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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CATHERINE E. SATTERLEE, et al. Petitioners, v. LUMBERMAN'S MUTUAL CASUALTY COMPANY, et al. Respondents/Insurers.	WCC No. 2003-0840 **MONTANA STATE FUND'S ANSWER BRIEF IN OPPOSITION TO PETITIONERS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND BRIEF IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

COMES NOW the Respondent/Insurer, Montana State Fund ("State Fund"), pursuant to Administrative Rules of Montana 24.5.329 and this Court's briefing schedule, and hereby files its Answer Brief In Opposition to Petitioners' Motion for Partial Summary Judgment And Brief In Support of Cross-Motion for Summary Judgment. For the reasons stated herein, the State Fund requests this Court deny Petitioners' motion and instead grant summary judgment in favor of the State Fund regarding the constitutionality of Montana Code Annotated § 39-71-710 with respect to

permanent total disability ("PTD") benefits and rehabilitation benefits.

STATEMENT OF ADDITIONAL UNCONTROVERTED FACTS

For purposes of summary judgment, the State Fund does not take issue with the facts the Petitioners (hereinafter referred to as "Satterlee") presented in support of the motion for partial summary judgment. However, additional facts are relevant to this Court's consideration of the constitutionality of Montana Code Annotated § 39-71-710. Pursuant to Administrative Rules of Montana 24.5.329(3), the State Fund has filed a separate pleading containing the additional facts which are necessary for a proper consideration of the constitutional issue presented through briefing.

For the Court's convenience, the State Fund sets forth several facts which have heightened applicability to the pending legal issues. If *Satterlee* invalidates § 710 as applied to PTD benefits, the prospective costs associated with that decision would force the State Fund to raise its workers' compensation insurance rates by an estimated 11-21%, which correlates to an annual premium increase of $21.6-$41.4 million for the State Fund's policyholders in Montana. State Fund's Statement Additional Uncontroverted Facts 2, 10 (Aug. 8, 2005) ("SOF"). Statewide, Montana employers would pay approximately $60 million more for their workers' compensation insurance each year as a result of the prospective costs of *Satterlee*. SOF 10. In addition, if *Satterlee* applies retroactively, the increase in benefits costs for the State Fund is estimated at $161 million. SOF 1, 10. The increase in benefits costs to the Old Fund (the Old Fund is responsible for claims occurring on or before June 30, 1990) is estimated at $105 million, and the liability for Old Fund claims falls upon the taxpayers of Montana. The Old Fund is currently unfunded by approximately $7 million, and the money which is necessary to administer and pay the Old Fund's claims must be transferred from the State's General Fund. SOF 1, 10-11.

A retroactive application of *Satterlee* would eliminate the State Fund's surplus, causing the State Fund to become severely crippled or insolvent. SOF 9. The elimination of the State Fund's surplus would result in a significant rate increase over many years in an attempt to restore surplus to target levels. SOF 9. If the State Fund attempted to recapture its depleted surplus in one year and restore surplus to the statutory minimum amount, the State Fund would have to increase its rates by an additional 60%, which translates into more than $120 million in increased premium. SOF 10. If the State Fund attempted to recapture its depleted surplus over a three-year period, it would have to increase its rates by approximately 16%. SOF 10. This rate increase would be in addition to the rate increases caused by prospective application of *Satterlee*. SOF 9. It would also be in addition to the rate increases caused by the

prospective and retroactive application of the other common fund cases. SOF 14. Collectively, the benefit cost estimates associated with retroactively applying the common fund cases of *Satterlee*, *Reesor*, *Stavenjord* and *Schmill* range from $152-$209 million for the State Fund and $100-$125 million for the Old Fund. SOF 14. Notably, the estimates do not include the significant claims-related and administrative expenses associated with retroactively implementing each decision. SOF 14.

The State Fund's estimates are specific to the State Fund and the Old Fund, but the estimates can easily be extrapolated to the workers' compensation system in its entirety. If that is done, it becomes evident that a substantial system-wide increase in premiums would be necessary to cover the liabilities associated with *Satterlee* and the common fund cases. Consequently, the cost of doing business in Montana would skyrocket, and many carriers could either become insolvent or cease their business operations in this State. Thus, the common fund cases, and *Satterlee* in particular, pose a very real threat to the destruction of the workers' compensation system in Montana, which would leave many injured workers and their families without a prompt and guaranteed recourse for workplace injuries. This scenario is exactly why the Legislature first enacted the Workers' Compensation Act in Montana nearly a century ago, and maintaining an affordable workers' compensation system is but one of the many legitimate governmental objectives that exist for terminating PTD benefits upon a claimant's eligibility for retirement benefits. Accordingly, § 710 is constitutional and Satterlee's motion for partial summary judgment should be denied.

ARGUMENT

Even in the absence of a formal cross-motion, this Court may grant summary judgment to a non-moving party when no issues of material fact are in dispute and the matter to be resolved is a legal one. *See* Dec. & S.J., *In re Telles*, 2005 MTWCC 21 (Apr. 22, 2005). *Accord Payne Realty & Housing, Inc. v. First Sec. Bank of Livingston* (1991), 247 Mont. 374, 807 P.2d 177; *Hereford v. Hereford* (1979), 183 Mont. 104, 107, 598 P.2d 600, 602 ("By the great weight of authority, no formal cross-motion is necessary for a court to enter summary judgment."). Therefore, the State Fund asserts that it is entitled to summary judgment on the legal issue presented in Satterlee's motion because no issues of material fact are in dispute and the constitutionality of § 710 is a question of law. *State v. Mathis*, 2003 MT 112, ¶ 8, 315 Mont. 378, ¶ 8, 68 P.3d 756, ¶ 8. Specifically, the State Fund requests this Court to conclude that § 710's termination of PTD and rehabilitation benefits when a claimant becomes eligible to receive retirement benefits does not constitute a violation of the Equal Protection Clause of the Montana Constitution.

A. SATTERLEE'S ABSOLUTE RELIANCE ON *REESOR V. MONTANA STATE FUND*, 2004 MT 370, 325 MONT. 1, 103 P.3D 1019, TO SUPPORT HER CONSTITUTIONAL ARGUMENT IS MISPLACED BECAUSE *REESOR* WAS LIMITED TO PERMANENT PARTIAL DISABILITY ("PPD") BENEFITS AND DOES NOT CONTROL

Satterlee claims that the Montana Supreme Court's decision in *Reesor* requires a holding that "[t]he age limitation on permanent total disability and rehabilitation benefits[1] set forth in § 39-71-710, MCA" is unconstitutional. Satterlee Br. 5-8 (Feb. 18, 2005). According to Satterlee, there is no distinction between the issues and analysis in *Reesor* and the issues and analysis in this litigation. However, as explained below in more detail in Section B(1), § 710's limitation on benefits is not age-dependent; instead, it is dependent on a claimant's eligibility to receive Social Security retirement benefits or retirement benefits from an alternative to Social Security (hereinafter collectively referred to as "qualifying retirement benefits"). Further, although the Montana Supreme Court ultimately held that § 710's limitation on PPD benefits was unconstitutional, *Reesor's* limited holding must be analyzed in connection with the narrow issue the Montana Supreme Court addressed. *Reesor*, ¶ 19. To do otherwise would give weight to dicta. As *Reesor* specifically states, the only appellate issue in that case was whether the limitation on PPD benefits set forth in Montana Code Annotated § 39-71-710 violated Montana's Equal Protection Clause. *Reesor*, ¶ 2. Therefore, as discussed below, *Reesor* does not control because there are significant differences between *Reesor* and *Satterlee*.

1. A Separate Constitutional Analysis Must be Performed in *Satterlee* Because PTD Claimants Are Not Similarly Situated with PPD Claimants.

