WORKERS' COMPENSATION COURT
LEWIS AND CLARK COUNTY

CATHERINE E. SATTERLEE, et. al.,

-vs-

LUMBERMAN'S MUTUAL CASUALTY COMPANY/MONTANA STATE FUND, et al.

WCC No. 2003-0840

TRANSCRIPT OF PROCEEDINGS

Heard at the Workers' Compensation Court
1625 11th Avenue, Helena, Montana
October 7, 2005
1:00 p.m.

BEFORE THE HONORABLE JUDGE JAMES JEREMIAH SHEA

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vs.	)
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LUMBERMAN'S MUTUAL CASUALTY	)
COMPANY/MONTANA STATE FUND,	)
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BE IT REMEMBERED, that the above-captioned proceedings was heard at the Offices of the Workers Compensation Court, 1625 Eleventh Avenue, Helena, Montana, on the 7th day of October, 2005, beginning at the hour of 1:00 p.m., before the Honorable James Jeremiah Shea, was reported by Laurie Crutcher, Registered Professional Reporter, Notary Public.

* * * * *

A P P E A R A N C E S

ATTORNEYS APPEARING ON BEHALF OF THE CLAIMANTS:
MR. THOMAS J. MURPHY
MR. JAMES G. HUNT

ATTORNEYS APPEARING ON BEHALF OF THE RESPONDENTS:
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MR. LARRY W. JONES
MR. JOHN E. BOYHER
MR. LEO S. WARD
MR. MICHAEL P. HERINGER
MR. THOMAS E. MARTELLO
MR. RONALD A. THUESEN
MS. ANGIE K. JACOBS
MR. STEVEN W. JENNINGS
MR. PETER J. STRIZICH
MR. BILL VISSER
MR. SHAWN BUBB
MR. LAWRENCE HUBBARD
MS. NANCY BUTLER
MR. GEOFFREY KELLER
MR. PETER STRAUSS
MR. MARK CADWALLADER
MR. MIKE FANNING

Whereupon, the following proceedings were had:

* * * * *

THE COURT: Why don't we go on the record. And we are on the record on Satterlee, et al., versus Lumberman's Mutual Casualty Company, et al., WCC Claim No. 788-CU-041791. Rather than read through all of them, we'll submit a caption if everybody is in agreement with that for the record.

We're here on Petitioner's motion for summary judgment. If you will identify yourselves when you speak, and I think that will probably be sufficient.

Mr. Hunt, or Mr. Murphy, it's your motion, so if you would like to begin, please.

MR. MURPHY: May it please the Court and Counsel, my name is Tom Murphy. I'm co-Counsel with Jim Hunt representing the Satterlee claimants. Hereafter I will refer to our clients as "Satterlee."

Satterlee challenges the constitutionality of Section 39-71-710 because it eliminates her PTD disability benefit after the age of full retirement. Because Satterlee is over

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65 years of age, 710 terminated her PTD benefit, whereas a younger woman would receive and continue to receive PTD. I will discuss four points to demonstrate that 710 violates equal protection.

First, recent decisions by this Court and the Montana Supreme Court recognize that equal PTD benefits should be paid to similarly situated claimants like Satterlee.

Second, Satterlee suffered a wage loss in her Social Security retirement benefit, which we may from time to time call an SSRI benefit. The SSRI benefit does not reimburse, and furthermore, Satterlee paid for her SSRI benefit. So it is wrong to allow an insurer to take full credit for it.

Third, Montana public policy requires fair PTD benefits when there is an actual wage loss. Public policy does not hinge PTD entitlement on the assets of an injured woman. The Montana system is not need based. Rather PTD is based on the element that is lost; in this case, the wage that is lost. It's not based on whether she has passive income, whether she owns an apartment in Helena, or whether she's receiving Social Security benefits.

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Fourth, Montana law fiercely protects the rights of older women to work. Therefore, Satterlee asks this Court to apply a higher level of scrutiny. We suggest the middle tier level of scrutiny, because Montana law protects the rights of the elderly to work. Why would we protect that right so fiercely going in, and not give equal protection when people lose that right to work by injury?

Satterlee was injured in 1992. She was age 57 at the time of her injury. She's now receiving Social Security Retirement benefits, SSRI. Normally, a woman like Satterlee would be able to keep working if she wanted to, because she could exercise an older woman's well-protected right to work. We've cited to the Court a number of employment statutes that show that Montana strictly construes, strictly defends the rights of elderly people to work.

But with this injury, she lost that ability. She lost the ability to work up to age 65, and she lost the ability to work after age 65, and that is what is key here. She has the same financial need to work as other people that are working after 65, but she has no way to fulfill

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it. The loss of that ability is what we're asking for from this Court. Simply put, Social Security Retirement benefits don't cover all of her needs, or all of the needs of a number of people over age 65 that are forced to work.

Here, the State Fund refuses to pay ongoing permanent total disability benefits because Satterlee is over the age of 65, applying the age limitation found in Section 39-71-710, and that allows the State Fund to completely stop paying any benefit whatsoever to Satterlee when she reaches the full age of retirement.

