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FILED
SEP 22 2005
OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT
FOR 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**

DOCKET ITEM NO. 255

INTRODUCTION

Catherine Satterlee, James Zenahlik, Joseph Foster, and Doris Bowers (hereafter Satterlee) are all older similarly situated workers who are denied PTD benefits because of their age. The Satterlee petitioners were denied ongoing PTD benefits because §39-71-710, MCA, terminates PTD entitlement at the age of Social Security Retirement Income (hereafter SSRI) eligibility. However, §39-71-710, MCA, was found unconstitutional in *Reesor v. State Fund,* 2004 MT 370, 325 Mont. 1, 103 P.3d 1019 (2004). Based on *Reesor*, this Court should hold that §39-71-710, MCA, violates Satterlee's right to equal protection. Age alone should not eliminate Satterlee's right to receive PTD benefits.

ARGUMENT

Reesor held that §39-71-710, MCA, was unconstitutional because it denied equal PPD benefits to elderly claimants. Here, Satterlee submits §39-71-710 is unconstitutional because it denies equal PTD benefits to elderly claimants. PPD and PTD benefits are legally indistinguishable in the statute:

> (1) If a claimant is receiving disability or rehabilitation compensation benefits and the claimant receives social security retirement benefits or is eligible to receive or is receiving full social security retirement benefits or retirement benefits from a system that is an alternative to social security retirement, the claimant is considered to be retired. When the claimant is retired, the liability of the insurer is ended for payment of ***permanent partial disability benefits*** other than the impairment award, payment of ***permanent total disability benefits, <u>and</u> payment of rehabilitation compensation benefits***. However, the insurer remains liable for temporary total disability benefits, any impairment award, and medical benefits.
>
> (2) If a claimant who is eligible under subsection (1) to receive retirement benefits and while gainfully employed suffers a work-related injury, the insurer retains liability for temporary total disability benefits, any impairment award, and medical benefits.

[Emphasis added].

The denial of PTD benefits to Satterlee and other elderly claimants because of age is a violation of the equal protection clause of the Montana Constitution. Article II, Section 4, of the Montana Constitution provides:

> The dignity of the human being is inviolable. No person shall be denied equal protection of the laws.

Fundamental fairness and the Montana Supreme Court holding in *Reesor* leave no doubt that §39-71-710, MCA, expressly denies equal PTD benefits to older workers. The resulting

inequity is severe and indefensible. If Ms. Satterlee were younger, she would receive full PTD benefits. Therefore, Ms. Satterlee submits that §39-71-710, MCA, violates the Equal Protection Clause of the Montana Constitution.

The two classes involved here are virtually identical to *Reesor*: PTD eligible claimants who receive SSRI versus PTD eligible claimants who do not receive SSRI. Respondents do not address these classes. Rather, in an end run, they attempt to redefine the classes. Respondents' avoidance of the issue shows clearly that Respondents cannot justify the disparate treatment mandated by the statute. This Court should find that *Reesor* defines the classes, agrees they are similarly situated, and holds such disparate treatment unconstitutional.

For equal protection purposes, the *Reesor* classes and the Satterlee classes are identical. These classes are similarly situated for the following reasons: both classes have suffered work-related injuries, both classes are unable to return to work, both classes have injury-related wage loss, both classes have permanent physical restrictions, and both classes have §39-71-702, MCA, as their exclusive remedy under Montana law. *Reesor* at ¶12. Therefore, the classes presented in Satterlee are similarly situated, as were the classes in *Reesor*. The age of the claimant is the only difference between the classes.

There is no reasonable rationale provided by any of the Respondents for denying equal protection. The single discriminating factor between the classes is age, yet Respondents argue there is a constitutional basis for this discrimination – economics. When it is distilled down, it is all about money. However, the issue before this Court is whether §39-71-710, MCA, denies equal protection and is therefore unconstitutional.

This question should be decided with little regard to economics. No Respondent presents any economic information that is legally and factually sufficient to be considered by this Court. Further, if the economic information is considered, it appears overstated.

THERE ARE ONLY TWO CLASSES

Here, there are only two classes: (1) PTD claimants who receive SSRI; and (2) PTD claimants who do not receive SSRI. The two classes at bar are legally identical to the classes identified in *Reesor*:

> Reesor maintains the two classes involved in this appeal are: (1) PPD eligible claimants who receive or are eligible to receive social security retirement benefits; and (2) PPD claimants who do not receive and are not eligible to receive social security retirement benefits.

Reesor at ¶10.