Satterlee's brief is void of any analysis regarding the allegedly unconstitutional equal protection violation created by § 710's termination of PTD claimants when a claimant is eligible to receive qualifying retirement benefits. Instead, Satterlee blindly relies on *Reesor* to support her contention that § 710 cannot constitutionally terminate a claimant's PTD benefits when the claimant becomes eligible to receive qualifying retirement benefits. Satterlee's attempt to broaden the scope of *Reesor* and apply it to

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[1] Although Satterlee claims the limitation on rehabilitation benefits is unconstitutional, her primary focus addresses § 710's limitation on PTD benefits. Likewise, the State Fund's Answer Brief focuses on PTD benefits, but the arguments raised herein are equally applicable to § 710's limitation on rehabilitation benefits.

PTD claimants fails to appreciate the significant differences between PTD claimants and PPD claimants. Those significant differences require this Court to conduct a separate constitutional analysis which is specific to PTD claimants.

Unlike PPD benefits, total disability benefits under Montana's Workers' Compensation Act ("WCA") are full wage loss benefits because entitlement to them requires a claimant to "suffer a total wage loss as a result of an injury" and have no "reasonable prospect of physically performing regular employment." *See* Mont. Code Ann. § 39-71-701; § 39-71-702 and § 39-71-116(24). As the Montana Supreme Court recently noted, the primary difference between the two groups is an obvious one that is established by the definition of each group: PPD claimants can return to work, while PTD claimants cannot. *See Rausch v. Montana State Fund*, 2005 WL 1332118, ¶ 20 (Mont. June 7, 2005) ("*Rausch II*"). In addition, after achieving MMI, a PPD claimant receives wage loss benefits which help restore the claimant to a pre-accident wage level, assuming there was a wage loss in connection with the injury. *Rausch II*, ¶ 23. A PPD claimant also receives benefits based on age, education, work restrictions and physical impairment. Mont. Code Ann. § 39-71-703. However, the PTD claimant who is unable to return to work receives workers' compensation benefits at a higher weekly rate which are paid over the course of the PTD claimant's work life. *Rausch II*, ¶ 24. Clearly, PPD benefits are a different kind of benefit than a PTD benefit, and the approach to paying those benefits differs substantially under the WCA. Therefore, the Montana Supreme Court concluded that "PPD claimants and PTD claimants are not similarly situated." *Rausch II*, ¶ 25. *Accord Rausch v. State Compen. Ins. Fund*, 2002 MT 203, ¶ 18, 311 Mont. 210, ¶ 18, 54 P.3d 25, ¶ 18 ("*Rausch I*") (stating that PTD claimants and PPD claimants are members of distinct classes which are not similarly situated). Consistent with the Montana Supreme Court's recent finding, this Court has previously explained why PTD claimants and PPD claimants occupy different classification groups:

> **Permanently totally disabled workers represent a separate and distinct class from permanently partially disabled workers.** While the members of both classes may have suffered industrial injuries, their disabilities are very different. The class of permanently partially disabled workers consists of injured workers who are able to return to work, and therefore able to continue earning wages. The class of permanently totally disabled workers consists of workers who cannot return to employment on a regular basis, and who are thus incapable of earning meaningful wages.
>
> The difference between the classes is reflected in the benefits which the legislature has provided for the two classes. Permanently totally disabled

> workers are entitled to bi-weekly benefits during the entire period of their disability, § 39-71-702, MCA (1991), at least until they begin drawing retirement benefits or become entitled to full social security retirement benefits, § 39-71-710, MCA (1991). The benefits available to permanently partially disabled claimants are more limited. Permanently partially disabled workers are limited to a maximum of 350 weeks of benefits, including any impairment award. § 39-71-703(2), MCA (1991). That is approximately 6¾ years. In contrast, a worker who becomes permanently totally disabled at age 25 could receive up to 40 years or more of biweekly benefits. As set forth in an earlier paragraph, the biweekly benefits amounts available to permanently totally disabled workers are also greater than the amounts available to permanently partially disabled workers.
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> Thus, while permanently partially disabled workers may collect an impairment award, that award is only one component of the more limited benefits available to permanently partially disabled claimants. The overall level of those benefits in the broad scheme of things is significantly less than benefits available to permanently totally disabled workers.

Order & Judm. Regarding Constitutional Challenge ¶¶ 10-12, *Rausch v. State Compen. Ins. Fund*, 2001 MTWCC 15 (Apr. 20, 2001), *reversed on other grounds by Rausch I* (emphasis added).

Unquestionably, Montana's WCA treats PPD claimants differently from PTD claimants and those two groups of injured workers occupy different classifications under Montana law. As a result, the constitutional analysis and holding of *Reesor* cannot govern the constitutional analysis of *Satterlee*. Accordingly, this Court must conduct a separate equal protection analysis in *Satterlee* to determine if § 710's termination of PTD benefits violates the Equal Protection Clause of the Montana Constitution.

B. SECTION 710'S TERMINATION OF PTD BENEFITS DOES NOT VIOLATE EQUAL PROTECTION GUARANTEES BECAUSE IT DOES NOT DISCRIMINATE BETWEEN LIKE CLASSES AND IS RATIONALLY RELATED TO LEGITIMATE GOVERNMENTAL OBJECTIVES

Satterlee asserts that *Reesor* mandates a holding that § 710 is unconstitutional because it denies PTD benefits to claimants who are eligible for social security retirement benefits, but pays PTD benefits to claimants who are ineligible for social security retirement benefits. Satterlee Br. 6-8. As the party challenging the constitutionality of § 710, Satterlee bears the heavy burden of proving the statute is

unconstitutional beyond a reasonable doubt. *Powell v. State Compen. Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, ¶ 13, 15 P.3d 877, ¶ 13 (citing *Grooms v. Ponderosa Inn* (1997), 283 Mont. 459, 467, 942 P.2d 699, 703). A legislative enactment is presumed constitutional and every intendment in its favor will be presumed, unless its unconstitutionality appears beyond a reasonable doubt. *Powell*, ¶ 13 (noting that every possible presumption must be indulged in favor of the constitutionality of a legislative act, and courts should not consider the constitutionality of a statute unless it is absolutely required) (citing *Davis v. Union P. R.R. Co.* (1997), 282 Mont. 233, 240, 937 P.2d 27, 31); *State ex rel. Hammond v. Hager* (1972), 160 Mont. 391, 400-401, 503 P.2d 52, 57 (Haswell & Daly, JJ., concurring). The question of constitutionality is not whether it is possible to condemn the legislative action. Instead, the question of constitutionality is whether it is possible to uphold the legislative action, and the legislative action will not be declared invalid unless it conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt. *Powell*, ¶ 13 (citing *Stratemeyer v. Lincoln County* (1993), 259 Mont. 147, 150, 855 P.2d 506, 508-509, *cert. denied*, 510 U.S. 1011 (1993)).

The constitutional analysis is essentially a three-step process. The first step in the constitutional analysis is to determine what level of scrutiny applies. Here, the State Fund agrees with Satterlee that the rational basis test is the proper test to apply because the provisions of the WCA neither infringe upon the rights of a suspect class nor involve fundamental rights. Satterlee Br. 7. *Accord Henry v. State Compen. Ins. Fund*, 1999 MT 126, ¶ 33, 294 Mont. 449, ¶ 33, 982 P.2d 456, ¶ 33; *Powell*, ¶ 21. The next step is to identify the classes involved because if the classes at issue are not similarly situated, there can be no equal protection violation. *See Powell*, ¶ 22. The third step involves an analysis of whether a rational basis exists for how the classes are defined and, ultimately, how the classes are treated. Where the classes are similarly situated and there is unequal treatment between the classes, or where the individuals within the class are treated unequally, then a rational basis must be shown to uphold the unequal treatment. If the statute which causes the unequal treatment bears a rational relationship to a legitimate governmental interest, then the constitutional challenge is defeated. *Henry*, ¶ 33 (citing *Heisler v. Hines Motor Co.* (1997), 282 Mont. 270, 279, 937 P.2d 45, 50; *Matter of S.L.M.* (1997), 287 Mont. 23, 32, 951 P.2d 1365, 1371).

