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MONTANA WORKERS' COMPENSATION COURT

CATHERINE E. SATTERLEE, et al., **Petitioners,** **vs.** **LUMBERMAN'S MUTUAL CASUALTY COMPANY, et al.** **Respondents.**	**WCC No.: 2003-0840** **BRIEF IN OPPOSITION TO PETITIONERS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Respondent Putman & Associates, adjustor for Royal & Sunalliance, and Intervenors ASARCO, Inc., Benefits, Continental Casualty Co., Golden Sunlight Mines, Northwest Healthcare, Corp., Northwestern Energy, LLC, F.H. Stoltze Land & Lumber Co. and Safeway hereby submit this brief in opposition to Petitioners' Motion for Partial Summary Judgment.

INTRODUCTION

Petitioners are individuals who have been declared permanently totally disabled ("PTD") as a result of work-related injuries and who have reached retirement age. They claim that § 39-71-710, MCA, which provides that an insurer's liability for payment of PTD benefits ends when a claimant is considered "retired," that is, when a claimant receives or is eligible to receive social security retirement benefits or retirement benefits under an alternative system, violates the Montana Constitution's Equal Protection Clause. Petitioners also argue that the statute is unconstitutional because it impermissibly delegates legislative authority.

Petitioners have not, and cannot, establish beyond a reasonable doubt that § 39-71-710, MCA, violates their right to equal protection. As discussed fully below, the Montana Supreme Court's holding in *Reesor v. Montana State Fund*, 2004 MT 370, 325 Mont. 1, 103 P.3d 1019, that § 39-71-710, MCA, is unconstitutional as to permanently partially disabled ("PPD") claimants does not mandate the conclusion that § 39-71-710, MCA, is unconstitutional as to PTD claimants. Further, the distinction drawn by the Legislature between PTD claimants who have reached retirement age and PTD claimants who have not reached retirement age bears a rational relationship to legitimate government objectives.

Petitioners likewise cannot prove beyond a reasonable doubt that § 39-71-710, MCA, contains an unconstitutional delegation of legislative authority. Section 39-71-710, MCA, does not impermissibly delegate the Legislature's authority to make Montana law but rather validly incorporates federal law in order to determine when a PTD claimant should be considered "retired" for purposes of its operation. Even if Petitioners are correct that the statute may be construed as improperly mandating the incorporation of future changes in federal law, there is an alternate construction which would render the statute constitutional which should and must be adopted by the Court.

Petitioners have failed to meet the heavy burden of proof necessary to establish that § 39-71-710, MCA, is unconstitutional. The Court should accordingly deny their Motion for Partial Summary Judgment.

LAW AND ARGUMENT

I. Standard of Review.

Whether a statute is constitutional is a question of law. *State v. Mathis*, 2003 MT 112, ¶ 8, 315 Mont. 378, ¶ 8, 68 P.3d 756, ¶ 8. The Montana Supreme Court, however, has routinely emphasized:

> The constitutionality of a legislative enactment is prima facie presumed, and every intendment in its favor will be presumed, unless its unconstitutionality appears beyond a reasonable doubt. The question of constitutionality is not whether it is possible to condemn, but whether it is possible to uphold the legislative action which will not be declared invalid unless it conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt.

Stratemeyer v. Lincoln County, 259 Mont. 147, 150, 855 P.2d 506, 508-509 (1993). A statute may not be declared invalid unless the constitutional violation is clear and palpable. *Linder v. Smith*, 193 Mont. 20, 31, 629 P.2d 1187, 1193 (1981). Every possible presumption must be indulged in favor of the constitutionality of a legislative act, and if any doubt exists, it must be resolved in favor of the act. *Powell v. State Compensation Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, ¶ 13, 15 P.3d 877, ¶ 13.

Here, the Court must presume that § 39-71-710, MCA, is constitutional and if there is any doubt, it must resolve the issue in favor of Respondents. Petitioners bear a heavy burden: they must prove, beyond a reasonable doubt, that that statute conflicts with the Constitution of Montana. As is demonstrated below, Petitioners have not, and cannot, meet their burden.

II. The portion of § 39-71-710, MCA, which terminates an insurer's liability for PTD benefits when a claimant is "retired" does not violate the Equal Protection Clause of the Montana Constitution.

