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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CATHERINE E. SATTERLEE, et al., Petitioners, vs. LUMBERMAN'S MUTUAL CASUALTY COMPANY, et al. Respondent/Insurer.	WCC No. 2003-0840 **INTERVENERS' RESPONSE TO PETITIONERS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Petitioners argue that § 39-71-710, MCA is unconstitutional because it denies them equal protection by denying them full permanent total disability benefits ("PTD") allowed to other similarly situated claimants who are not retired. Petitioners further argue that the Montana Supreme Court, in *Reesor v. Montana State Fund*, 2004 MT 370, 325 Mont. 1, 103 P.3d 1019, has already disposed of this issue by holding that § 39-71-710's denial of permanent partial disability benefits ("PPD") is an unconstitutional denial of equal protection. Finally, Petitioners argue that § 39-71-710 is also unconstitutional because it delegates state sovereignty to the federal government. As set forth below, Petitioners have not satisfied their heavy burden of proving "beyond a reasonable doubt" that the challenged statute is unconstitutional as it relates to PTD benefits.

Not only do Petitioners fail to carry their heavy burden, further inquiry reveals sound reasons for the different limitations provided by the Legislature for PPD benefits (limited to 375 weeks) and PTD benefits (limited only at retirement). The Legislature's limitation on PTD benefits is consistent with its legitimate governmental interest in assisting a worker with wage-loss benefits at a reasonable cost to employers. If extended into retirement, a worker receiving PTD benefits would receive a windfall -- PTD wage-loss benefits as well as retirement benefits -- at an unreasonable cost to employers.

I. The Petitioners' Motion for Summary Judgment is Premature.

Preliminarily, this Court should deny Petitioners' Motion for Partial Summary Judgment as premature. As the Court is aware, summonses were issued to hundreds of workers' compensation insurers inviting them to participate in the briefing and argument of Petitioners' constitutional challenges.[1] Responses to these summonses were originally due on June 6, 2005, and that date was extended for at least some insurers to June 20. Subsequently, the Court set a briefing schedule and granted intervening insurers an extension to respond to Petitioners' Motion for Partial Summary Judgment by September 1, 2005.

[1] By making this Response to the Petitioners' Motion for Summary Judgment, Intervenors do not concede that this litigation, which concerns specific claims made against other insurers, applies to them.

The Court should refrain from hearing and deciding Petitioners' Motion until such time as Intervenors are permitted (a) access to factual discovery taken to date, and (b) an opportunity to explore through discovery the factual basis for Petitioners' claims, including, but not limited to whether a class of similarly situated injured workers even exists, and whether Petitioners would qualify as members of a class based on their intent and ability to work after retiring or becoming eligible to retire. For example, it is not known to Intervenors, without the benefit of discovery, the age at which Petitioners would have become eligible to receive Social Security retirement benefits, much less whether Petitioners were or will be eligible to receive retirement benefits from an alternative retirement system (or the criteria for such an alternative system). The Intervenors have had no opportunity to engage in discovery, or even to participate in or to acquire copies of the discovery taken to date. To the extent that the Court's ruling is intended to apply to Intervenors through further common fund or class certification proceedings, Intervenors respectfully submit that granting Petitioners' Motion for Partial Summary Judgment would deprive Intervenors of their fundamental rights to due process. Accordingly, the Court should deny Petitioners' Motion for Summary Judgment and grant Intervenors the opportunity to obtain and take the discovery necessary to oppose Petitioners' Motion. *See* § 24.5.326 A.R.M., *see also* MONT. R. CIV. P. 56(f).

II. The Montana Legislature Did Not Violate the Equal Protection Clause of the Montana State Constitution by Deciding Not to Make PTD a Lifetime Benefit.

A. Because the Court in *Reesor* did not address any issues relating to PTD benefits, *Reesor* does not control the outcome of this case.

Petitioners suggest that the constitutional question has already been settled by the Montana Supreme Court in *Reesor.* Petitioners are wrong, as the Montana Supreme Court does not decide issues not raised by the parties. *Dempsey v. Allstate Ins. Co.*, 2004 MT 391, ¶ 36, 325 Mont. 207, 219, 104 P.3d 483, 490. In *Reesor*, the question before the Court was whether § 39-71-710's limitation on PPD benefits was constitutional. The Court itself narrowly defined the issue before it:

> The only issue on appeal is whether the age limitation on PPD benefits, set forth in § 39-71-710, MCA, violates Article II, Section 4 of the Montana Constitution.

Reesor, ¶ 2. The Court simply did not address the precise question presented here, which concerns only ***PTD*** benefits. As shown below, PTD benefits differ substantially from the PPD benefit scheme analyzed in *Reesor.*

B. Petitioners must prove, beyond a reasonable doubt, that § 39-71-710 is unconstitutional as it relates to PTD benefits.

Not surprisingly, Petitioners do not address the applicable legal standard. This Court must presume the constitutionality of the challenged statute, and the Petitioners have the burden of proving, ***beyond a reasonable doubt***, that § 39-71-710's treatment of PTD benefits is unconstitutional. *State v. Butler,* 1999 MT 70, ¶ 8, 294 Mont. 17, 19, 977 P.2d 1000, 1002.