1. Satterlee's Equal Protection Argument Fails As a Matter of Law Because Claimants Who are Eligible to Receive Qualifying Retirement Benefits are Not Similarly Situated With Claimants Who are Ineligible to Receive Qualifying Retirement Benefits.

The Equal Protection Clause does not preclude different treatment of different classes of people so long as all persons within a group or class are treated the same. Thus, the Court must first identify the classes involved and determine whether they are similarly situated because the first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. *Powell,* ¶ 22 (*citing Henry* ¶ 27). In addressing the classes involved in an equal protection challenge, the Montana Supreme Court has provided the following guidance:

> [A] prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. **The equal protection clause does not preclude different treatment of different groups or classes of people so long as all persons within a group or class are treated the same.** Consequently, when addressing an equal protection challenge, this Court must first identify the classes involved and determine whether they are similarly situated. **If the classes at issue are not similarly situated, then the first criteria for proving an equal protection violation is not met and we need look no further.**

Powell, ¶ 22 (citations omitted) (emphasis added).

Satterlee asserts that § 710[2] creates the following classes of claimants: (1) PTD

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[2] Montana Code Annotated § 39-71-710 (2003) states in full:

> **39-71-710. Termination of benefits upon retirement.** (1) If a claimant is receiving disability or rehabilitation compensation benefits and the claimant receives social security retirement benefits or is eligible to receive or is receiving full social security retirement benefits or retirement benefits from a system that is an alternative to social security retirement, 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,

or rehabilitation claimants who receive, or are eligible to receive, social security retirement benefits; and (2) PTD or rehabilitation claimants who do not receive, or are ineligible to receive, social security retirement benefits. Satterlee Br. 7. The State Fund asserts that the classes are broader than Satterlee suggests and include claimants who are eligible to receive qualifying retirement benefits[3] versus those who are ineligible to receive qualifying retirement benefits. However, even if this Court adopts the classifications proposed by Satterlee, no equal protection violation results from the two classes of claimants created by § 710 because those classes are not similarly situated with one another.

In her brief, Satterlee mistakenly suggests that the two classes of claimants created by § 710 are alike in all respects, with chronological age serving as the only difference between the two classes of claimants. Satterlee Br. 7. However, age is not the key difference between the two classes because PTD benefits do not terminate at a specific age. In order to have an entitlement to qualifying retirement benefits, a claimant must have made appropriate contributions to the retirement plan during the course of the claimant's working life. Therefore, contrary to Satterlee's assertion, the limitation on PTD benefits is not triggered by age but is instead triggered by a claimant's eligibility to receive qualifying retirement benefits. Obviously, the eligibility to receive qualifying retirement benefits occurs at different ages for different people.[4]

> 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.

[3] The plain language of the statute verifies that the receipt of social security retirement benefits is not the only method by which PTD benefits may be terminated. Under § 710, PTD benefits also terminate when the claimant becomes eligible to receive "retirement benefits from a system that is an alternative to social security retirement[.]" This may include retirement benefits from various federal plans.

[4] No specific age triggers an entitlement to Social Security retirement benefits. Instead, if the worker has accumulated enough quarters to make himself or herself eligible for Social Security retirement, the date the worker becomes eligible to receive

The difference between the classes created by § 710 is the eligibility to receive qualifying retirement benefits, and a clear distinction exists between claimants who receive qualifying retirement benefits and those who do not. The best example of the significance of this distinction can be seen by way of example. Claimants who have not accumulated enough credits (*see* 20 C.F.R. §§ 404-498) to be eligible to receive Social Security retirement benefits continue to receive PTD benefits. Claimants who receive qualifying retirement benefits have a benefit available to them that is not available to the other class. However, if *Satterlee* invalidates § 710 as applied to PTD claimants, then an absurdity will result whereby claimants who are not considered part of the normal labor market because they are eligible for qualifying retirement benefits will receive PTD benefits and retirement benefits, but claimants who are ineligible for qualifying retirement benefits will only receive PTD benefits. Certainly, the Legislature could not have intended for workers who are not part of the normal labor market to earn more than workers who are part of the normal labor market. *See generally Watson v. Seekins* (1988), 234 Mont. 309, 763 P.2d 328, 331-332 (holding that workers' compensation is not intended to benefit a disabled worker more than a worker who is merely retired). To avoid such an absurdity, this Court should construe § 710 as terminating a claimant's PTD benefits when the claimant becomes eligible to receive qualifying retirement benefits. *Hiett v. Missoula County Pub. Sch.*, 2003 MT 213, ¶ 36, 317 Mont. 95, ¶ 36, 75 P.3d 341, ¶ 36 ("[W]when more than one interpretation [of a statute] is possible, in order to promote justice and give effect to the purpose of the statute, we will reject an interpretation that leads to an unreasonable or absurd result in favor of another that leads to a reasonable result."); *S.L.H. v. State Compen. Mut. Ins. Fund*, 2000 MT 362, ¶ 17, 303 Mont. 364, ¶ 17, 15 P.3d 948, ¶ 17 ("To avoid an absurd result and to give effect to a statute's purpose, we read and construe the statute as a whole."). More importantly, the receipt of qualifying retirement benefits clearly differentiates the two classes from one another. Because the classes at issue in this litigation are not similarly situated, there can be no equal protection violation. *See Powell*, ¶ 22.

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those benefits depends on the worker's birth year. For example, a worker born in 1960 or later cannot receive full Social Security retirement benefits until the claimant is sixty-seven. However, for workers born between 1937 and 1959, the age of full Social Security retirement benefits ranges from sixty-five to sixty-six and ten months. *See* http://www.ssa.gov/retirechartred.htm. Therefore, the age of eligibility varies from claimant to claimant.

Other important distinctions exist between claimants who are eligible for qualifying retirement benefits versus those who are not. As suggested above, the legislative history and 1981 version of § 710 verify that claimants who are retired are not part of the normal labor market:

> If a claimant is receiving total disability compensation benefits and the claimant receives retirement social security benefits or disability social security benefits paid to the claimant are converted by law to retirement benefits, **the claimant is considered retired and no longer in the open labor market**. When the claimant is considered retired, the liability of the insurer is ended for payment of such compensation benefits. . . .

Mont. Code Ann. § 39-71-710 (1981) (emphasis added). *Accord* 1981 Legislative History, Senate Labor & Employment Hearing at Ex. 2 (Jan. 13, 1981) (submission to legislature from the Workers' Compensation Division) ("This amendment would provide for the termination of total disability workers' compensation benefits in cases where the claimant is deemed to be retired and no longer in the open labor market."). *See also Southeastern Pa. Transp. Auth. v. W.C.A.B. (Henderson)*, 669 A.2d 911, 913 (Pa. 1995) ("It is clear that disability benefits must be suspended when a claimant voluntarily leaves the labor market upon retirement.").

Statistical data from the United States Government confirms that by age 67, approximately 85% of people receive Social Security retirement benefits. Depending on gender, 30-40% of people who receive Social Security retirement benefits also receive benefits from another pension or retirement plan. In addition, workers who are receiving Social Security retirement benefits and are not part of the open labor market have different work habits than workers who are part of the open labor market. As Paul Polzin's affidavit indicates, at age sixty-seven, two-thirds of the people who are receiving Social Security retirement benefits do not earn annual income from working. As the age of the retired person increases, the amount of retired workers who actually earn income from working decreases. By age seventy, approximately three-fourths of retired workers do not earn annual income from work. SOF 36-43. The steady decline in labor force participation highlights another key difference between the classes and does not support a conclusion that wage loss benefits should be paid for the duration of a claimant's life.