Article II, section 4 of the Montana Constitution provides that no person shall be denied the equal protection of the laws. The basic rule of equal protection is that persons similarly situated with respect to a legitimate government purpose of the law must receive like treatment. *Rausch v. State Compensation Ins. Fund*, 2005 MT 140, ¶ 18, 327 Mont. 272, ¶ 18, 114 P.3d 192, ¶ 18. The principal purpose of Montana's Equal Protection Clause is to ensure that Montana's citizens are not subject to arbitrary and discriminatory state action. *Powell*, ¶ 16.

The determination of whether a statute violates Montana's Equal Protection Clause requires three steps. First, the Court must identify the classes involved and determine whether they are similarly situated. *Henry v. State Compensation Ins. Fund*, 1999 MT 126, ¶ 27, 294 Mont. 449, ¶ 27, 982 P.2d 456, ¶ 27. If the classes at issue are not similarly situated, the first criteria for proving an equal protection violation is not met and the Court need look no further. *Powell*, ¶ 22. If the classes involved are similarly situated, the Court must determine the appropriate level of scrutiny to apply to the challenged statute. *Henry*, ¶ 29. Finally, the Court must apply the chosen level of scrutiny to the challenged statute to determine if it is constitutional. *Id.*, ¶ 32-33.

It is well-established that equal protection challenges to statutes contained the Montana Workers' Compensation Act ("the Act") are subject to the rational basis test, *see Henry*, ¶ 29, and Petitioners do not argue otherwise. As such, the only issues left to be resolved by this Court are whether the classes involved are similarly situated and if so, whether § 39-71-1-710, MCA, passes the rational basis test.

At the outset, it is important to note that Petitioners identify only two classes that are involved here: (1) PTD claimants who receive or are eligible to receive retirement benefits; and (2) PTD claimants who do not receive and are not eligible to receive retirement benefits. The guts of Petitioners' argument, however, is because *Reesor* rendered § 39-71-710, MCA, unconstitutional as to PPD claimants, the statute "cannot be considered constitutional with respect to PTD or rehabilitation claimants." (*See* Pet. Br. at 7). As such, there are really three identifiable classes involved here: (1) PPD claimants who receive or are eligible to receive retirement benefits; (2) PTD claimants who receive or are eligible to receive retirement benefits; and (3) PTD claimants who do not receive and are not eligible to receive retirement benefits.

As is demonstrated below, two of the classes involved in this case, PPD and PTD claimants who receive or are eligible to receive retirement benefits, are not similarly situated and Petitioners therefore cannot establish that different treatment of those classes violates equal protection principles. Further, even assuming for the sake of argument that two of the classes, PTD claimants who receive or are eligible to receive retirement benefits and PTD claimants who do not and are not eligible to receive retirement benefits, are similarly situated, the classification used in § 39-71-710, MCA, does not violate the Equal Protection Clause because it bears an identifiable rational relationship to legitimate government interests.

A. Equal protection does not prohibit different treatment of PPD claimants who receive or are eligible to receive retirement benefits and PTD claimants who receive or are eligible to receive retirement benefits because the two classes are not similarly situated.

Petitioners argue the Montana Supreme Court's holding *Reesor*, that the limitation on an insurer's liability for PPD benefits set forth in § 39-71-710, MCA, violates equal protection, mandates the conclusion that the limitation on an insurer's liability for PTD benefits set forth in the statute violates equal protection. Petitioners claim that § 39-71-710, MCA, cannot be unconstitutional as to PPD claimants but constitutional as to PTD claimants. Petitioners' argument fails because the two classes to which they are referring, PPD claimants who receive or are eligible to receive retirement benefits and PTD claimants who receive or are eligible to receive retirement benefits, are plainly not similarly situated.

As noted above, the first prerequisite to a meritorious equal protection claim is that the classes at issue are similarly situated. *Powell*, ¶ 22. The Equal Protection

Clause does not prohibit the Legislature from treating different groups or classes of people differently so long as all persons within a group or class are treated the same. *Id.* As such, equal protection does not forbid classifications but rather keeps the government from treating differently persons who are in all respects alike. *See Kottel v. State*, 2002 MT 278 ,¶ 53, 312 Mont. 387, ¶ 53, 60 P.3d 403, ¶ 53; *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