THE COURT: Can I interrupt you for one second. On that, on 39-71-710, and I understand as the Reesor Court has interpreted it, but it's not strictly an age triggering statute, is it? I mean it's the eligibility for Social Security or like benefit?

MR. MURPHY: Eligibility is one of the criteria, but the Reesor Court found that 710 was mainly discriminating based on age, and that's why Reesor found 710 unconstitutional. Eligibility was not the reason.

The purpose behind, the public policy behind workers compensation benefits is to provide

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a reasonable wage loss benefit. And Reesor, as well as Henry, Stavenjord, Schmill, all of those cases all said that discriminating against these people, and not paying them an equal benefit, was the problem. It wasn't about what how much money you had going into it, it's about distributing it equally.

And when the Court in Reesor looked at what the insurers were doing, and said, "You're not distributing this equally. We're not going to comment on what it costs you, but you're not distributing it equally. Why would you use age alone as a reason to deny these people this benefit?" And Reesor was PPD. Here it's PTD. And the Court said you can't do that.

THE COURT: Let me ask you one thing to back up. And I don't want to get your argument disjointed, and I apologize, because I assume you're kind of giving me an outline of where you are headed.

But just jumping ahead, as to the middle tier of scrutiny, how -- Maybe I'll just ask you to jump ahead to that, because that's obviously going to be a -- in terms of the scrutiny that's applied here.

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When you have Reesor and the whole line of cases that are saying that, particularly when you're talking about equal protection, that Henry, that the lowest level is rational basis, then what would be the distinction here between this and Reesor, for instance, where they applied a rational basis?

MR. MURPHY: Addressing middle tier scrutiny, I guess I have to blame the Henry case where it was attempted, but not allowed. In Henry, actually the claimant asked for a strict scrutiny analysis, which is the highest scrutiny available, because the claimant contended that it was a fundamental right at issue.

But the question, at least in my mind, maybe it's not a strict scrutiny case, but Montana has recognized middle tier scrutiny in the Butte Community Union case. And I started thinking, well, normally this Court and the Supreme Court will apply a rational basis test to a workers compensation claim, and that is the rule. But in a case like this where you have age, age is the distinguishing factor. It's not just a workers compensation issue, but it's discrimination based on age, and made me think that doesn't seem right.

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Montana protects age pretty strenuously, and so it deserves a higher level of protection, and that's how I got on to the argument for middle tier scrutiny.

So the answer to your question is Henry didn't really address middle tier scrutiny. Reesor, we did. We asked the Court to apply middle tier scrutiny, but the Court didn't reach that question, because the Court found -- and the Court is going to analyze the case -- the Court went to rational basis first, and said, "Hey, this doesn't even meet rational basis, so we're not going to even have to address middle tier scrutiny."

And I guess that would be my quick answer to that question out of turn.

THE COURT: I appreciate that, because my question is that particularly in Reesor, where the Court did find that on this very statute that it was age discrimination, and clearly that's the argument here. We're just talking about a difference in benefits, we're talking about the same statute, we're talking about the same classification, basically age, correct?

MR. MURPHY: That's correct, same

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classes, same statute, and the ruling in Reesor we contend controls.

THE COURT: And the distinction here being that the Court just didn't reach whether middle tire would have applied because if it doesn't pass rational basis, it doesn't pass middle tier.

MR. MURPHY: That's correct. So the Court in Reesor did not have to reach middle tier. But of course as litigants, I think we have to put the argument forward, and keep it preserved on appeal in case the Court ever did want to address that issue.

We think that when we're talking about the rights of the elderly, not only to employment, but to the same benefits when they lose that employment, we think that those are sufficiently important rights that deserve middle tier scrutiny, but we believe -- and as we prevailed in Reesor -- we believe that we should prevail on either test, either level of scrutiny, reasonable or rational basis, or the reasonableness standard in middle tier scrutiny.

Without the age limitation that's found in 710 here, Satterlee would be entitled to on

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going PTD benefits. So therefore, but for her age alone, we contend that she would receive ongoing PTD. The large disparity based solely on age violates equal protection, and there is no rational basis for it, as was found in -- what we contend -- Henry, Stavenjord, Schmill, and Reesor.

THE COURT: I apologize again, but since we are speaking specifically about Ms. Satterlee, and you say but for age alone -- and I appreciate that that's what they're saying in -- what the Reesor Court says, that this is effectively an age alone discrimination.

But applying it to Ms. Satterlee, if she had not earned sufficient credits from Social Security, her age alone would not have deprived her of these benefits pursuant to Section 710, would it? She would be still receiving them?

MR. MURPHY: Effectively, as found in Reesor, age alone is the only reason that they used as a dividing line. It is the dividing line that they used.

THE COURT: I appreciate that, that that's what they're saying in Reesor. But when we're talking specifically about -- just kind of to wrap my own mind around it, because obviously

there are number of issues here, and clearly Reesor is -- it's a Supreme Court opinion. It's binding on this Court.

But my question is: As you speak to Ms. Satterlee specifically as an individual -- and I appreciate there are other claimants involved here, and there are other claimants globally involved here -- but when you say she was terminated based on her age alone, if she had not acquired a sufficient number of Social Security credits, she would still be receiving her PTD benefits, wouldn't she?