Frustrated by their inability to defend the inequitable treatment of these two classes, Respondents have tried in various ways to redefine more than two classes. Respondents argue against the obvious, because that is the only way they can derail the equal protection analysis established in *Reesor*. This is not a new tactic. Respondents also tried to redefine the classes in *Reesor*:

> The State Fund initially challenges Reesor's classification scheme contending these classes are not similarly situated because the added benefit of social security

serves the same purpose as replacing lost wages, and specifically, Reesor only suffers a partial wage loss yet receives full social security retirement benefits. Corollary to this argument is the State Fund's assertion that workers' compensation benefits and social security retirement benefits are part of an integrated system of wage loss benefits, and both benefits serve the same purpose to restore earnings due to wage loss, the cause of wage loss being irrelevant. Relying upon *Watson v. Seekins* (1988), 234 Mont. 309, 763 P.2d 328, it contends workers' compensation offset statutes prevent double dipping, and receiving both social security retirement benefits *and* disability benefits is, in essence, double dipping.

Reesor at ¶11.

The Supreme Court in *Reesor* rejected the Respondent's attempt to redefine the classes, and more importantly found that the two classes, as proposed here, are similarly situated:

> We agree with Reesor, however, when he asserts that both classes are similarly situated because both classes have suffered work-related injuries, are unable to return to their time of injury jobs, have permanent physical impairment ratings and must rely on § 39-71-703, MCA, as their exclusive remedy under Montana law. The claimant's age, as a result of eligibility to receive social security retirement benefits, is the only identifiable distinguishing factor between the two classes. Furthermore, chronological age and the corresponding eligibility for social security retirement benefits is unrelated to a person's ability to engage in meaningful employment. Therefore, we conclude the classes are similarly situated for equal protection purposes.

Reesor at ¶12.

In the case at bar, both classes of PTD claimants are similarly situated because both classes have suffered work-related injury, both are unable to return to work, both have permanent physical impairment, and both must rely on §39-71-702, MCA, as their exclusive remedy under Montana law. Therefore, the equal protection analysis here is legally identical to *Reesor*.

A MIDDLE-TIER ANALYSIS SHOULD BE APPLIED

After the Court determines that the classes are similarly situated, the Court decides which of three levels of scrutiny to apply. The Montana Supreme Court has recognized three levels of scrutiny: strict scrutiny, middle-tier scrutiny, and rational basis. Strict scrutiny applies when a law affects a suspect class or threatens a fundamental right. Middle-tier scrutiny applies when the law affects a right conferred by the Montana Constitution but is not found in the Constitution's Declaration of Rights. Middle-tier scrutiny requires the State to demonstrate that its interest in the classification outweighs the value of the right to an individual. The rational basis test applies in the absence of strict or middle-tier scrutiny. Under the rational basis test, the government must show that the objective of the statute is legitimate and that the objective is rationally related to the classification used by the Legislature. *Reesor* ¶13.

Satterlee acknowledges that historically the Court applies the rational basis test to workers' compensation statutes. *Henry v. State Compensation Insurance Fund*, 294 Mont. 449, 456, 982 P.2d 456, 461, (1999). However, given the rare combination of age discrimination and

the loss of workers' compensation benefits found in the present statute, Satterlee submits that the middle-tier analysis applies. The middle-tier analysis requires the State show the law is reasonable and its interest in the resulting classification outweighs the value of the right of the individual. Montana is very diligent in its protection against age discrimination in the employment context. Therefore, Satterlee believes the same diligence (scrutiny) should apply when protecting older workers who lose their employment to work-related accidents.

The Montana Legislature has repeatedly and fully protected age in virtually the same manner as it protects suspect classes. Because of statutes like §49-1-102, MCA, §49-2-303, MCA, §49-2-403, MCA, and §49-2-308, MCA, Satterlee submits that Montana does treat the rights of the elderly as "significantly important." Specifically, §49-2-303(1)(a), MCA, prohibits an employer from discriminating against a “person or in a term, condition, or privilege of employment because of . . . age. . . .” The Montana Supreme Court has even held that workers have a fundamental right to employment and any infringement on that right is reviewed under a strict scrutiny standard to determine if a compelling state interest justifies the infringement. *Wadsworth v. Dept. of Revenue*, 275 Mont. 287, 911 P.2d 1165, 1174 (1996). When Montana's statutes and case law are considered together, it makes no sense to fully protect the constitutional rights of an older employee entering the workforce, but then to deny the older employee a similar constitutional protection when she is unable to work because of an accident.

Thus, because the right to PTD and rehabilitation must arise out of an employment relationship, and because §39-71-710, MCA, discriminates because of age, a middle-tier scrutiny test should apply. However, even if the Court determines that a rational basis test applies, there is no rational basis for terminating PTD or rehabilitation benefits because of age as held in *Reesor*.

Particularly instructive, *Butte Community Union v. Lewis,* 219 Mont. 426, 712 P.2d 1309 (1986), held that the government was not reasonable when it picked age as the determinative classification to deny welfare benefits. This Court held it was arbitrary for the Montana Legislature to use age as the determinative factor to deny welfare benefits:

> The State has failed to show that misfortunate people under the age of 50 are more capable of surviving without assistance than people over the age of 50. Broad generalizations, concluding that those who are 49 years of age can retrain or relocate while those who are days older cannot, are arbitrary.

Butte Community Union, 219 Mont. at 434, 712 P.2d at 1314.