In *Reesor*, the Montana Supreme Court identified the classes involved as PPD claimants who received or were eligible to receive social security retirement benefits and PPD claimants who did not receive and were not eligible to receive social security retirement benefits. *Reesor*, ¶ 10. The court decided the two classes were similarly situated because the claimant's age, as a result of eligibility to receive social security retirement benefits, was the only identifiable distinguishing factor between the classes. *Id.*, ¶ 12. The court went on to point out that "chronological age and the corresponding eligibility for social security retirements benefits is unrelated to a person's ability to engage in meaningful employment." *Id.*

Unlike the two classes compared in *Reesor*, the significant differences between the two classes at issue here, PPD claimants who receive or are eligible for retirement benefits and PTD claimants who receive or are eligible for retirement benefits, are readily apparent. The differences are first illuminated by referring to the current statutes defining PPD and PTD. Section 39-71-116(22), MCA, defines PPD as a physical condition in which a worker, after reaching maximum medical healing:

(a) has a permanent impairment established by objective medical findings;
(b) **is able to return to work in some capacity** but the permanent impairment impairs the worker's ability to work; and
(c) has an actual wage loss as a result of the injury.

Mont. Code Ann. § 39-71-116(22) (2005) (emphasis added). In contrast, § 39-71-116(23), MCA, defines PTD as "a physical condition resulting from an injury as defined in this chapter, after a worker reaches maximum medical healing, **in which a worker does not have a reasonable prospect of physically performing regular employment**." Mont. Code Ann. § 39-71-16(23) (2005) (emphasis added).

The Montana Supreme Court recently recognized the important differences between PPD claimants and PTD claimants and held that they are not similarly situated in *Rausch*. In that case, the issue was whether allowing impairment awards to PPD claimants but denying them to PTD claimants pursuant to the 1987 and 1989 versions of the Act violated equal protection. The court undertook a thorough review of the 1987 and 1989 statutory framework governing PPD and PTD. The court then explained the various differences between the two classes:

> After the medical assessment, the permanently disabled claimant loses eligibility for TTD benefits and becomes eligible for one of two significantly different benefit systems, depending on whether the claimant is able to return to work. The PPD claimant, who is able to return to work, is entitled to wage supplement benefits, which serve to restore the claimant to a pre-accident wage level if the claimant has suffered a decrease in wages upon return to work. Additionally, the PPD claimant is entitled to an impairment award, which compensates the claimant for the permanent loss of physical function. This benefit is smaller than the total disability benefit, and is paid over a shorter period of time, but is designed to compensate a claimant who is able to return to work and re-commence earning a wage.
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> ***
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> In contrast, PTD claimants, who cannot return to work, are not eligible for either wage supplement benefits or to an impairment award. Instead, PTD claimants are eligible for a larger benefit which is paid continuously for the claimant's work life.

Rausch, ¶¶ 23, 24. The Court concluded that it would be inappropriate for it to make comparisons between two dissimilar classes and then to order that either class was entitled to a benefit afforded the other class. *Id.*, ¶ 25. The Court accordingly decided that because the classes were not similarly situated, the claimants' equal protection challenge failed. *Id.*

In light of the statutory definitions and *Rauch*, it is clear that PPD claimants who receive or are eligible for retirement benefits and PTD claimants who receive or are eligible for retirement benefits are not similarly situated. PPD claimants are, by definition, able to work in some capacity after their work-related injuries. They are entitled to wage supplement benefits to compensate them for their actual loss of wages after they return to the job market. Their wage supplement benefits are payable over a certain period of time as defined in § 39-71-703, MCA. Because PPD claimants are able to work, some of them, like the plaintiff in *Reesor*, are employed after they are entitled to receive retirement benefits and thus actually suffer a palpable loss of wages as a result of their work-related injuries after that point.

In contrast, PTD claimants are not able to return to the job market after their work-related injuries. They are entitled to a larger benefit to compensate them for actual lost wages and earning capacity. Their benefits are limited in time **only** by § 39-71-710, MCA. While the court's statement in *Reesor* regarding the lack of relationship between chronological age and an individual's ability to engage in meaningful employment rings true as to PPD claimants, it simply has no application to PTD claimants who, by definition, cannot engage in employment either before or after they are entitled to retirement benefits.