The State Fund asserts that the classes in this litigation are totally disabled claimants who receive or are eligible to receive qualifying retirement benefits versus totally disabled claimants who are ineligible to receive qualifying retirement benefits. As explained above, the classes at issue in this litigation are not similarly situated so there

can be no equal protection violation. Therefore, the State Fund is entitled to summary judgment as a matter of law regarding the constitutionality of § 710 as applied to PTD benefits.

2. Assuming Arguendo that Claimants Who Are Eligible to Receive Qualifying Retirement Benefits are Similarly Situated with Claimants Who are Ineligible to Receive Qualifying Retirement Benefits, Satterlee's Equal Protection Argument Still Fails As a Matter of Law Because a Rational Basis Exists for Terminating PTD Benefits when a Claimant Becomes Eligible to Receive Qualifying Retirement Benefits.

Assuming arguendo that the two classes of claimants are similarly situated, it becomes necessary to examine whether the disparate treatment concerning the payment of PTD benefits to claimants who are ineligible to receive qualifying retirement benefits but not to claimants who are eligible to receive qualifying retirement benefits is rationally related to a legitimate governmental interest. If a rational relationship exists, then the constitutional challenge is defeated. *Henry*, ¶ 33 (citations omitted).

The Equal Protection Clauses of the Montana Constitution and the United States Constitution both provide that no person shall be denied the equal protection of the laws. When scrutinizing statutes involving social and economic policy under an equal protection analysis, the United States Supreme Court provides the following direction:

> Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. **In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification**. . . . "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."

F.C.C. v. Beach Communs., Inc., 508 U.S. 307, 313-314 (1993) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (citations omitted) (emphasis added)). In the context of social and economic regulation, a Court's review of equal protection challenges must be

especially deferential to legislative choice. *U.S. R.R. Retirement Bd. v. Fritz*, 499 U.S. 166, 175 (1980) ("[I]n cases involving social and economic benefits, [the judiciary] has consistently refused to invalidate on equal protection grounds legislation which it simply deemed unwise or unartfully drawn."); 2 Ronald D. Rotunda et al., *Treatise on Constitutional Law*, § 18.3 (1986) ("[S]o long as it is arguable that the other branch of government had [a rational] basis for creating the classification, a court should not invalidate the law."). The same constitutional principles hold true in Montana, where our Legislature has the power to determine the amount and type of benefits available to an injured claimant. *See Ingraham v. Champion Intl.* (1990), 243 Mont. 42, 48, 793 P.2d 769, 772 (In Montana, "[t]he power of the legislature to fix the amounts, time and manner of payment of workers' compensation benefits is not doubted."); *Cunningham v. Nw. Improvement Co.* (1911), 44 Mont. 180, 119 P. 554 (the legislature has the right to regulate and provide for benefits in cases of injury or death).

Satterlee faces a significant burden of proving the constitutional deficiency of § 710 beyond a reasonable doubt, especially in the face of a court's required presumption to uphold the viability of a legislative enactment. Based on the arguments set forth in Satterlee's brief and the legitimate justifications that exist for terminating PTD benefits when a claimant becomes eligible to receive qualifying retirement benefits, Satterlee cannot meet her heavy burden of proving that § 710 violates the Equal Protection Clause.

a. *Terminating PTD benefits when a claimant becomes eligible to receive qualifying retirement benefits is rationally related to the legitimate governmental objective of preventing duplicate payments of wage loss benefits.*

Workers' compensation disability benefits are part of an interrelated system of benefits, all serving the singular purpose of replacing lost wages. *Harris v. State, Dept. of Labor & Indus.*, 843 P.2d 1056, 1066 (Wash. 1993) ("[s]tate disability benefits and federal old age social security benefits serve the same purpose: to restore earnings due to wage loss. The cause of wage loss – whether it be old age, disability, or unemployment – is irrelevant."); *Black v. MDMC/Benefis Healthcare*, 2001 MTWCC 47, ¶ 38; *Vogel v. Wells Fargo Guard Serv.*, 937 S.W.2d 856, 860 (Tenn. 1996) ("old-age and disability benefits, though different, are 'substantially similar' and serve the same purpose – the replacement of wages") (quoting *Brown v. Goodyear Tire & Rubber Co.*, 599 P.2d 1031, 1036 (Kan. App. 1979), *aff'd*, 608 P.2d 1356 (Kan. 1980)); Arthur Larson & Lex. K. Larson, *Larson's Workers' Compensation Law* vol. 4, § 97.10 (1990). There is a long-standing and prevailing wisdom acknowledging a connection between the purposes of the workers' compensation, unemployment, and retirement statutes.

Larson's workers' compensation treatise states it best:

> Wage-loss legislation is designed to restore to the worker a portion, such as one-half to two-thirds, of wages lost due to the three major causes of wage-loss: physical disability, economic unemployment, and old age. The crucial operative fact is that of wage loss; the cause of the wage loss merely dictates the category of legislation applicable [. . . . The worker] is experiencing only one wage loss and, in any logical system, should receive only one wage-loss benefit. This conclusion is inevitable, once it is recognized that workers' compensation, unemployment compensation, nonoccupational sickness and disability insurance, and old age and survivors' insurance are all parts of a system based upon a common principle. If this is denied, then all coordination becomes impossible and social legislation becomes a grab-bag of assorted unrelated benefits.

Larson, *Larson's Workers' Compensation Law* vol. 9, §157.01 (2000); *See also Harris*, 843 P.2d 1056; *Black*, ¶ 38.

Montana Code Annotated § 39-71-710 coordinates the provision of wage-loss benefits between the workers' compensation system and qualifying retirement systems. The Montana Supreme Court has held that workers' compensation is not intended to benefit a disabled worker more than a worker who is merely retired, further reflecting the interrelation of benefits. *See Watson*, 763 P.2d at 331-332. Like the Social Security offset provisions at issue in *Watson*, Montana Code Annotated § 39-71-710 serves to coordinate the interrelated systems of wage-loss benefits and prohibits the over-replacement of wage loss and double dipping. *See Ruter v. Minnesota Dept. of Corrections*, 569 N.W.2d 407, 408 (Minn. 1997) (for a single wage loss, there should be only one wage-loss benefit); *Harris*, 843 P.2d at 1066 (citation omitted) (the worker has incurred only one wage-loss and should receive only one wage-loss benefit). Moreover, the Montana Supreme Court previously sanctioned an earlier version of Montana Code Annotated § 39-71-710 approving the concept of terminating certain workers' compensation benefits when a person is considered retired and receives Social Security retirement benefits. *Hunter v. Gibson Prods. of Billings Heights, Inc.* (1986), 224 Mont. 481, 730 P.2d 1139.[5]

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[5] A majority of other jurisdictions have found that the termination of benefits at retirement is constitutionally permissible. *See McDowell v. Jackson Energy RECC*, 84 S.W.3d 71, 76-77 (Ky. 2002) (terminating workers' compensation benefits when the employee qualifies for Social Security retirement benefits is rationally related to

In *Reesor*, the Montana Supreme Court rejected a coordination of benefits argument in the context of PPD benefits. However, *Reesor* mistakenly noted that Social Security retirement benefits are not wage loss benefits because of the 2000 amendment to the SSA. *Reesor* ¶ 24 (citing to the Senior Citizen's Freedom to Work Act of 2000). Under the 2000 amendment, workers over the age of 65 are permitted to earn unlimited wages without causing a reduction in their social security retirement benefits. *Reesor*, ¶ 24. However, contrary to the majority's insinuation in *Reesor*, the 2000 amendment to the SSA did not drastically alter the SSA or the purpose for which retirement benefits are paid. Instead, the 2000 amendment was a minor one that only impacted workers between the ages of 65 and 69 because under prior law, workers over the age of 70 could earn an unlimited amount of wages without having their social security retirement reduced. *See* Moon, Moss, McGill & Hayes, 6 Me. Emp. L. Letter 8, *Retirement Age Employees Now Can Work and Earn Without Limitation* (Oct. 2000); 320 Practicing Law Institute 67, 73 (Sept. 2002). As Paul Polzin noted, this explains why a spike appears in earnings at age 66, but then a steady decline occurs in labor force participation. SOF 38. Even with the 2000 amendment, by age 70, over three-fourths of people who receive Social Security retirement benefits are not working. SOF 37. Further, workers