THE STIPULATION

As pointed out in Satterlee’s Brief, the State Fund entered into a stipulation agreeing that *Reesor* “will likely determine whether Petitioners are entitled to receive additional benefits in this matter.” (Satterlee’s Brief at p. 4). The State Fund’s lawyers proposed the Stipulation and they drafted the document. Now the State Fund tries to backpedal out of the Stipulation by stating that *Reesor* “may control the legal issue presented in Satterlee.” (State Fund Brief at p. 22). However, Satterlee submits that the State Fund gave an honest evaluation when it proposed the Stipulation the first time. The fact that the State Fund now wants to retreat from a Stipulation that it drafted sheds light on the Respondents’ newly contrived arguments asserted in their response briefs.

It is compelling that Respondents J.H. Kelly, LLC, and Louisiana Pacific Corporation (hereafter Kelly) initially agreed with the State Fund's first and honest evaluation. In its response brief, Kelly posed the question of whether *Reesor* compels a conclusion of unconstitutionality when PTD and rehabilitation benefits were terminated upon petitioners reaching retirement age. Kelly recognized the "response is yes." Kelly correctly reasoned:

> The main factual difference is that *Reesor* involved termination of PPD benefits, whereas this case involves termination of PTD/rehabilitation benefits. That, however, is a distinction without a difference, especially since the three benefits that ostensibly may be terminated upon a claimant's retirement are contained within the ***same*** statute, a statute already found to violate equal protection guarantees.
>
> Thus, Respondents would concede that Petitioner's motion for partial summary judgment should be granted on the issue of the unconstitutionality of Section 39-71-710, MCA.

[Emphasis original]. (Kelly Brief, p. 3).

Understandably, the State Fund and Kelly are attempting to reverse their initial assessments, but these assessments are more accurate than the incongruous arguments they now propose.

THERE IS NO RATIONAL BASIS TO DISCRIMINATE BETWEEN THE TWO CLASSES BASED UPON AGE

Whether a rational basis test or a middle-tier test applies, it is a violation of equal protection to discriminate against PTD claimants because of age. Although Respondents attempt to explain their reasoning otherwise, the reasons were dismissed in *Reesor*.

When determining whether there is a rational basis to discriminate against PTD claimants solely because of age, this Court should follow the reasoning and holding of the Montana Supreme Court in *Reesor*:

> We said in *Henry* that "[a] classification that is patently arbitrary and bears no rational relationship to a legitimate governmental interest offends equal protection of the laws. As we have previously held, equal protection of the laws requires that all persons be treated alike under like circumstances." *Henry*, ¶ 36 (quoting Davis v. Union Pacific R. Co. (1997), 282 Mont. 233, 242-43, 937 P.2d 27, 32).

Montana's public policy and objective of workers' compensation act is articulated in §39-71-105, MCA, which states in pertinent part:

> 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 the Montana 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 benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease.

If PTD benefits automatically terminate at a specific age, and workers do not retire at a specific age, then PTD wage-loss benefits cannot bear a reasonable relationship to actual lost wages.

In *Reesor*, the Respondents made many of the same arguments as here. Ultimately, all of these arguments were economic and rejected by the Court. The Court recognized that SSRI and workers' compensation benefits are not the same type of benefits and therefore are not duplicate payments:

> [T]he State Fund urges that social security retirement benefits and state disability benefits serve the same purpose of restoring earnings due to wage loss. . . . [I]t asserts the purpose of §39-71-710, MCA, is to coordinate wage replacement benefits and avoid duplicity in the award of benefits.
>
> . . .
>
> The issue in this case is whether it is fair to deny men and women full PPD benefits simply because their age makes them eligible to receive social security retirement or similar benefits. We conclude that the disparate treatment of partially disabled claimants based upon their age, because they are receiving or are eligible to receive social security retirement benefits, is not rationally related to that legitimate governmental interest.
>
> The State Fund reasons §39-71-710, MCA, is rationally related to a legitimate government goal because the Legislature is simply attempting to coordinate the wage loss benefits provided by social security retirement with PPD benefits provided by workers' compensation.

Reesor then explained why workers' compensation benefits and SSRI benefits are not comparable. Workers' compensation is a wage loss replacement and available only if a worker is injured. SSRI is not a wage loss system and is triggered by reaching a certain age:

> [T]he WCA is an exclusive statutory remedy whereby an injured worker gives up the right to sue in tort in exchange for guaranteed wage loss compensation for his injuries. The WCA contemplates only wage loss due to injury; it is not a need based system. While workers' compensation and social security retirement may be similar in that both are social programs, social security retirement benefits, unlike workers' compensation, provide the recipient with supplemental income after he contributes to the program throughout his working life. Once a recipient qualifies to receive social security retirement by working the requisite number of quarters, the triggering event to receive benefits is reaching the retirement age as specified by the federal statute. This is in direct contrast to workers' compensation benefits which are available only if a worker is injured while in the course and scope of employment and experiences wage loss as a result of such injury.