Because PPD claimants who receive or are eligible for retirement benefits and PTD claimants who receive or are eligible for retirement benefits are not "in all respects alike," they are not similarly situated. Equal protection does not preclude different treatments of those classes. As such, although *Reesor* dictates that PPD claimants who receive or are eligible for retirement benefits are still entitled to receive PPD benefits, § 39-71-710, MCA may treat PTD claimants differently without violating the Equal Protection Clause.

Since two of the classes at issue are not similarly situated, the Court's attention must focus on the remaining two classes: PTD claimants who receive or are eligible for retirement benefits and PTD claimants who do not receive and are not eligible for retirement benefits. As is demonstrated below, Petitioners' equal protection challenge must fail even if these two classes can be considered similarly situated.

B. Even if PTD claimants who receive or are eligible for retirement benefits and PTD claimants who do not receive and are not eligible for retirement benefits are classes that are similarly situated, the classification used in § 39-71-710, MCA, does not violate the Equal Protection Clause.

Assuming for the sake of argument that PTD claimants who receive or are eligible for retirement benefits and PTD claimants who do not receive and are not eligible for retirement benefits are similarly situated classes, the Court must evaluate § 39-71-710, MCA, under the rational basis test. Applying that test leads inexorably to the conclusion that the portion of § 39-71-710, MCA, relating to PTD claimants is constitutional.

The rational basis test requires the government to show that: (1) the statute's objective was legitimate; and (2) the statute's objective bears a rational relationship to the classification used by the Legislature. *Henry*, ¶ 33. The rational basis test employs a relatively relaxed standard reflecting the courts' awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976). In applying the rational basis test, a classification will not be set aside if any state of facts reasonably may be conceived to justify it. *Johnson v. Sullivan*, 174 Mont. 491, 498, 571 P.2d 798, 802 (1977).

In both *Henry* and *Reesor*, the Montana Supreme Court pointed out that the Legislature clearly and unambiguously set forth its objectives and interest in enacting the Act in § 39-71-105, MCA. *See Henry*, ¶ 34; *Reesor*, ¶ 18. Pertinent to this case, that statute reads as follows:

> (1) It is an objective of the Montana workers' compensation system to provide, without regard to fault, wage-loss and medical benefits to a

> worker suffering from a work-related injury or disease. Wage-loss benefits are not intended to make a 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 the actual wages lost as a result of the work-related injury or disease** . . .
>
> (3) . . . Claimants should be able to speedily obtain benefits, **and employers should be able to provide coverage at reasonably constant rates** . . .

Mont. Code Ann. § 39-71-105(1),(3) (2005) (emphasis added).

In light of § 39-71-105(1), MCA, there are at least two rationales for the Legislature's decision to enact § 39-71-710, MCA. These rationales are: (1) to ensure that PTD benefits paid bear a reasonable relationship to actual wages lost by the PTD claimant; and (2) to ensure that employers are able to provide coverage at reasonable rates thus maintaining the financial viability of the workers' compensation system. It cannot be seriously disputed that both of the objectives are legitimate and reasonable. The question then becomes whether the challenged classification used by the Legislature is rationally related to those objectives. The Court should not hesitate to answer that question in the affirmative.

Although PPD claimants and PTD claimants are not similarly situated, it is helpful to refer to *Reesor* to understand why the classification at issue here is reasonably related to the government's interest in ensuring that benefits paid bear a reasonable relationship to actual wages lost. In *Reesor*, the court found that the primary goal of workers' compensation benefits is to establish a wage replacement for injured workers. *Reesor*, ¶ 18. The court rejected the respondents' argument that wage loss benefits were akin to retirement benefits, noting that there is no requirement that an individual must stop working in order to be entitled to social security retirement benefits. *Id.*, ¶ 24. The court decided that the classification created by the Legislature, PPD claimants who receive or are eligible for social security retirement benefits, is not rationally related to the government goal. *Id.*, ¶ 25. Implicit in the court's decision is the logic that because PPD claimants can, and some do, work after the point that they become entitled to retirement benefits, they suffer an actual wage loss due to their work-related injury after that point that should be compensable. *Id.*, ¶¶ 23-25.

Unlike PPD claimants, PTD claimants are not able to perform regular employment and no statutory time limitation is placed on payment of their benefits. Common sense dictates, however, that had PTD claimants been able to return to the job market after their work-related injuries, they would have transitioned out of the labor market and their actual wage loss would have ceased at some point. In order to correlate actual wages lost with benefits paid, the Legislature had to place some limitation on payment of PTD benefits. It did so by assuming that PTD claimants would

have transitioned out of the work force at the age at which they began to receive or were eligible to receive retirement benefits.