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government's goal of avoiding duplication of benefits and reducing overall cost of workers' compensation system); *Harris*, 843 P.2d 1056 (workers' compensation benefits offset by Social Security retirement benefits is rationally related to the government's goal to prevent duplication of benefits); *Injured Workers of Kansas v. Franklin*, 942 P.2d 591, 610 (Kan. 1997) (same); *Case of Tobin*, 675 N.E.2d 781, 784 (Mass. 1997) (terminating benefits on eligibility for Social Security or private pension benefits is rationally related to the legitimate governmental interests of coordinating workers' compensation, Social Security and pension benefits to prevent stacking of benefits); *Vogel*, 937 S.W.2d at 860 (same); *Berry v. H.R. Beal & Sons*, 649 A.2d 1101, 1103 (Me. 1994) (reduction in workers' compensation benefits for Social Security retirement received is rationally related to the government's goal of coordinating benefits, preventing stacking of benefits, and alleviating the burden on employers who are required to pay into workers' compensation and Social Security systems); *Ruter*, 569 N.W.2d at 408 ("Avoiding duplication of wage-loss benefits is an eminently rational basis for benefits coordination provisions [.]"); *Harrell v. Fla. Constr. Specialists*, 834 S.2d 352, 357 (Fla. Dist. App. 2003) (citing *Wilkins v. Broward County Sch. Bd.*, 754 S.2d 50, 52 (Fla. Dist. App. 2000) (the legislature could legitimately assume that where a claimant is injured and reaches permanent total disability prior to age 62, the claimant would not continue to work after reaching the traditional retirement age)).

who elect early retirement are still subject to a reduction of benefits based upon the amount of their earnings under the 2000 amendment.

The *Reesor* dissent pointed out the majority's misplaced reliance on the 2000 amendment to the SSA and correctly noted that "the science of the field" recognizes a coordination of benefits between workers' compensation and Social Security retirement. *See Reesor*, ¶¶ 31-33 (citations omitted). The dissent also noted that one conceivable legislative purpose for terminating benefits upon the receipt of qualifying retirement benefits is to prevent the double payment of wage loss benefits to a worker from two different employer-funded programs, both of which are designed to replace wage loss. *Reesor*, ¶ 31 (citations omitted). In fact, unbeknownst to the majority in *Reesor*, the coordination between workers' compensation benefits and Social Security retirement benefits was specifically discussed prior to the legislative enactment of § 710. *See* 1981 Legislative History, Senate Labor & Employment Hearing 3 (Jan. 13, 1981) (explaining that workers' compensation benefits would stop at retirement because the injured worker would be entitled to Social Security and other benefits). Because the coordination of benefits was discussed during legislative hearings prior to § 710's enactment, and because previous Montana law suggests that avoiding a duplication of benefits is a legitimate governmental objective, the termination of PTD benefits when a worker becomes eligible to receive qualifying retirement benefits passes constitutional muster. *See Reesor*, ¶¶ 31-33 (citations omitted).

Although § 710 may imperfectly address the various wage loss and benefit scenarios, such imperfection does not render the statute unconstitutional. *See Gulbrandson v. Carey* (1995), 272 Mont. 494, 505, 901 P.2d 573, 580 (while the differences in benefit entitlement may be less than perfect, such imperfection does not mandate a conclusion that it violates equal protection). Further, in analyzing the justification for disparate treatment, it is important to recognize that a statute is not rendered unconstitutional merely because it provides different economic benefits to different claimants. *Stratemeyer*, 855 P.2d at 510; *Shea v. North-Butte Mining Co.* (1919), 55 Mont. 522, 179 P. 499, 501. Here, it is rational for the Legislature to terminate PTD benefits when those benefits are replaced by a related wage loss benefit system. Thus, Montana Code Annotated § 39-71-710 rationally serves the Legislature's goal of coordinating benefits and preventing the duplication of benefits derived from related benefit systems designed to serve the singular purpose of wage loss replacement. Therefore, Satterlee's equal protection argument fails as a matter of law.

b. *Terminating PTD benefits when a claimant becomes eligible to receive qualifying retirement benefits is rationally related to the legitimate governmental objectives of allowing employers to obtain workers' compensation coverage at reasonably constant rates, maintaining the viability of the WCA and promoting business in Montana.*

Several public policy provisions of the WCA are codified at Montana Code Annotated § 39-71-105. One of the policy provisions of the WCA is that "[w]age-loss benefits . . . are intended to assist a worker at a reasonable cost to the employer." Mont. Code Ann. § 39-71-105(1). Consistent with public policy of maintaining an affordable workers' compensation system in Montana to promote business, the Legislature has expressly stated that one objective of the WCA is to allow employers to secure workers' compensation coverage for their employees at reasonably constant rates. Mont. Code Ann. § 39-71-105(3).

The Montana Supreme Court in *Reesor* did not examine the financial impact of *Reesor* on the workers' compensation system. However, 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 the WCA in Montana. The State Fund recognizes that the Montana Supreme Court has indicated that "[c]ost-control alone cannot justify disparate treatment which violates an individual's right to equal protection of the law." *Heisler*, 937 P.2d at 52. However, the Montana Supreme Court has also concluded that cost control, when coupled with promoting business in Montana to improve our economic conditions, is a legitimate governmental objective:

> Even a cursory glance at the legislative history and statute indicates a concern over the high cost of the Workers' Compensation program to the State of Montana and the employers involved in the program. It is evident that this was the primary purpose for the legislative changes in the Workers' Compensation Act. "**[P]romoting the financial interests of businesses in the State or potentially in the State to improve economic conditions in Montana constitutes a legitimate state goal."** *Meech v. Hillhaven West, Inc.* (1989), 238 Mont. 21, 48, 776 P.2d 488, 504. (Citation omitted.) A purpose would be to provide for injured workers at a reasonable cost.

Stratemeyer v. Lincoln County (1993), 259 Mont. 147, 153, 855 P.2d 506, 510, cert. denied, 510 U.S. 1011 (1993) (emphasis added). *Accord McDowell*, 84 S.W.3d 71 (noting that in declaring KRS 342.730(4) constitutional [which provided for the termination of workers' compensation benefits when the employee qualified for Social

Security retirement], the Kentucky Supreme Court found that the rational purpose behind the statute was to reduce the overall cost of maintaining the workers' compensation system, thereby improving the economic climate for all citizens of Kentucky).

If this Court grants Satterlee the relief she requests, PTD claimants will become entitled to receive lifetime PTD benefits.[6] Through common fund proceedings, Satterlee will attempt to apply a favorable decision retroactively to 1981, the year the Legislature enacted § 710's termination of PTD benefits at retirement. *See Schmill v. Liberty Nw. Ins. Corp.*, 2005 MT 144, ¶ 14, 327 Mont. 293, ¶ 14, 114 P.3d 204, ¶ 14 (noting that judicial decisions are presumptively retroactive in Montana, and a decision will avoid retroactive application only if all three factors of the non-retroactivity test are satisfied). The State Fund has estimated the cost impact of *Satterlee* on both a prospective and retroactive basis. To avoid repetition, the State Fund will not repeat the information contained in the Statement of Additional Uncontroverted Facts. However, several facts deserve special consideration because they verify that *Satterlee* would stifle economic development, cause a marked increase in the cost of doing business in Montana, and threaten the viability of the WCA.