C. The proper classes in this case are retired and non-retired workers, not the young and the old.

As noted in *Reesor*, the first step in any equal protection challenge is to identify the classes involved and to determine whether they are similarly situated. *Reesor*, ¶ 10. Petitioners argue that the age-based classification used in *Reesor* applies to this action. In *Reesor,* the Petitioner proposed two classes of persons: (1) PPD eligible claimants who receive or are eligible to receive social security retirement benefits; and (2) PPD claimants who do not receive and are not eligible to receive social security retirement benefits. *Reesor*, ¶ 10. The Respondent in *Reesor* did not contest that classification. Because the Supreme Court does not address issues not raised by the parties, whether the age-based classification system proposed by the Respondent in *Reesor* accurately identifies the classes involved here is an open question. ***Since § 39-71-710 does not discriminate based on age, but rather on retirement status, the classes should be defined as retirees and non-retired workers.***

As stated above, the question before the Court in *Reesor* was the constitutionality of the age limitations for PPD benefits set forth in § 39-71-710, MCA, which provides:

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

§ 39-71-710, MCA (emphasis added).

The statute does not distinguish between persons based on their age, but rather on their retirement status. Accordingly, the classes affected by § 39-71-710 are retirees and non-retired workers. More importantly, retirement eligibility is not tied to age alone, as plaintiffs suggest. Rather, even for Social Security retirement benefits, age is only one component in determining whether a person is eligible to receive retirement benefits. *See* 20 C.F.R. §§ 404-498. To qualify for Social Security benefits, a person must have made sufficient contributions to the retirement plan during the course of his/her working life. Even once sufficient contributions are made, eligibility occurs at different ages for different people, depending on each person's year of birth. Of course, § 31-71-710 also contemplates eligibility for alternative retirement plans, which may or may not have any age criteria at all. Thus, although age may be a criterion for certain retirement plans, years of working service is a more consistent proxy for retirement

eligibility. Because retirement plans (and their criteria for eligibility) are diverse, PTD claimants cannot be defined solely by age for purposes of retirement benefit eligibility. Consequently, Petitioners' allegations of equal protection violations should be dismissed.

D. Even if classes of PTD claimants could be considered similarly situated in the abstract, the Legislature's decision to distinguish between retired and non-retired persons is Constitutional.

> Perfection in making classifications is neither possible nor necessary. Neither is mathematical nicety or perfect equality. Rather, where the goals of a classification are legitimate, and the classification is rationally related to the achievement of those goals, the statute should be constitutionally upheld.

McClanathan v. Smith (1980), 186 Mont. 56, 67-68, 606 P.2d 507, 513. In this case, the Legislature's limitation on PTD benefits should be upheld as rationally-related to the objective of providing wage-loss benefits at a reasonable cost to employers. By truncating PTD benefits at retirement, the Legislature recognized that disabled, retired workers would not generally be working.

The Montana Legislature has expressly stated its goals with respect to providing workers' compensation benefits.

> It is an objective of the Montana workers' compensation system to provide, without regard to fault, wage supplement and medical benefits to a worker suffering from a work-related injury or disease. ... [T]he wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease.

§ 39-71-705(1), MCA. The policy objective behind the Workers' Compensation Act is thus to provide wage supplementation to injured workers in order to mitigate the "negative impact on the worker, the worker's family, the employer, and the general public." § 39-71-105(2), MCA. The Legislature was not attempting to assist younger persons or to mitigate the impact of a worker's removal from the workforce due to retirement or for reasons other than injury or disease.

To accomplish its goal, the Legislature was required to identify those persons who are not members of the work force, whose absence is not due to injury or disease, and whose receipt of PTD benefits would not advance the policy of mitigating the negative impacts created when workers leave the work force due to injury or disease. Of course, in the absence of a list of such persons, the Legislature must necessarily identify classes that best describe who is and who is not a member of the work force. In § 39-71-710, the Legislature relies upon a person's retirement status as an indication that they are not members of the work force.

Not surprisingly, retirement status is a fairly accurate gauge of who works and who does not. Only 30.8% of 65 year old males and 24.6% of 65 year old females receiving social security retirement continue to work. (*See* U.S. Bureau of the Census and U.S. Bureau of Labor Statistics, *Current Population Survey: Civilian Labor Force Status, By Age and Gender* (Mar. 2004 Supp.), attached as Exhibit 3 to the Affidavit of

Paul E. Polzin (Docket Entry #227).) Clearly, in relying on retirement status as a means of identifying persons who are not members of the work force, whose absence from the work force is not due to injury or disease, and whose absence does not result in the negative impacts which the Act seeks to mitigate, the Legislature has created a generally accurate, albeit imperfect, classification system. This classification system is rationally related to the legitimate legislative goal of limiting workers' compensation benefits to those persons whose absence from the work force, due to injury or disease, creates the negative impacts recognized by § 39-71-105(2). Accordingly, § 39-71-710's classification system is constitutional because the goals of the classification are legitimate, and because the classification is rationally related to the achievement of those goals.