The classification chosen by the Legislature is arguably not perfect: all PTD claimants may not have chosen to transition out of the workforce when they became eligible for retirement benefits had they been able to return to work. However, perfection in classification is not required under the rational basis test. When faced with a somewhat similar issue involving a classification based upon age alone, the United States Supreme Court stated as follows:

> The rationality commanded by the Equal Protection Clause does not require States to match age distinctions and the legitimate interests they serve with razorlike precision... Under the Fourteenth Amendment, a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests. The Constitution does not preclude reliance on such generalizations. That age proves to be an inaccurate proxy in any individual case is irrelevant. "[W]here rationality is the test, a State 'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.' "(citation omitted). Finally, because an age classification is presumptively rational, the individual challenging its constitutionality bears the burden of proving that the "facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." (citation omitted).

Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000).

The Montana Supreme Court has likewise repeatedly emphasized that the fact that a classification may be imperfect or result in some inequity does not necessarily render it unconstitutional. *See, e.g., Davis v. Union Pacific R.R. Co.*, 282 Mont. 233, 243, 937 P.2d 27, 32 (1997) ("A classification having some reasonable basis does not deny equal protection merely because it is not made with precise mathematical nicety or results in some inequality."); *Gulbrandson v. Carey*, 272 Mont. 494, 505, 901 P.2d 573, 580 (1995) ("To a certain extent, nearly all legislation sets forth classifications regarding applicability, benefits and recipients; the fact that some of these classifications are imperfect does not necessarily mandate the conclusion that they violate the equal protection clause"); *Arneson v. State*, 262 Mont. 269, 274, 864 P.2d 1245, 1248 (1993). Despite the fact that a classification may be imperfect, it is only when it is patently arbitrary or discriminatory that it offends equal protection. *See Henry* ¶ 36; *Kottel*, ¶ 53.

Here, Petitioners simply cannot meet their burden of establishing that the facts on which the Legislature apparently based the classification at issue could not have reasonably been conceived to be true. *See Johnson*, 174 Mont. at 498, 571 P.2d at 802. The Legislature could have logically assumed that most PTD claimants would

have transitioned out of the workforce and stopped earning wages at the age at which they would receive or be eligible to retirement benefits had they been able to return to work. The U.S. Census Bureau has reported that in 2002, 90% of married couples and unmarried individuals age 65 and over received social security benefits. (*See* http://www.ssa.gov/policy/docs/chartbooks/fast_facts/2004/ff2004.html).[1] The Current Population Survey conducted by the Bureau of Census for the Bureau of Labor Statistics indicates that in 2004, only 13.5 % of individuals age 65 and above were employed. (*See* http://www.bls.gov/cps/home.htm). In contrast, 59.9% of individuals 55 to 64 years old were employed. (*Id.*)

The Legislature's decision to terminate an insurer's liability for PTD benefits when a claimant receives or is eligible to receive retirement benefits is additionally rationally related to the government's valid interest in ensuring that employers are able to provide workers' compensation coverage at reasonable rates thus maintaining the financial viability of the workers' compensation system.

Although the Montana Supreme Court has stated that reducing costs cannot be the sole justification for treating two classes differently, it has recognized that it may be a justification if there are also independent legitimate distinctions that justify the disparate treatment. *See Heisler v. Hines Motor Co.*, 282 Mont. 270, 283, 937 P.2d 45, 52-53 (1994). For instance, in *Stratemeyer*, the issue was whether § 39-71-119, MCA, violated the Equal Protection Clause because it disallowed benefits for workers that had suffered mental injuries with no physical components. The court noted that a purpose of the statute would be to provide for injured workers at a reasonable cost. *Stratemeyer*, 259 Mont. at 153, 855 P.2d at 510. The court found that the statute did not violate equal protection of the law because "[t]he exclusion of mental claims rationally relates to the possible goal of reducing costs and having a viable program for the State and the enrolled employers and employees in the worker's compensation field." *Id.* at 154, 855 P.2d at 511.

As noted above, § 39-71-710, MCA, provides the **only** statutory limitation on PTD benefits. In the absence of the limitation contained in the statute, an insurer would be responsible for paying PTD benefits to a claimant until his or her death. The result would be to place an enormous financial burden upon insurers which would inevitably be passed on to Montana employers through increased insurance premiums.