If *Satterlee* is found to invalidate Montana Code Annotated § 39-71-710 as applied

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[6] Only eight states currently provide lifetime PTD benefits to workers who are permanently, totally disabled. *See* Council of State Governments, *Workers' Comp. Trends Alert* 7-8 at Table 2.2. A judicial decision which invalidates § 710 and allows claimants to receive lifetime PTD benefits would drastically change the entitlement scheme of Montana's WCA. Such a paramount change in the provisions of the WCA would be akin to judicial legislation. However, the separation of powers doctrine prohibits this Court from engaging in judicial legislation. *See* Mont. Const. art. III, § 1; *Sheehy v. Public Emp. Retirement Div.* (1993), 262 Mont. 129, 144, 864 P.2d 762, 772 ("But what would then be imposed and given effect would be a law completely different from what is clearly intended in the original act. It may even be a better law, but that is not our business; such would be judicial legislation."); *State ex rel. Johnson v. District Ct. of Eighteenth Jud. Dist.* (1966), 147 Mont. 263, 270, 410 P.2d 933, 936 ("[c]ourts cannot legislate"); *Brereton v. U.S.*, 973 F. Supp. 752, 756-57 (E.D. Mich. 1997) (reasoning that to allow hedonic damages without consciousness of the loss would constitute impermissible judicial legislation in an area controlled by statute).

to PTD claims[7], the prospective application of *Satterlee* would require rate increases ranging from 11% to 21% for State Fund's policyholders. Based on annual premiums of approximately $200 million, this rate increase corresponds to an annual increase of approximately $21,600,000 to $41,400,000 for State Fund's policyholders. The costs and rate increases associated with retroactively applying *Satterlee* are even more staggering than the prospective costs. Excluding claims which are coded or otherwise identified as settled, for claims arising on or after October 1, 1981 through June 30, 1990, the increase in benefit costs against the Old Fund – the liability of which is the responsibility of the taxpayers of Montana[8] – is estimated at $93 million to $116 million. For non-settled claims arising on or after July 1, 1990 through December 22, 2004, the increase in benefit costs against the State Fund is estimated at $135 million to $186 million. In total, the benefit costs to the State Fund and the Old Fund associated with retroactively applying *Satterlee* are estimated at $228 million to $302 million. The State Fund's estimate is not a "best case/worst case" scenario but instead represents the "highly likely range" from an actuarial standpoint. SOF 1-2, 10-11.

A retroactive application of *Satterlee* would eliminate the State Fund's surplus, which would force the State Fund to significantly increase its rates over many years to restore surplus to target levels. If the State Fund attempted to recapture its depleted surplus in one year and restore it to the statutory minimum amount, the State Fund would have to increase its rates by an additional 60%, which translates into more than $120 million in increased premium payments for Montana businesses who procure workers' compensation coverage through the State Fund. If the State Fund attempted to recapture its depleted surplus over a three-year period, it would have to increase its rates by approximately 16%. SOF 10. Further, the Old Fund would be severely impacted by a retroactive application of *Satterlee*. The Old Fund is currently unfunded by more than $7 million, and the financial impact on the Old Fund would have to be paid out of Montana's General Fund. If history is any guide, to cover the liabilities of the Old Fund, the State of Montana would have to reinstate its payroll tax, which was in existence until 1998 to cover workers' compensation liabilities created by the workers' compensation crisis in the 1980s. SOF 10-12.

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[7] The State Fund's cost impact estimates do not include costs associated with retroactively increasing a claimant's entitlement to rehabilitation benefits because rehabilitation benefits are typically exhausted before a claimant is rendered PTD.

[8] Liabilities of the Old Fund are paid with money from the State of Montana General Fund. Thus, any funds which are necessary to pay and administer Old Fund claims must be transferred from the State's General Fund. SOF 10-11.

In addition to *Satterlee*, several common fund cases are currently pending which seek to apply, or are already applying, judicial decisions retroactively. *See Stavenjord; Schmill; Reesor; Flynn; Rausch; Hiett.*[9] In addition to *Schmill*, if *Satterlee*, *Reesor* and *Stavenjord* all apply retroactively, the cumulative benefit cost impact on the State Fund ranges from $152 million to $209 million, with an additional benefit cost to the Old Fund of $100 million to $125 million, for a total estimated financial impact of $252 million to $334 million. SOF 14. Notably, the State Fund's estimates do not include the significant claims-related and administrative expenses[10] associated with retroactively implementing each decision. SOF 14. As this Court recalls, the workers' compensation crisis in the 1980s led to the insolvency of the Old Fund and forced many private sector insurers out of Montana, which resulted in a legislative overhaul of the WCA in 1987. The recent onslaught of common fund cases – and *Satterlee* in particular – are threatening to create another workers' compensation crisis in this State. If the State Fund's estimates are extrapolated to apply to the workers' compensation system as a whole, it becomes readily apparent that the financial impact of *Satterlee* will be the death knell for the WCA, which would leave injured workers without a quick and guaranteed recourse for their workplace injuries. Therefore, § 710's disparate treatment of two classes of claimants is rationally related to the legitimate governmental objectives of (1) maintaining an affordable WCA in Montana that allows employers to obtain coverage at reasonably constant rates, (2) promoting business and economic development in this State, and (3) preserving the rights and remedies afforded to all injured workers in Montana. Therefore, the justifiable termination of PTD benefits at

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[9] A full listing of the pending common fund litigation can be located on the WCC website at http://wcc.dli.mt.gov/common_fund_litigation.asp.

[10] As the Affidavits of Cris McCoy, Marvin Kraft and David Ogan indicate, identifying and retrieving affected files imposes significant costs and burdens on the State Fund. In order to stay current on technological changes, the State Fund has maintained different computerized claims management and data storage systems. However, due to interface problems, some of the information that was compacted for transfer from one system could not be disassembled in the subsequent system. Files that need to be physically located and retrieved require additional administrative effort on the part of the State Fund. Further, each affected file would need to be adjusted, entitlement would have to be determined, and benefits would have to be paid. Lastly, under the current organizational structure of the State Fund, accomplishing special tasks like common fund implementation is more difficult than it was in the mid-1990s. SOF 15-35.

retirement does not violate equal protection.

c. Other conceivable legitimate governmental objectives exist which justify the termination of PTD benefits when a claimant becomes eligible to receive qualifying retirement benefits.

Even if this Court rejects the State Fund's argument that the termination of PTD benefits upon a claimant's eligibility to receive qualifying retirement benefits is not rationally related to the legitimate government objectives identified above, the disparate treatment is still constitutionally permissible if this Court can conceive of any governmental objective which justifies the disparate treatment. *Stratemeyer*, 855 P.2d at 509-510 ("The purpose of the legislation does not have to appear on the face of the legislation or in the legislative history, but may be any possible purpose of which the court can conceive. In this case, the Workers' Compensation Court expected the legislature to provide the purpose. This, however, is not required of legislation being examined relative to equal protection.").

The wisdom of the Florida Supreme Court provides guidance in identifying other legitimate governmental objectives for terminating PTD benefits when a claimant becomes eligible to receive qualifying retirement benefits. *See Sasso v. Ram Prop. Mgt.*, 452 S.2d 932 (Fla. 1984). In *Sasso*, a seventy-eight year old claimant was injured while working as a landscape gardener. As a result of his workplace injury, Sasso's arm was permanently impaired and he was unable to find employment. Sasso requested PTD benefits as a result of his injury, but his claim was denied because wage loss benefits terminated at age sixty-five under Florida's statutory scheme. Sasso claimed that Florida's statutory scheme violated the equal protection clause because it unconstitutionally denied him wage loss benefits as a result of his age. *Sasso*, 452 S.2d at 934. In rejecting Sasso's constitutional challenge, the Florida Supreme Court found that the disparate treatment of older versus younger workers was rationally related to at least three legitimate government objectives:

1. To reduce fringe benefits to reflect a productivity decline with age;

2. To induce older workers to retire to allow younger workers a chance to advance in their employment; and

3. To reduce the cost of workers' compensation premiums.

Sasso, 452 S.2d at 934 n. 3.

