legislation responsible for maintaining reasonably priced insurance coverage, a nearly impossible burden will be passed to taxpayers responsible for supporting the Cities, Counties and Schools. The same taxpayers could also be required to pay another employee tax to bail out the retrospective unfunded liabilities associated with an unfavorable decision against the State Fund's "Old Fund."

This unnecessary imposition on taxpayers is particularly egregious because the statute challenged by Petitioners does not treat similarly situated members of a class in a disparate manner. Further the Legislature has a rational basis for terminating permanent total disability benefits when a permanently totally disabled worker becomes eligible to receive Social Security retirement benefits. Under these circumstances, Petitioners' cannot carry the heavy burden of demonstrating beyond a reasonable doubt no rational basis for the statute and the constitutionality of the statute should be upheld.

IDENTIFICATION OF AMICI

A. Montana Municipal Insurance Authority

The Montana Municipal Insurance Authority was formed in the 1980's as a response to the crisis in obtaining reasonably priced insurance for local governmental entities like cities and towns. The MMIA's Workers' Compensation Program began providing coverage in January 1986. Its current membership consists of 100 cities and towns across Montana and it provides coverage to a municipal workforce of about 7,000 employees. The Workers' Compensation Program relies on taxpayer funded premiums. Reasonable rate setting relies, in turn, on the benefits determined by statutes like §39-71-710, MCA. If §710 is found unconstitutional and permanently totally disabled workers are entitled to receive permanent total disability benefits for life and after becoming eligible for

social security retirement, MMIA's Workers Compensation Program will face in excess of a million of dollars of unfunded liability (if the decision is retroactively applied) and additional millions in prospective liability. Cities could be required to spend more tax dollars to provide workers compensation which, of course, impacts the ability to provide other essential governmental services. (See attached affidavit of Bob Worthington.)

B. THE MONTANA ASSOCIATION OF COUNTIES

The Montana Association of Counties' workers compensation program was started in 1985 in response to the same crisis in insurance coverage for local government entities that resulted in the formation of the MMIA. Currently 53 of Montana's 56 counties participate in the program which provides workers compensation coverage for approximately 10,000 employees. The program is entirely funded by its member entities which are in turn funded by taxpayer contributions. Currently the program is paying permanent total disability benefits to 15 individuals. If MCA §39-71-710 as applied to permanent total disability workers is found to be unconstitutional, additional liability to the program for these claims is well in excess of a million dollars. Retroactive and/or prospective application of such a decision would likewise result in significant additional liability. The addition of significant unfunded liability and prospective liability will have a significant detrimental impact on the program, the covered entities and, ultimately, the taxpayers.

C. THE MONTANA SCHOOLS GROUP INSURANCE AUTHORITY

Like the Cities and Counties, the Montana Schools Group Insurance Authority is a workers compensation self insurance pool formed in 1989 in response to the insurance crisis of the 1980's. Currently, 231 school districts are members and 20,000 K-12 public school employees are covered. The program is funded, in large part, by the taxpayers in the 231 school districts. The self insurance pool concept and reliance on the statutory benefit scheme created by the Legislature has resulted in significant price relief for taxpayers. (See attached affidavit of Shawn Bubb.)

If Petitioners are successful in this case, retroactive and prospective costs could be several million dollars, with devastating impacts to the taxpayers paying for the program, and the 20,000 employees covered by the program. It is estimated the cost to recoup just the potential retrospective costs would remove 109 teachers from Montana's classrooms, based on an average base teacher salary of $22,858.00 per year. (See attached affidavit of Shawn Bubb.)

ARGUMENT

Obviously, a decision favorable to Petitioners in this case will require local government entities, taxpayers and thousand of employees covered by the Cities, Counties and Schools self-insurance programs to expend additional millions of dollars to provide workers compensation benefits with a corresponding decrease in monies available for governmental services and employee salaries and benefits. Such a result is entirely unnecessary as Petitioners' cannot prove §39-71-710, MCA is unconstitutional. On the contrary, §710 has the obvious rational basis of providing permanent total disability benefits to permanently totally disabled workers until they are eligible for social security retirement. These workers are easily distinguished from partially disabled workers because they will not re-enter the workforce at any time and they are not suffering a wage loss when they become eligible for social security retirement benefits. Termination of permanent total disability benefits under these circumstances is entirely consistent with the Legislature's express intent to provide wage loss benefits at reasonable cost to employers. Petitioners' motion for partial summary judgment should be denied and Respondents' cross motion should be granted.