Respondents have attempted to distinguish *Reesor* from this case relying upon other case law. However, the *Reesor* Court distinguished these other cases recognizing there is no rational basis for denying older workers' compensation benefits to a similarly situated worker with an

identical injury as a younger worker. To do so is a violation of equal protection and unconstitutional:

> We also conclude that the *Flynn* and *Watson* cases are distinguishable. Both cases addressed reduction of disability benefits through the offset provisions of the WCA. As we said earlier, social security retirement benefits and social security disability benefits are two distinct programs and cannot offset one another due to the fact that both programs are based on completely different concepts. We see no reason why a forty-year-old injured worker should receive full PPD benefits pursuant to §39-71-703, MCA, and a sixty-five-year-old worker with an identical injury should receive only an impairment award due to the fact he has reached social security retirement age. There is no rational basis to deny a class of injured workers a category of benefits based upon their age.
>
> . . .
>
> Therefore, we conclude that providing PPD benefits to a younger person in Reesor's situation in the amount of $23,056.25 under the WCA, but limiting Reesor's benefit, based on his age, to only $2,975 pursuant to §39-71-710, MCA, violates the Equal Protection Clause found in Article II, Section 4 of the Montana Constitution. There has been a failure to demonstrate a rational basis for the infringement of such a constitutionally protected right, therefore, we hold that §39-71-710, MCA, is unconstitutional.

Reesor at ¶¶15-25.

In is brief, Respondent Putman recognizes that equal protection "keeps the government from treating differently persons who are alike in all respects." Putman concedes that *Reesor* held that "chronological age and the corresponding eligibility for social security retirement benefits is unrelated to a person's ability to engage in meaningful employment." (Putman & Associates Brief at p. 5). This logic can lead to only one conclusion under an equal protection analysis; that distinguishing between the two PTD classes is a violation of equal protection because it was based solely upon chronological age.

Here, as in *Reesor,* the arbitrary elimination of PTD benefits for elderly injured workers runs contrary to the Legislature's stated goal to provide reasonable wage loss benefits based on "a reasonable relationship to actual wages lost" to both classes of injured worker. Therefore, this Court should hold that there is no rational basis to support the elimination of PTD benefits for elderly injured workers. Montana public policy does not allow disparate PTD entitlement between similar classes of injured workers.

At its inception, workers' compensation was developed as a no fault system to replace common law tort actions by employees against employers. Obviously, there never was, nor could there ever be, an age limitation that would prohibit an elderly injured person from suing for negligence and full damages in tort law. There could be no recognized public policy that would be served by allowing such an arbitrary age limitation; nevertheless, an arbitrary age limitation has crept into workers' compensation law, and this Court should declare it unconstitutional. If it is allowed to stand, should the exclusive remedy protect employers for negligence after a worker reaches a certain age?

Satterlee contends that there is no rational relationship for the State to provide disparate PTD benefits to persons harmed at work whether they are old or young. Workers in both classes

have been harmed, both are unable to return to work, so both classes have incurred loss of earning capability. There is no rational reason to pay PTD benefits to one group of workers in these different but equal classes.

The emphasis of Montana's public policy is focused on the losses suffered by the injured worker. Thus, Montana policy is not served by eliminating PTD because of other benefits. Likewise, there is no rational basis to deny PTD benefits because the worker has passive income. PTD benefits are need-based, SSRI benefits are not. Montana does not deny PTD benefits to younger claimants who have passive income from other sources. Yet, that is what §39-71-710, MCA, does to older workers when it denies PTD benefits to SSRI recipients.

Montana public policy is not served by denying reasonable wage loss benefits to an older woman simply because she has other assets. Clearly, Montana law provides the same wage-loss benefit to a younger woman whether she is rich or poor. This is the law because Montana public policy requires the State to furnish reasonable wage loss benefits "that bear a reasonable relationship to the actual wage lost." Nothing in Montana's public policy suggests that a workers' compensation insurance company should reduce the claimant's benefits if the claimant has other assets.

Other recent Montana Supreme Court cases support Satterlee's argument that termination of PTD benefits based on age is a violation of equal protection. In *Stavenjord*, the Court followed the *Henry* precedent when it held that equal PPD benefits should be paid to similarly situated claimants under the Workers Compensation Act and the Occupational Disease Act. *Stavenjord v. Montana State Fund*, 314 Mont. 466, 477, 67 P.3d 229, 237 (2003). In so holding, the Court recognized Montana's public policy is not served by disparate PPD benefits between two similar classes of disabled workers; therefore, *Stavenjord* held the denial of equal benefits to be unconstitutional because it was not rationally related to Montana's governmental interest. *Stavenjord*, 314 Mont. at 477, 67 P.3d at 237.

In *Schmill*, the Montana Supreme Court again disapproved disparate treatment of two classes of disabled workers when it held that apportioning compensation for one class of disabled worker (occupational disease) and not for another class of disabled worker (workers' compensation) violates equal protection. *Schmill v. Liberty Northwest Ins. Corp.*, 315 Mont. 51, 67 P.3d 290 (2003).