A close analysis of Petitioners' argument demonstrates that Petitioners themselves do not wholly adopt the pure "age-based" classification scheme that they urge upon the Court. The Petitioners distinguish between working retirees who suffer a work-related PTD injury and non-retired workers who suffer the same injury. This is, at best, a dubious classification system because the substantial majority of retirees do not work. Again, such classes could hardly be considered similarly situated. However, even if Petitioners' scheme made some sense, Petitioners have completely failed to allege that they are even within the class they seek to "protect." Petitioners have not alleged that they intended to continue to work beyond retirement age or that they are physically capable of doing so, even assuming that the PTD injury in question had not occurred. The question as to whether each of the Petitioners is among the small minority of persons who would have chosen to continue to work – and would have been able to do so – beyond retirement is a question of fact.

Significantly, none of the Petitioners have alleged any facts relating to this question. Moreover, the intervening Respondents have had no opportunity to engage in discovery, much less to participate in or to even acquire copies of the discovery taken to date. *See* § 24.5.326 A.R.M., *see also* MONT. R. CIV. P. 56(f). Indeed, it is likely that some or all of the Petitioners' employers have mandatory retirement policies such that the Petitioners would not have had the option to continue to work beyond a specified age. Because there are questions of fact as to each Petitioners' intent and ability to continue to work beyond retirement age, Petitioners' Motion for Summary Judgment should be denied.

E. Retirees and Non-Retired Persons Are Not Similarly Situated.

The Montana Supreme Court has held that the equal protection clause of the Montana Constitution does not preclude different treatment for groups not similarly situated:

> The basic rule of equal protection is that persons similarly situated with respect to a legitimate governmental purpose of the law must receive like treatment. However, the equal protection clause does not preclude different treatment of different groups so long as all individuals within the group are treated the same. Thus, to prevail on an equal protection challenge, a party must demonstrate that the state has adopted a classification which discriminates against individuals similarly situated by treating them differently on the basis of that classification. If the classes are not similarly situated, then the first criterion for proving an equal

protection violation is not met, and it is not necessary for us to analyze the challenge further.

Rausch v. State Compensation Insurance Fund, 2005 MT 140, ¶ 18, 327 Mont. 272, ¶ 18, 114 P.3d 192, ¶ 18.

As demonstrated above, the classes impacted by § 39-71-710 are retirees and non-retired workers. These classes are not similarly situated.

Retired persons have an income stream from sources other than wages. In 2003, for example, the average monthly retirement benefit for males from social security was $1,038.90. (Social Security Administration, *Annual Statistical Supplement, 2004*, at Table 5.B4, *available at* http://www.ssa.gov/policy/docs/statcomps/supplement/2004/5b.pdf, attached as Exhibit A) Thus, retired persons are not dependent upon wages earned from work. Indeed, as shown above, the vast majority of retirees do not work. Non-retired workers however, are entirely dependent upon wages earned at work because they have no source of retirement income. Thus, as a general rule, persons who are receiving benefits, or are eligible to receive benefits, under social security or an alternative system, do not face the complete and devastating loss of income faced by non-retired workers who experience a wage loss. Of course, this loss of income faced by non-retired, injured workers is precisely the evil that workers' compensation benefits are intended to mitigate. PTD benefits give injured workers an income until such time as they can qualify for retirement income.

Another factor that heightens the economic difference between retirees and non-retired workers is that retirees have had a lifetime to build a retirement income quite apart from social security. Indeed, on average 42.1% of males receiving social security retirement benefits also have other forms of retirement, such as company or union pensions, federal government retirement, US military retirement, state or local government retirement, US railroad retirement, annuities, and IRA, KEOGH, or 401(k) type plans. (*See* U.S. Bureau of the Census and U.S. Bureau of Labor Statistics, *Current Population Survey*: *Retirement Income by Source* (Mar. 2004 Supp.), attached as Exhibit 5 to the Affidavit of Paul E. Polzin (Docket Entry #227).) Thus, for 43.1% of retirees, their post retirement income is greater than the average male social security retirement income.

Retirees are significantly different than non-retired workers with respect to the impact of a PTD injury. Accordingly, the retired and non-retired classes affected by § 39-71-710 are not similarly situated. Thus, "the first criterion for proving an equal protection violation is not met, and it is not necessary...to analyze the challenge further." *Rausch*, ¶ 18.

F. § 39-71-710's Limitation on Post-Retirement PTD Benefits is Rationally Related to a Legitimate Government Interest.

As stated in *Reesor*, when conducting an equal protection analysis, the Supreme Court selects the rational basis test when neither strict scrutiny nor middle tier scrutiny apply. *Reesor*, ¶ 13. Strict scrutiny applies when a law discriminates against a suspect class or denies a fundamental right. *Id.* Middle tier scrutiny applies when a law affects a right conferred by the Montana Constitution that is not found in the Declaration of