I. Petitioners cannot prove beyond a reasonable doubt §710 is unconstitutional.

Petitioners consistently ignore the primary hurdle they must clear to be successful in this case. The constitutionality of statutes is prima facie presumed, and all issues must be resolved in favor of the constitutionality of the statute. Powell v. State Fund, 2000 MT 321, ¶13, 302 Mont 518, ¶13, 15 P3d 877. Unconstitutionality must be proven beyond a reasonable doubt, the highest standard of proof available under the law, and every possible presumption must be indulged in favor of the statute. Id.

It is the Court's job to find the constitutional purpose of the statute not to search out reasons to condemn it. Id. This principle has been lost in recent years, but if cannot be ignored as Petitioners have attempted to do in this case.

Petitioners have wedded willful ignorance of the standard of proof of constitutionality with abject failure to identify an impermissible, discriminatory purpose. State v. Price, 2002 MT 229 ¶42, ¶41, 311 Mont. 439, ¶41, 57 P3d 42, ¶41. They have failed to demonstrate the necessary antipathy to justify overturning a statute which has been in operation since 1981. Vance v. Bradley, (1979), 440 U.S. 93,97,99 S.Ct. 939, 942-43, 59L.Ed.2d 171,176. A less than perfect result for some individuals is not impermissible discrimination, or antipathy, and imperfect statutes are not constitutionally infirm if they have a rational basis. Classifications, even discriminatory classifications, are reasonable if any state of facts reasonably may be conceived to justify them. Johnson v. Sullivan, (1977), 174 Mont. 491,498,571 ¶.2d 798,802.

If the Court applies these traditional standards of constitutional interpretation, then it cannot find §710 unconstitutional. It does not treat similarly situated individuals unequally and it has a rational basis consistent with the express purpose of the Workers' Compensation Act.

II. Section 710 contains no unconstitutional classifications.

The Montana Supreme Court in Reesor v. State Fund, 2004 MT 370, began its analysis at almost the right point: "When addressing an equal protection challenge, this Court must first identify the classes involved, and determine if they are similarly situated." Reesor ¶10. Petitioners in the present case suggest have and have not classes of permanently totally disabled claimants, those eligible for social security retirement and those who are not eligible. These, however, are not similar classes subject to dissimilar treatment as Petitioners suggest. These classes are not similarly situated.

Understandably, Petitioners argue the Reesor decision applies to the facts of this case to resolve the similar classification issue. However, the Montana Supreme Court in Rausch v. State Fund, 2005 MT 140, made it abundantly clear permanent total benefits issues are addressed differently.

> "PPD benefits compensate the worker for sustaining a partial disability by a smaller impairment award, and supplements the wages earned by the claimant upon return to work. PTD benefits do not contemplate a return to work, but, rather, provide a continuous, higher benefit which is paid over the work life of the totally disabled claimant. With these distinctions in mind, it would be inappropriate for the Court to make comparisons between these dissimilarly situated classes and then to order that either class is entitled to a benefit designed for a different class-here , that PTD claimants are entitled to an impairment award. We conclude, therefore, that PPD claimants and PTD claimants are not similarly situated, and that Appellants' equal protection challenge to the failure to pay an impairment award to PTD claimants must fail."

Rausch II, ¶25.

Clearly Reesor, a permanent partial disability case, is not dispositive of the issues presented here. Petitioners' almost sole reliance on Reesor to support their claim to permanent total disability benefits for life is misplaced. Just like the Rausch II, the court recognized that PTD and PPD claimants are not similarly

situated, permanently totally disabled claimants eligible to receive social security retirement are not similarly situated with permanently totally disabled claimants ineligible to receive social security retirement benefits for obvious reasons. Ineligible claimants potentially have no other source of income beyond permanent total disability benefits and the Legislature determined their benefits would continue. Eligible claimants, on the other hand, have access to social security retirement benefits and the Legislature determined it would be inequitable and unnecessarily costly to provide ongoing PTD benefits to workers already receiving social security retirement benefits.