As this Court struck down arbitrary limitations in *Reesor, Stavenjord* and *Schmill*, the age limitation on PTD benefits required by §39-71-710, MCA, must be struck down in this case as well.

PTD benefits are provided in exchange for the worker relinquishing her right to sue in common law tort. If a statute were enacted to prevent a common law tort because an injured worker received SSRI benefits, that statute would be legally repulsive. Here, the practical effect is the same. Satterlee is stripped of her full PTD benefits because she receives SSRI benefits because of her age. SSRI benefits "are not designed or intended to compensate for workplace injury or replace elements of damage that might be recovered in a common law action for such an injury." *State ex. rel. Boan v. Richardson*, 482 S.E.2d 162, 166 (W.Va.1996). In fact, the Social Security Administration has recognized that SSRI was never intended to be a worker's sole retirement income:

> But Social Security was never meant to be the only source of income for people when they retire. Social Security replaces about 40 percent of an average wage earner's income after retiring, and most financial advisors say retirees will need about 70-80 percent of their work income to live comfortably in retirement. To have a comfortable retirement, Americans need much more than just Social Security.

Introductory letter from Commissioner of Social Security, SSA Publication No. 05-10024, January 2005.

Not only were SSRI benefits not intended to be a sole source for retirement, when PTD benefits are terminated, the economic consequences are often compounded. For example, a claimant who is PTD at age 50 will receive SSDI benefits and PTD benefits from workers' compensation until social security retirement age. During the period of time from age 50 to eligibility for retirement age, the injured worker does not contribute any additional money to social security. SSRI is based upon contributions from the employee, so the worker's SSRI is likely much less than it would have been had the claimant worked from age 50 until retirement. *See* SSA Publication No. 05-10055, ICN 462560, March 2005.

Another problem likely faces the 50-year-old worker at retirement. PTD claimants will not have any extra money income for retirement accounts. For example, a state employee would lose the opportunity to contribute to the public employees' retirement system. Further, because the employee is likely to have less money, she will lose health insurance and cannot contribute to other retirement accounts.

Thus, reaching retirement age leaves her with a lower amount of social security retirement benefits because of the injury, the reduced likelihood of having any private or individual retirement accounts, and suddenly without any PTD benefits. With the loss of PTD benefits, many slip into poverty.

ECONOMIC IMPACT TO INSURERS IS NOT A RATIONAL BASIS FOR DISCRIMINATING AGAINST PTD CLAIMANTS BASED ON AGE

Respondents disregard *Reesor*. Respondents argue if Petitioners prevail, the cost will be prohibitive and too much of a burden on the businesses of Montana. Therefore, Respondents argue that this Court should find §39-71-710, MCA, constitutional as it applies to PTD and rehabilitation claimants, despite *Reesor's* holding that found §39-71-710, MCA, unconstitutional as it applied to PPD claimants.

Although couched in different language, all of Respondents arguments are about money and cost. There are three reasons these economic arguments should not be adopted.

- First, the Montana Supreme Court has held that cost alone cannot justify violation of equal protection.
- Second, none of the affidavits provided by Respondents provides legally sufficient facts that this Court can consider.
- Third, although Respondents have not provided sufficient facts to determine cost, the costs presented by Respondents are not supported by the evidence and appear significantly overstated and are therefore not "uncontroverted."

The issue before this Court is whether §39-71-710, MCA, violates the constitutionally mandated equal protection rights of Catherine Satterlee, James Zenahlik, Joseph Foster, and Doris Bowers. It is not the retroactive application of Satterlee. Although Satterlee pleaded common fund in her petition, her motion does not address retroactivity or cost. If the Court limits its decision to the motion and these four claimants, then economics should not an issue in this decision.

Thus, Satterlee's motion should be granted. Respondents have generally conceded that Petitioners' facts as alleged are accurate. These facts create two similarly situated classes which are legally identical to *Reesor*. Therefore, this Court has sufficient undisputed facts to grant Satterlee's Motion for Partial Summary Judgment and should do so.

In the event this Court entertains the economic issue raised by Respondents, it should conclude that these money saving arguments cannot be used to justify a denial of equal protection of older workers. Many decisions made by this Court and the Montana Supreme Court affect the cost of workers' compensation premiums. The Supreme Court has held that, "[c]ost-control alone cannot justify disparate treatment which violates an individual's right to equal protection of the law." *Heisler v. Hines Motor Company*, 282 Mont. 270, 283, 937 P.2d 45, 52 (1997). Boiled down to their essence, all arguments set forth by Respondents are about economics. As with *Reesor*, economics cannot justify unconstitutional disparity based on age.

However, if this Court decides it appropriate to consider economic arguments, none of the Respondents presents legally sufficient facts for this Court to consider. None of the affidavits provide a sufficient factual basis for the conclusory economic figures presented nor do they meet the criteria for expert witness testimony. Although the State Fund argues that the "financial impact of Satterlee is an issue that cannot be ignored in this litigation because Satterlee has the very real potential to destroy the viability" of workers' compensation, the Respondents' own affidavits show they have not done the necessary claims research to have the factual basis to calculate these figures.

