James G. Hunt, Esq.
HUNT LAW FIRM
310 Broadway
Helena, MT 59601
Telephone: (406) 442-8552 / Facsimile: (406) 495-1660

Thomas J. Murphy, Esq
MURPHY LAW FIRM
P. O. Box 3226
Great Falls, MT 59403-3226
Telephone: (406) 452-2345 / Facsimile: (406) 452-2999

Attorneys for Petitioners

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, and 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