Unlike the permanently partially disabled workers in Reesor, there are two distinct and dissimilar classes in the present case and their dissimilar treatment is justified by their dissimilar status. Eligible claimants have a source of retirement income to replace their permanent total disability benefits. Ineligible claimants are a different class entirely and are dependant upon permanent total disability benefits as their sole income source.

If this Court resolves all doubt in favor of the constitutionality of §710, as it is required to do, it must find two dissimilar classes of beneficiaries with dissimilar treatment justified by their dissimilar circumstances. The Court need go no further in the analyses and should rule in favor of the Respondents.

III. Even if the classes were similar, which they are not, there is a rational basis for dissimilar treatment of eligible and ineligible claimants.

Equal protection claims brought by injured workers are subject to the rational basis test. Reesor, ¶14. Classifications cannot be patently arbitrary and bear no rational relationship to a legitimate governmental interest. Id., ¶15. Apparently, the Reesor Court finds legitimate governmental objectives in the public policy statement set forth by the Legislature in §39-71-105, MCA. Those policies clearly state the workers compensation system is designated to provide wage supplement and wage loss benefits to injured workers at reasonable cost to the employer. "Within that limitation, the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury." Id., ¶16; §39-71-105(1), MCA. Section 39-71-105(3) provides, in part, that employers should be able to provide coverage at reasonably constant rates. Providing reasonably constant rates is an obvious element of the legitimate stated goal of promoting the economic health of Montana communities and businesses. Meech v. Hillhaven West Inc., (1989), 238 Mont 21,48,776 P.2d 488,504.

The plain language of §105(1) refers to supplementary wage loss benefits at a reasonable cost to employers. As a rule, retired people are no longer in the workforce earning wages, unless they are not eligible for retirement. It makes perfect sense to terminate permanent total disability upon eligibility for social security benefits because that is when the injured worker likely would have left the

work force and no longer earning wages. Social security retirement replaces wages for eligible workers, but it is not a wage loss benefit. The worker is retired and is no longer earning wages subject to wage loss. Fellenberg v. Transportation Insurance Company, 2005 MT 90, ¶17.

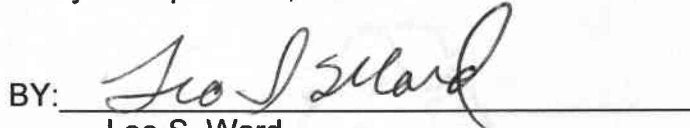
The Legislature has a legitimate objective in supplementing lost wages until permanently totally disabled workers became eligible for wage replacement social security benefits. After that time, they are no longer suffering wage loss, but are eligible for wage replacement benefits. Likewise, the Legislature has a legitimate objective in continuing to provide PTD benefits to workers ineligible for social security retirement benefits, because they did not have the opportunity to earn the quarters necessary to qualify for wage replacement benefits and had no other form of wage replacement income available to them. This objective is both just and humane, as well as rational. It provides for those ineligible for wage replacement benefits through no fault of their own at reasonable cost to employers.

The purpose of §710 is clear on its face as it applies to permanently totally disabled claimants. However, even if it was not clear, any possible purpose that Court can conceive must be entertained before the legislation can be found unconstitutional. Stratemeyer v. Lincoln County, (1993), 259 Mont. 147,152,855 P.2d 506, 509,510. If the Court applies the beyond a reasonable doubt standard to this rational basis for providing benefits to those with no other option, while terminating benefits of those eligible for wage replacement benefits, it must rule in favor of Respondents. Section 39-71-710, MCA, is not constitutionally infirm and it should be given the benefit of the presumption of constitutionality when it clearly supports the legitimate government interests set forth in §39-71-105, MCA.