Rule 24.5.329(7), MWCCR, requires summary judgment affidavits to meet the same elements as Rule 56(e), M.R.Civ.P. With respect to summary judgment affidavits, the Montana Supreme Court has held:

> Rule 56(e), M.R.Civ.P., requires a summary judgment affidavit to contain certain elements: Affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . An adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits . . . . must set forth specific facts showing that there is a genuine issue for trial.
>
> . . . Since Cooper's compound affidavit does not comply with the requirements of Rule 56(e), M.R.Civ.P., we conclude, as a matter of law, that Cooper's affidavit does not raise a genuine issue of material fact.

Cooper v. Sisters of Charity, 265 Mont. 205, 208-209, 875 P.2d 352, 354 (1994). *See also, Thornton v. Niswanger,* 263 Mont. 390, 868 P.2d 633 (1994).

The affidavits presented here do not satisfy evidentiary admissibility, competency and foundation standards and, therefore, cannot sustain Respondents' argument. They do not show a genuine issue for trial. Further, as set forth in the attached Affidavits of David K. Johnson (Exhibits A and B), these affidavits likely fail to meet the minimal professional requirements for economists. Mr. Johnson reviewed the State Fund's "Statement of Additional Uncontroverted Facts" as well as the affidavits of Daniel Gengler, David Ogan, Christine E. McCoy, Mark Kraft, Robert Worthington and Shawn Bubb provided by the Respondents. After reviewing these documents, Mr. Johnson states in his affidavit:

> 5. The purpose of providing expert testimony is to assist the finder of fact. The Statement of Ethical Principles and Professional Practice of the National Association of Forensic Economist state in part:
>
> > *Practitioners of economics should stand ready to provide sufficient detail to allow the replication of all numerical calculations, with reasonable effort, by other competent forensic economic experts, and be prepared to provide sufficient disclosure of the sources of information and assumptions underpinning their opinions to make them understandable to others.*
>
> Thus, Respondents should have sufficient information available and be prepared to provide it. To date, Respondents have not done so. The affidavits submitted by the Respondents have simply provided unsubstantiated numbers without the Respondents' sources of information or assumptions. Hence, the Respondents' affidavit conclusions cannot be tested or relied upon for determining the economic cost of Satterlee.
>
> 6. If sufficient information had been available, I would have prepared an expert report in conformity with Rule 26(b) (4) of the Montana Rules of Civil Procedure and requirements of the preceding section of this affidavit. My report would have evaluated the Respondents' Rule 26 (b) (4) report, had one existed.
>
> 7. As a result of the foregoing, it is my opinion that the damages claimed by the Respondents in their affidavits are not supported by sufficient facts or known assumptions, may be materially incorrect and should not be used to form the basis of any opinion regarding the economic cost of Satterlee.

Although these are affidavits and not expert witness reports, in order to be admissible, expert testimony must meet the requirements of Rule 26(b)(4), M.R.Civ.P., including the factual foundation requirements. In order to be considered, affidavits must "justify" the Respondents' "opposition" pursuant to Rule 24.5.329(8), MWCCR, as observed by Mr. Johnson:

> From the "Uncontroverted Facts" I attempted to verify damages claimed in the "Uncontroverted Facts" and was unable to do so. This was the result of having insufficient information. In order to evaluate the damages claimed in the "Uncontroverted Facts", additional information would be needed. Examples of additional information include the number of claimants included in each year of the historical computation, the date at which the claimant became eligible for payments, where applicable, the date of death of the claimant, the age and sex of

each claimant, estimated wage growth rates and the discount rates, etc. Lacking this information, one can only speculate as to what actual damages might be.

A review of these affidavits shows Mr. Johnson is correct. For example, none of them provide the number of PTD claimants over 65 years old upon which the figures are based. None of them provide any basis for calculating the value of any of the claims. Only conclusory numbers are provided. Obviously, the basis of these numbers is critical to any Satterlee analysis.

Not only do the affidavits fail to provide legally sufficient facts which support the "Uncontroverted Facts," the State Fund admits it has not done the fact-finding research to obtain the necessary information to determine the PTD claimants. In his affidavit, Mr. Johnson confirms this:

> Christine E. McCoy indicated that a Satterlee review will have to identify claimants who may be affected by the decision and may include the review of a claim file with information stored on all media types. According to Ms. McCoy, claimants can be substantially identified by using complex computer queries to search the CMS and DB02 systems and that manually reviewing each file may be the only way of identifying affected claims. It is my opinion that these admissions by Ms. McCoy probably show that some or all of the damages claimed by the State Fund are based solely on estimates without a sufficient factual basis.