Like the statute at issue in *Stratemeyer*, § 39-71-710, MCA, does not arbitrarily deny benefits to a class of claimants for the sole purpose of saving the government money. Rather, the statute places a reasonable limitation on PTD benefits in order to contain the cost of the system to employers while ensuring that PTD claimants are compensated commensurate with the wages they would have lost had they been able

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[1] The Court may take judicial notice of these facts pursuant to Mont. R. Evid. 201(b).

to rejoin the workforce. The government's objective is at least rationally related to the classification it has chosen to use.

Finally, although *Reesor* determined that § 39-71-701, MCA, is invalid as to PPD claimants, it is entirely permissible for the Court to decide that the remainder of the statute is constitutional. The Montana Supreme Court has emphasized that if an invalid part of a statute is severable from the rest, the portion which is constitutional may stand while the part which is unconstitutional is stricken and rejected. *Newville v. Dept. of Family Serv.*, 267 Mont. 237, 255, 883 P.2d 793, 804 (1994). Thus "a statute is not totally destroyed because of an improper provision, unless such provision is necessary to the integrity of the statute, or was an inducement to its enactment." *Id.* "When an unconstitutional portion of the act is eliminated, if the remainder is complete in itself and capable of being executed in accordance with apparent legislative intent, it must be sustained." *Id.*

The portion of § 39-71-710, MCA that terminates an insurer's liability for PPD benefits when a claimant receives or is eligible for retirement benefits is not necessary to the integrity of the statute. It could not have been an inducement to the enactment of the original statute which addressed only the termination of PTD benefits. *See* Mont. Code Ann. § 39-71-710 (1981). The remainder of § 39-71-710, MCA, providing for termination of an insurer's liability for PTD benefits, is complete in itself and is capable of being executed. As such, the portion of § 39-71-710, MCA, held invalid in *Reesor* is severable from the rest of the statute which, as demonstrated above, is clearly constitutional.

Petitioners have not met their heavy burden of establishing that § 39-71-710, MCA, violates equal protection. It might very well be true that the Legislature's decision to terminate an insurer's liability for PTD benefits at the age at which the claimant would likely have exited the workforce results in some inequality or is not the best means to accomplish the Legislature's purpose. However, when rationality is the test, it is neither the Court's duty nor province to judge the wisdom of the Legislature's decisions.

III. Section 39-71-710, MCA, is not an impermissible delegation of the Montana's Legislature's power.

Petitioners additionally argue that § 39-71-710, MCA, is unconstitutional because it impermissibly delegates the Legislature's authority. Petitioners claim that because the statute provides that an insurer's liability for PTD benefits is terminated when a claimant is eligible for social security retirement benefits, it unlawfully adopts future changes in federal law. Petitioners' argument is without merit for at least two reasons.

First, delegation of the power to determine when a claimant is eligible for social security retirement benefits is not, in reality, a delegation of legislative power. In *State v. Stark*, 100 Mont. 365, 52 P.2d 890, 892 (1935), the Montana Supreme Court

explained the difference regarding what is and what is not an impermissible delegation of legislative power:

> Delegation of power to determine who are within the operation of the law is not a delegation of legislative power...The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and must therefore be a subject of inquiry outside of the halls of legislation.

Stark, 52 P.2d at 892-894.

Lee v. State, 195 Mont. 1, 635 P.2d 1282 (1981), relied upon by Petitioners, is completely distinguishable from the case at hand. In *Lee*, the challenged statute basically allowed the federal government to decide what the speed limit in Montana should be. Additionally, the statute specifically adopted "all acts amendatory" to the Federal Highway Act and mandated that Montana's attorney general change the speed limit by proclamation whenever federal law changed.

Here, unlike the statute in *Lee*, § 39-71-710, MCA, does not delegate the substantive power to make Montana law to the federal government. Rather, the statute merely uses eligibility for federal retirement benefits, as well as eligibility for private retirement benefits, as guideposts to determine when a PTD claimant should be considered "retired." If § 39-71-710, MCA, delegates any power at all to the federal government, it delegates only the power to determine a state of things (when individuals are eligible for social security retirement benefits) upon which the statute makes its own action depend. Such delegation is both proper and appropriate under Montana law.