CONCLUSION

The Cities, Counties and Schools and the Montana taxpayers supporting these self insured programs should not be faced with fiscal disaster when the Legislature has pursued a legitimate and humane objective in furtherance of the public policy of providing wage loss benefits at a reasonable cost to employers. Respondents should prevail on their cross motion for partial summary judgment.

DATED this 1st day of September, 2005.

BY: 

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Attorneys for Respondent/Insurer

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of September, 2005, a true and correct copy of the foregoing was this day deposited in the United States mail, postage prepaid, addressed to:

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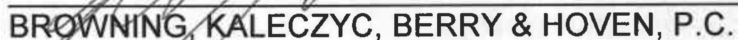

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ATTORNEYS FOR RESPONDENT/INSURER

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CATHERINE E. SATTERLEE, Petitioner, v. MONTANA MUNICIPAL INSURANCE AUTHORITY, MONTANA ASSOCIATION OF COUNTIES AND MONTANA SCHOOLS GROUP INSURANCE AUTHORITY, Respondents.	)))))))))	WCC No. 2003-0840 **AFFIDAVIT OF SHAWN BUBB**

STATE OF MONTANA)
:ss
County of Lewis and Clark)

SHAWN BUBB, being first duly sworn upon his oath, deposes and states:

1. I am the Director of Insurance Services for the Montana School Boards Association, which is the third party administrator for the Montana Schools Group Insurance Authority ("MSGIA"), and I am familiar with the history of the workers' compensation self insurance pool.

2. MSGIA is a workers' compensation self insurance pool formed in 1989 in response to the insurance crisis of the 1980's.

3. Currently, 231 school districts are members and 20,000 K-12 public school employees are covered under MSGIA.

4. The program is funded, in large part, by taxpayers in the 231 school districts.

5. The self insurance pool concept and reliance on the statutory benefit scheme created by the Legislature has resulted in significant price relief for taxpayers.

6. If Petitioners are successful in this case, retroactive and prospective costs could be several million dollars, with potentially devastating impact to taxpayers paying for the program and the 20,000 employees covered by the program.

7. I have estimated the cost to recoup just the retroactive costs could remove 109 teachers from Montana's classrooms, based on an average base teacher salary of $22,858.00 per year.

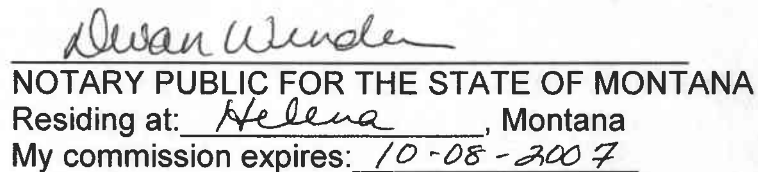
FURTHER Affiant Sayeth Not.

DATED this 30 day of August, 2005.

SHAWN BUBB

On this 30th day of August, 2005, before me, the undersigned, a Notary Public in and for the State of Montana, personally appeared Shawn Bubb, of Helena, Montana, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my notarial seal on the day and year first above written.



NOTARY PUBLIC FOR THE STATE OF MONTANA
Residing at: Helena, Montana
My commission expires: 10-08-2007

(Notarial Seal)

Oliver H. Goe
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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CATHERINE E. SATTERLEE, Petitioner, v. MONTANA MUNICIPAL INSURANCE AUTHORITY, MONTANA ASSOCIATION OF COUNTIES, AND MONTANA SCHOOLS GROUP INSURANCE AUTHORITY, Respondents.	) WCC No. 2003-0840))) **AFFIDAVIT OF ROBERT**) **WORTHINGTON**)))))))

STATE OF MONTANA)
:ss
County of Lewis and Clark)

ROBERT WORTHINGTON, being first duly sworn upon his oath, deposes and states as follows:

1. I am the Chief Executive Officer of the Montana Municipal Insurance Authority (MMIA). The MMIA is a Plan I self-insurer under the Montana Workers' Compensation Act.

2. During the mid 1980s cities and towns were finding it increasingly difficult to obtain affordable liability and workers' compensation insurance.

3. The MMIA was created via Interlocal Agreements to provide Montana cities and towns with an affordable way to obtain necessary liability insurance and mandatory worker's compensation coverage.