The State Fund has already explained how maintaining affordable workers' compensation premiums in Montana is rationally related to a legitimate governmental objective. The other two objectives identified by the Florida Supreme Court have not been addressed by the State Fund but are equally applicable to *Satterlee*. Therefore, the State Fund asserts that the termination of PTD benefits when a claimant becomes eligible to receive qualifying retirement benefits does not violate equal protection guarantees because it is rationally related to the additional legitimate governmental objectives of (1) reducing fringe benefits to reflect a productivity decline with age, and (2) allowing younger workers a chance to advance in their employment. Accordingly, Satterlee's constitutional challenge fails as a matter of law.

C. RESPONDENTS ARE NOT BOUND BY THE STATUS REPORT OF JUNE 9, 2004

Satterlee asserts that the State Fund and all Respondents are bound by the language of a prior Status Report which was filed by the State Fund on June 9, 2004, more than half a year prior to the Montana Supreme Court's decision in *Reesor*. In the Status Report, the State Fund indicated that the Montana Supreme Court's decision in *Reesor* may control the legal issue presented in *Satterlee*. Following the *Reesor* decision, the State Fund filed another Status Report in which it highlighted some of the key differences between *Reesor* and *Satterlee* and explained why *Reesor* was inapplicable:

> The factual underpinnings of *Reesor* concern the payment of PPD benefits to permanently partially disabled claimants. *See Reesor*, ¶¶ 2, 7. As such, the specific holding of *Reesor* provides that permanently partially disabled claimants are entitled to payment of PPD benefits past retirement age. However, none of the Claimants in this litigation are permanently partially disabled. Therefore, based on the limited holding of *Reesor*, a legal issue exists as to whether *Reesor* extends to permanently totally disabled claimants.

State Fund's Status Rpt. & Req. for Status Conf. 2 (Jan. 21, 2005).

Additionally, the Status Report from June of 2004 was filed three months before the Montana Supreme Court's holding in *Ruhd v. Liberty Nw. Ins. Corp.*, 2004 MT 236, ¶ 31, 322 Mont. 478, ¶ 31, 97 P.3d 561, ¶ 31, that common fund attorney fee liens apply globally to all insurers and self-insurers. Here, the Second Amended Petition for Hearing contains a request for common fund fees or class certification. If Satterlee prevails in this litigation, the common fund attorney fee lien would apply globally to all

carriers in the post-*Ruhd* environment. However, a majority of insurers and self-insurers who are participating in the briefing had no involvement with the filing of the Status Report on June 9, 2004, so the language contained therein cannot preclude other insurers or self-insurers from briefing the constitutionality of § 710 as applied to PTD benefits. As a result, the State Fund is also entitled to brief the constitutionality of § 710 because a ruling on the constitutionality of the statute will apply globally to all insurers or self-insurers. *See* Order Regarding Applicability of Rulings on Legal Issues, *Reesor v. Montana State Fund*, WCC No. 2002-0676, 2005 MTWCC 40 (July 20, 2005) ("All legal rulings will apply globally to all insurers and self-insurers whether or not they have specifically raised the issues which are decided.").

More importantly, to the extent Satterlee is suggesting that the State Fund is judicially estopped from arguing that *Reesor* is not controlling, the State Fund notes that a judicial admission is not binding for purposes of judicial estoppel unless the admission is an unequivocal statement of fact. *Stanley L. & Carolyn M. Watkins Trust v. Lacosta*, 2004 MT 144, ¶ 34, 321 Mont. 432, ¶ 34, 92 P.3d 620, ¶ 34 ("[A] judicial admission applies to facts, not to legal theories or positions. . . A judicial admission is not binding unless it is an unequivocal statement of fact. Hence, '[f]or a judicial admission to be binding upon a party, the admission must be one of fact rather than a conclusion of law or the expression of an opinion.'") (citation omitted). Because the scope and applicability of *Reesor* is a legal issue rather than a factual one, the State Fund is not judicially estopped from explaining why *Reesor* does not invalidate § 710 as applied to PTD or rehabilitation benefits.

D. MONTANA CODE ANNOTATED § 39-71-710 IS A CONSTITUTIONALLY VALID EXERCISE OF LEGISLATIVE POLICYMAKING AND NEITHER ADOPTS FUTURE FEDERAL REGULATIONS NOR DELEGATES LEGISLATIVE AUTHORITY TO THE FEDERAL GOVERNMENT

As a final argument, Satterlee contends that Montana Code Annotated § 39-71-710, is unconstitutional because it impermissibly delegates legislative authority to the federal government by adopting by reference changes in the federal Social Security laws or regulations to occur in the future. However, the statute does not delegate legislative authority to the federal government because it does not adopt any federal statutes in lieu of the legislature's own exercise of judgment. Rather, the termination of state disability benefits is simply made contingent upon the happening of a future independent event: a person's eligibility to receive qualifying retirement benefits.

1. The Delegation Doctrine.

The delegation doctrine is rooted in Article III, Section 1, of the Montana Constitution which provides:

> **Separation of powers**. The power of the government of this state is divided into three distinct branches – legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the other, except as in this constitution expressly directed or permitted.

The separation of powers provisions prohibit the legislature from delegating its legislative powers to any other body of government or private party unless the constitution provides otherwise. To avoid an unconstitutional delegation, a statute delegating authority must be "complete" when enacted. A statute is complete and validly delegates administrative authority when nothing with respect to a determination of what is the law is left to the administrative body. *Mathis*, ¶ 15 (citing *Bacus v. Lake County* (1960), 138 Mont. 69, 78, 354 P.2d 1056, 1061).

Constitutional challenges to delegations of legislative power fall into three categories: grants of legislative power to administrative bodies, statutes that adopt federal statutes or other standards, and statutes that are contingent upon the happening of some independent event. Montana Code Annotated § 39-71-710 falls into the third category. It makes the termination of state disability benefits contingent upon the happening of an independent event: a person's eligibility for Social Security benefits. To demonstrate the difference between the three categories, a discussion of each follows.

Montana has long defined the limitations on the legislature's power to delegate authority to administrative bodies. As long as the grant to an administrative agency prescribes a policy, standard, or rule to guide the exercise of the delegated authority and prescribes with reasonable clarity the limits of power delegated, the grant of power is valid. See *In re Petition to Transfer Territory from High School Dist. No. 6, Lame Deer, Rosebud County, to High School Dist. No. 1, Hardin, Big Horn County*, 2000 MT 342, ¶ 15, 303 Mont. 204, ¶ 15, 15 P.3d 447, ¶ 15; *Mathis*, ¶ 15. In other words, the statute itself must be complete and serve only to enable the agency to carry out the law, not to make the law.

The second category of delegation of cases involves statutes that adopt federal statutes or other private standards, rather than specifically delegating authority to

administrative bodies. Courts generally hold that a legislature may adopt existing federal laws or private standards, but not future ones because to do so transfers legislative authority to determine what the law will be to an outside entity. *See Lee v. State* (1981), 195 Mont. 1, 635 P.2d 1282; *Diversified Inv. Partn. v. Dept. of Social & Health Serv.*, 775 P.2d 947, 950 (Wash. 1989).