If the claimants have not been identified, then it is doubtful if the number of claimants or the value of claims has been identified. This is consistent with State Fund past cost estimates. This Court previously observed:

> The State Fund estimates its "hard costs" associated with retroactive application of Stavenjord at $7.5 million. . . . On its face, the State Fund's estimate is a worst case scenario, not a realistic estimate of actual costs. It is highly unlikely that every file will require the degree of work-up suggested by the State Fund.

Stavenjord v. State Fund, 2004 MTWCC 62, ¶ 30.

The State Fund has provided inconsistent and unsupported data. In the "Montana State Fund's Statement of Additional Uncontroverted Facts," it recognizes the National Council on Compensation Insurance provided estimates of prospective application of Satterlee. NCCI estimates a rate increase of 5% to 11%. (Fact 10c.) The State Fund's estimate is 11% to 21%. (Fact 10d.). This difference is explained away by the State Fund as "the assumption of discounting" but no explanation is given about the rate or application of the discount.

It is important to know what other factors have been considered by the State Fund. The State Fund claims that if Satterlee is retroactive, the Old Fund liability will be approximately $93 million to $116 million. Several facts are absent in the affidavits with respect to this figure. The number of claimants is not given and it is doubtful they are known given the affidavit of Ms. McCoy. What is the value given each claim? Does this include settled claims?

Antoher unknown fact is whether the Old Fund figure includes the 500 week PPD benefit to which PTD claimants during some of the Old Fund years. When the legislature terminated lifetime PTD benefits in 1981, a PTD claimant was still entitled to 500 weeks of PPD benefits. This benefit ended before 1990. This 500 week amount should already be a liability and

included in the current Old Fund figure of $7.4 million claimed by the State Fund because it is a current liability. The State Fund does not state whether it is included. Because the Respondents' facts are insufficient, these questions cannot be answered from the information provided.

Although the factual basis in Respondents' affidavits is significantly lacking, there is some information available which shows the State Fund's figures are likely exaggerated. These facts include:

- In 1981, there were 85 claimants who were receiving both PTD benefits and SSRI. *(See* Exhibit 1 attached to Lumberman's Brief, State Administration hearing notes, March 10, 1981, pp. 3 and 4).

- The State Fund paid 44.2% of total benefits over a four year period ending in fiscal year 2004. (Exhibits A and B, Affidavits of David Johnson, CPA).

- The 2004 Workers' Compensation Annual Report from the State of Montana tracked information, including the number of PTD claimants being paid from injuries suffered in 1999 through 2004. Table 6 of the Annual Report shows that 118 PTD claims existed in 2004 from workers' compensation injuries between 1999 and 2004. This figure is the sum of the cumulative claims from each year. (Exhibit C, Table 6, p. 35 of 2004 Governor's Report, is attached. The entire 2004 Annual Report can be found on-line).

- If the State Fund paid 44.2% of the benefits as stated above, then a reasonable assumption could be made that the State Fund would have approximately 44% of the 118 PTD claims (approximately 52) in 2004 from workers injured over this five year period. Satterlee recognizes this figure (52) is deduced from assumptions. However, this is because the State Fund failed to produce necessary facts.

The State Fund calculates that the total retroactive cost of Satterlee to the Old Fund and the New Fund will be between $228 million and $302 million. (Exhibit B, Schedule 2 attached to Mr. Johnson's second Affidavit). According to Mr. Johnson, if the liability is $228 million, then an average of 531 PTD claimants over 65 years must be paid each year beginning October 1, 1981, and ending December 22, 2004. In order to support a $302 million liability, an average of 703 claimants would have to be paid PTD benefits each year.

Thus, if Mr. Johnson is correct, the State Fund's numbers purport to show an increase from 85 PTD claimants over 65 years in 1981 to an average of between 531 PTD claimants and 703 PTD claimants paid each year since 1981. This seems unlikely. Further, the number of PTD claims from the 2004 Annual Report from 1999 to 2004 appear consistent with the 85 PTD claimants in 1981. Thus, the State Fund's figures appear overstated.

After failing to provide sufficient facts, then admitting it has not identified the claimants, the State Fund then admits that it has resorted to supplying financial information which is self-described as representing the "highly likely range." (Affidavit of Daniel Gengler, p. 2). Not only did the State Fund not provide legally sufficient facts, it appears to admit it does not know the facts. This Court cannot take seriously the State Fund's claims on the economic impact of this case without more information.

In keeping with the State Fund, none of the affidavits from other Respondents provide sufficient factual information. For example, the affidavit of Robert Worthington attached to the

MMIA brief does not give any basis for the conclusory figures provided. Therefore, all Respondents' economic evidence set forth in the affidavits should be disregarded because it is legally insufficient.

The fact that Respondents have not provided sufficient facts should not deter this Court from recognizing that Satterlee has provided sufficient unchallenged facts for partial summary judgment. Satterlee asks this Court to grant summary judgment in her favor based upon the evidence before it at this time.

If the Court determines it should examine the Respondents' affidavits at this time, this evidence needs to be placed in context. The State Fund believes it will have accrued a surplus of $141 million by June 30, 2005. (Affidavit of Daniel Gengler, p. 4). The State Fund's total "admitted assets" are $750 million and its net premium earned is $140 million as of June 30, 2004. (*See* Exhibit D, p. 9).