Moreover, even assuming for the sake of argument that § 39-71-710, MCA, does delegate more than a "power to determine some fact or state of things," Petitioners' claim that the statute is unconstitutional still must fail. Again, the question of constitutionality is not whether it is possible to condemn, but whether it is possible to uphold the legislative action. *Stratemeyer*, 259 Mont. at 150, 855 P.2d at 508-509. Where two constructions of a statute are possible, one of which would render the act unconstitutional and the other sustain its validity, the latter interpretation must be adopted. *McMillen v. Arthur G. McKee & Co.* 166 Mont. 400, 409, 533 P.2d 1095, 1099 (1975).

In *Lee*, the Montana Supreme Court expressly acknowledged that the legislature has the authority to adopt existing federal statutes or regulation in its enactments. *Lee*, 195 Mont. at 9, 635 P.2d at 1286. The court, however, found that excepted from that

right was any adoption of changes in the federal laws or regulations to occur in the future. *Id.*

In contrast to the statute in *Lee*, § 39-71-710, MCA, does not expressly adopt any future changes or amendments to federal laws or regulations governing entitlement to social security retirement benefits. Under the construction of the statute urged by Petitioners, however, the statute implicitly incorporates future changes in federal law, an unauthorized result under Montana law.

When faced with similar constitutional challenges, other courts have pointed out that they must adopt the statutory construction which does not raise a constitutional conflict and have thus held that a statute which adopts by reference another statute or code incorporates the standard as it existed at the time of the adoption. For example, in *McCabe v. North Dakota Workers Compensation Bureau*, 567 N.W.2d 201 (N.D. 1997), the Bureau argued that two statutes that required the use of the "most recent" and "most current" editions of the American Medical Association's "Guides to Evaluation of Permanent Impairment" required the use of the Guides in effect at the time the claimant was evaluated. The claimant argued that automatically incorporating future versions of the Guides into the statutes would allow an unconstitutional delegation of legislative power to a private entity. The North Dakota Supreme Court noted that numerous other courts had decided that attempting to incorporate future changes in other statutes, codes, regulations or guidelines was an unconstitutional delegation of legislative authority. *McCabe*, ¶ 13. The court held:

> The interpretation of the relevant statutes urged by the Bureau in this case would raise significant constitutional conflicts. This case presents ambiguous statutes capable of two different constructions, one of doubtful constitutional validity. Accordingly, we adopt the construction that does not raise constitutional conflicts. (citation omitted). We therefore construe NDCC 65-05-12 and 65-01-02(26) to adopt the "most recent" and "most current" edition of the Guides in existence at the time of their enactment.

Id., ¶ 16. *See also Michigan Manufactures Ass'n v. Director of Workers' Disability Compensation Bureau*, 352 N.W.2d 712, 715 (Mich. Ct. App. 1984) (deciding statute which incorporated the definition of "employment in the logging industry" found in an liability insurance manual must be construed as incorporating the definition in effect at time of the statute's enactment).

If § 39-71-710, MCA is in fact capable of two constructions, one which would unconstitutionally mandate the incorporation of future changes in federal law and one which would not, the Court must choose the construction which sustains the statute's validity. *See McMillen,* 166 Mont. at 409, 533 P.2d at 1099. Section 39-71-710, MCA, can be construed as a valid incorporation of a federal statute or regulation already in

existence at the time of its enactment. The Court, therefore, is obligated to adopt that construction and to reject Petitioners' constitutional challenge.

CONCLUSION

Petitioners have not met their burden of establishing beyond a reasonable doubt that the portion of § 39-71-710, MCA, regarding termination of an insurer's liability for PTD benefits is unconstitutional. The Court should accordingly deny Petitioners' Motion for Partial Summary Judgment.

DATED this 8 day of August, 2005.

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CERTIFICATE OF SERVICE

I, Angela K. Jacobs, do hereby certify that on the 8 day of August, 2005, I served a copy of the foregoing **Brief in Opposition to Petitioners' Motion for Partial Summary Judgment** in the above matter by mailing a copy thereof, first class postage prepaid to:

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Re:	Satterlee v. Lumberman's Mutual	Date:	August 8, 2005

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply

Dear Pat:

We are fax filing the attached Brief in Opposition to Petitioners' Motion for Partial Summary Judgment.

The original of this documents is being mailed to you today.

Thank you.