The third category of delegation of cases differs from the first two in that the challenged statutes neither delegate duties to an administrative body nor expressly adopt federal statutes or outside standards in lieu of a legislature's own judgment. Instead, they refer to federal statutes either to operate in coordination with a federal scheme or are made contingent upon the happening of a future event. State taxation statutes offer a prime example: Montana Code Annotated § 15-30-111 defines adjusted gross income, for state taxation purposes, as a "taxpayer's federal income tax adjusted gross income as defined in section 62 of the Internal Revenue Code of 1954, 26 U.S.C. 62, as *that section may be labeled or amended . . .*" (emphasis added). Though the federal definition of income may change, thus affecting Montana Code Annotated § 15-30-111, the reference to federal tax statutes is not an adoption of future federal regulations nor a delegation of the State's power to tax. *See In re Estate of West*, 415 N.W.2d 769 (Neb. 1987) (Nebraska estate tax computed by reference to, and designed to "pick up," the difference between federal estate tax credits and amount actually paid as Nebraska inheritance tax is not a delegation of legislative power, even when federal law is subject to amendment); *First Fed. Sav. & Loan Assn. v. Connelly*, 115 A.2d 455, 459 (Conn. 1955) (defining "net earnings" by reference to federal income tax law was not an unconstitutional delegation of power to tax, but an incorporation by reference of federal law into state law); *City Natl. Bank v. Iowa State Tax Commn.*, 102 N.W.2d 381 (Iowa 1960) (defining "adjusted gross income" by reference to federal definition of "taxable income" was not a delegation of the state power to tax).

2. The Delegation Doctrine As Applied to § 710.

The operative effect of Montana Code Annotated § 39-71-710 – the termination of PTD benefits – is contingent upon a person's eligibility to receive qualifying retirement benefits. A contingent statute such as Montana Code Annotated § 39-71-710 is significantly different than a statute that adopts future federal law in lieu of the legislature's own judgment. A case involving Washington's nursing home costs reimbursement statutes demonstrates the difference.

In *Diversified*, the Washington legislature enacted a statute calling for the invalidation of certain cost reimbursement statutes upon their conflict with federal law because the conflict would result in the loss of federal funding. *Diversified*, 775 P.2d at

948-949. When federal Medicaid statutes changed, thus creating a conflict with state statutes, the department issued an emergency rule invalidating the conflicting statutes as instructed by the legislature. *Diversified*, 775 P.2d at 949. The court held the statute valid because it did not adopt any federal rule or statute and did not delegate any power to the federal government. *Diversified*, 775 P.2d at 950, 952. Rather, the operative effect of the statute, which was complete in itself, was simply conditioned upon the happening of a specified event, the potential conflict with future federal regulations. *Diversified*, 775 P.2d at 950. The statute reflected the legislature's judgment that the continuation of federal funding was more important than the continuation of the conflicting state statutes. *Diversified*, 775 P.2d at 953. Though the event that triggered the operative effect of the statute was out of the control of the legislature, the statute did not transfer to the federal government the power to render judgment on whether the statute would continue in the face of a conflict. *Diversified*, 775 P.2d at 952. That judgment was one the legislature had already made. *Diversified*, 775 P.2d at 952.

The *Diversified* court contrasted valid contingent legislation with a legislative act that unconstitutionally adopts future federal statutes. *Diversified*, 775 P.2d at 952. In *State v. Dougall*, 570 P.2d 135 (Wash. 1977), the legislature enacted a statute authorizing a substance to be designated or rescheduled as a controlled substance by the mere act of final publication in the Federal Register. *Dougall*, 570 P.2d at 137. Because the state simply deferred to federal regulations, the power and judgment of the state legislature to determine which future drugs would be controlled substances under the state statute was impermissibly transferred to the federal government. *Diversified*, 775 P.2d at 952 (citing *Dougall*, 570 P.2d at 138).

The Wisconsin Court of Appeals upheld a workers' compensation statute as valid contingent legislation, though the law incorporated the federal Vocational Rehabilitation Act and all future amendments thereto. *Dane County Hosp. & Home v. Labor & Indus. Rev. Commn.*, 371 N.W.2d 815, 824 (Wis. App. 1985). The statute provided travel expenses for rehabilitation services provided outside an injured worker's home. Whether a worker was entitled to travel expenses depended, in part, upon the worker's eligibility for federal vocational rehabilitation benefits. *Dane County*, 371 N.W.2d at 824. The court held that incorporating the federal rehabilitation law was not a delegation of legislative authority because the statute granting travel expenses was merely "dependent in part on the happening of a contingency: eligibility for, and receipt of, rehabilitation services under the federal law[.]" *Dane County*, 371 N.W.2d at 824 (citing *State v. Wakeen*, 57 N.W.2d 364, 367 (Wis. 1953) ("legislature may enact a statute, the operation of which is dependent on the happening of a contingency fixed therein")).

Montana Code Annotated § 39-71-710 operates in the same manner as the

Washington cost reimbursement statute, the Wisconsin rehabilitation statute and the numerous state tax statutes that reference federal law without transferring authority. The Montana legislature has made the judgment that PTD benefits should terminate when a claimant becomes eligible to receive qualifying retirement benefits. It has not granted the federal government the power to make such a judgment simply because the availability of such benefits triggers the termination of PTD benefits. Montana Code Annotated § 39-71-710 is an expression of legislative policy, not a delegation of legislative power.

CONCLUSION

The *Reesor* decision was expressly limited to the termination of PPD benefits when a claimant became eligible to receive retirement benefits. The issue in this litigation focuses on PTD benefits, and the Montana Supreme Court has explained the differences between PPD and PTD claimants. Because a separate class of claimants is involved in *Satterlee*, a separate equal protection analysis must be conducted regarding the constitutionality of § 710.

Section 710 does not violate equal protection guarantees because claimants who are entitled to receive qualifying retirement benefits receive a monetary benefit that is not available to claimants who are ineligible to receive qualifying retirement benefits. As a result, the two classes of claimants are not similarly situated with one another. However, even if this Court determines that the classes are similarly situated, the disparate treatment under § 710 still passes constitutional muster. If *Satterlee* invalidates § 710 and allows claimants to receive lifetime PTD benefits, workers' compensation rates will skyrocket for Montana employers, and Montana taxpayers will have to absorb the cost impact on the Old Fund. Montana businesses and citizens cannot afford to absorb the fallout from a decision that turns PTD benefits into a pension plan because such a decision will costs hundreds of millions of dollars. Accordingly, the termination of PTD benefits at retirement is rationally related to the legitimate governmental objectives of maintaining the viability of the WCA, promoting business and improving economic conditions in Montana, and allowing employers to obtain coverage at reasonably constant rates. Further, the termination of PTD benefits at retirement prevents claimants from receiving a double payment of benefits for one wage loss. Therefore, Satterlee's constitutional claim fails as a matter of law.

Contrary to Satterlee's assertions, Montana Code Annotated § 39-71-710 is a constitutional exercise of legislative policymaking to distinguish between workers who are eligible to receive qualifying retirement benefits and those who are not eligible for that wage-loss benefit. Accordingly, Satterlee's contention that § 710 is unenforceable

under the delegation doctrine also fails as a matter of law.

For the reasons stated herein, the State Fund requests this Court deny Satterlee's motion for partial summary judgment and instead grant summary judgment in favor of the State Fund regarding the constitutionality of § 710. Pursuant to this Court's prior instruction, the Montana Contractor Compensation Fund, Allstate Insurance Company, State Farm Fire & Casualty, State Farm Insurance Company and State Farm Mutual Automobile Insurance Company will not file separate briefs but instead join in the filing of this brief.

DATED this 8 day of August, 2005.

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CERTIFICATE OF MAILING

I, the undersigned, of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for Respondent/Insurer, Montana State Fund, hereby certify that on this 8th day of August, 2005, I mailed a copy of the foregoing *Answer Brief in Opposition to Petitioners' Motion for Partial Summary Judgment*, postage prepaid, to the following persons:

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