The amount of the legally required surplus and its purpose is described in §39-71-2330(2), MCA. As the statute states, the purpose of the surplus is for cases like Satterlee:

> [T]he board shall annually determine the level of surplus that must be maintained by the state fund pursuant to this section, but shall maintain a minimum surplus of 25% of annual earned premium. The state fund shall use the amount of the surplus above the risk-based capital requirements to secure the state fund against various risks inherent in or affecting the business of insurance and not accounted for or only partially measured by the risk-based capital requirements.

The 25% minimum surplus is approximately $35 million (25% of $140 million). The State Fund declared a $5 million dividend payment to policyholders and has returned $38 million in dividend payments since 1998. (Exhibit E – the article is also found on the State Fund's website and is dated April 15, 2005).

However, if this Court is going to consider the "sky is falling" economic argument set forth by the Respondents, then Petitioners request this Court allow them to discover the basis of Respondents' claims about the financial impact of Satterlee. *See* Rule 56(d), M.R.Civ.P., and Rule, 24.5.328(8), MWCCR. Petitioners moved for summary judgment without discovery because Petitioners' facts cannot be reasonably controverted, and *Reesor* is clear that PTD benefits and rehabilitation benefits cannot be distinguished from PPD benefits in §39-71-710, MCA. However, if the Court intends to consider the economic impact of this case, Petitioners' will challenge the "uncontroverted facts" because Petitioners cannot agree they are accurate. Therefore, the State Fund's Cross-Motion for Partial Summary Judgment should not be granted without discovery being undertaken.

SIMULTANEOUS PAYMENT OF SSRI AND PTD IS NOT DOUBLE PAYMENT FROM EMPLOYER FUNDED PROGRAMS

Respondents argue here, as in *Reesor*, that the Legislature's purpose in §39-71-710, MCA, is to prevent double payment to an employee out of two different government programs, both of which are funded by the employer. This is an inaccurate statement of these two programs. First, when employers pay into social security and pay a workers' compensation premium, they have less disposable income with which to pay their employees. Thus, it stands to reason that employees receive less pay than they would otherwise.

Second, employees pay 50% of the social security contribution directly from their wages. Therefore, to characterize SSRI as fully funded by the employer is wrong. If the Court were to agree that benefits should be coordinated because SSRI is an employer funded program, then PTD benefits should be reduced by 50%, the contribution of the employer. Satterlee does not agree that this 50% reduction should apply. However, if the Court accepts a coordination of benefits argument, then 50% should be the maximum reduction.

RESPONDENT'S DID NOT ADDRESS REHABILITATION BENEFITS IN THEIR ARGUMENTS

Except in passing, none of the Respondents addressed whether *Reesor* should apply to rehabilitation benefits. Petitioner Doris Bowers seeks PTD and rehabilitation benefits in the alternative. Rehabilitation benefits were ignored by Respondents because none of the arguments presented apply.

This is a twofold admission by Respondents. First, rehabilitation benefits are legally identical to PPD benefits in *Reesor*. Thus, denial of rehabilitation benefits because of age is a violation of equal protection.

Second, and more importantly, by ignoring rehabilitation benefits in their arguments, Respondents admit all of their arguments directed at PTD benefits are economic. Respondents recognize that because of *Reesor,* they cannot successfully argue there is a rational basis for denying rehabilitation benefits because none of their economic arguments apply.

Therefore, this Court should find that §39-71-710, MCA, violates equal protection when it denies rehabilitation benefits to PTD claimants receiving SSRI. This Court should also recognize that Respondents' failure to address rehabilitation benefits is an implicit admission that all their arguments are economic.

SATTERLEE DID NOT WAIVE HER RIGHT TO A CONSTITUTIONAL CHALLENGE OF §39-71-710, MCA

Lumberman's argues that Satterlee failed to raise her constitutional argument at the "earliest opportunity" and, therefore, she has waived that argument and her claim should be dismissed. This argument fails. Although the Supreme Court has announced its preference that constitutional arguments should be raised first at the trial court level and at the "first opportunity," no case law flatly bars Satterlee from raising her constitutional challenge in this forum under these facts.

As is clear from the Petition and as is acknowledged in Lumberman's brief, Satterlee was injured on July 25, 1992. Lumberman's denied payment of PTD benefits. In January of 1996, this Court ruled that, though Satterlee was totally disabled for other reasons, she was not PTD as a result of her July 25, 1992, industrial accident. In December of 1996, the Montana Supreme Court reversed this Court's denial of Satterlee's claims for PTD benefits and remanded the case for entry of judgment in Satterlee's favor. *Satterlee v. Lumberman's Mutual Casualty Company*, 280 Mont. 85, 929 P.2d 212 (1996).

After the Supreme Court decision, Satterlee turned age 65 on September 30, 1999, and Lumberman's ceased paying permanent total disability payments in the amount of $235.55