MR. MURPHY: Correct. In fact, I have a number of claimants in my office that continue to receive, and will receive PTD benefits for the rest of their life. It really makes you wonder why would they single out people of this age to treat differently.

But the point that we're making is that the dividing line in 710 is an age based dividing line.

When the Court looks at the equal protection challenge that we're bringing, it first has to ask two questions, and I think we've kind of touched on them both already, but the first one

is: Which classes are involved? And the second one is: Are these classes similarly situated?

Here we contend that the two classes at issue are the ones that receive PTD benefits before the full age of retirement, and those that do not are not entitled to receive PTD after that age. Those are the same classes in a way that were analyzed in Reesor, and frankly in Henry, Stavenjord, and Schmill.

Satterlee submits that these classes are similarly situated for the following reasons: Both classes have suffered work related injury; both classes are unable to return to work; both classes have injury related wage loss, that's 100 percent wage loss; both classes have permanent physical restrictions; and both classes, most importantly, have the Workers Compensation Act as their sole and exclusive remedy.

To just take a bunny trail here, work comp is supposed to replace tort actions, civil actions that people would be otherwise entitled to. How far would a restriction on the right of an elderly person's to full benefits go to in Civil Court? Would that be constitutional? No. That's what they're trying to do in the workers

compensation context.

If it's really supposed to replace, the exclusive remedy doctrine replace that common law action, it just seems that those principles should raise a question as to whether that's just. It's just not providing equal protection.

Here, people that are injured in the same way -- some are younger, they get the benefits; some are older, they don't -- that's a denial of equal protection.

I think I've addressed the questions about middle tier. This was where I was probably going to hit middle tier and rational basis. I might just skip over that.

And as you know, Judge, Mr. Hunt and I are splitting our time, so I think I'm going to turn the podium over to him at this time, to talk about some of the other aspects of our argument.

THE COURT: Thank you.

MR. HUNT: Your Honor, my name is Jim Hunt, and I'm following Mr. Murphy. I hope not to cover too much of the same ground he did.

Your Honor, Article 2, Section 4 of the Montana Constitution provides that the dignity of a human being is inviolable. No person shall be

denied equal protection of the laws. And whether a middle tier test or a rational basis test is applied here, there is no rational basis provided by any of the Respondents to deny equal protection.

There is a single discriminating factor between the two classes described by Mr. Murphy, and that is age. The insurers argue there is a constitutional basis for this discrimination, and for all intents and purposes, it comes down to economics.

When the State Fund first looked at this case, as this Court is aware, we entered into a stipulation where the State Fund agreed that Reesor would likely decide how this case came out. They have backed off of that in their brief, and said may, but the fact is they said likely.

And interestingly enough, J.H. Kelly, Inc. and Louisiana Pacific, when they first looked at it, said we win. The only thing we talk about is common fund. When you look at this --

THE COURT: Mr. Atwood didn't get the memo.

MR. HUNT: I would like to have had a conversation with him after he filed that brief.

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When you look at this at first blush, Your Honor, when you look at it at last blush, it is Reesor with one word changed, and that's it. Kelly correctly reasoned in their brief that it's the same statute, same issues, and it should be decided the same way.

Although the insurance companies attempt here to explain this as that a rational basis exists, the reasons given were all given in Reesor, and they were all dismissed. The Reesor case noted that in Henry, equal protection of the law requires that all persons be treated alike under like circumstances. Mr. Murphy touched on the policy, the workers compensation policy of the State of Montana.

But let me just point out that in Reesor, the Court held that the public policy and the primary goal of the Workers Compensation Act is to establish a wage replacement for injured workers, and that's found on Page 7 of the Reesor decision, Your Honor.

If permanent total disability benefits automatically terminate at a certain age, and workers do not retire at a specific age, then how can work comp be there for replacement of wages

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for these workers? There is no rational basis for doing that. If the primary goal is to replace wages, and it says there is no more after a certain age, then, Your Honor, it does not meet the primary goal of the Workers Compensation Act, according to Reesor.

Montana policy is not served by eliminating permanent total disability benefits because of passive income or assets, and permanent total disability benefits are need based. Social Security retirement benefits are not need based.

Let me go through some of the arguments here, and this might be a little repetitive, but I want to make the point that the arguments presented in Reesor, and the arguments presented here by the Respondents. The Respondents in both cases say and said, "SSRI and work comp is for the same purpose: To restore earnings due to wage loss." That was rejected in Reesor, and should be rejected here. They both say -- Reesor and here, the Respondents -- that SSRI and work comp benefits were interrelated and coordinated benefits; that was rejected in Reesor.

They both say terminating work comp prevents double payments for single wage loss;

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that was rejected in Reesor. They say the rational basis to terminate work comp and replace by SSRI is because it's another wage loss system; and the Court specifically said in Reesor that it is not another wage loss system, that SSRI is in fact not a wage loss system.

The Respondents in Reesor said, and they say here, that it is for the purpose of reducing fringe benefits to reflect a productive decline with age; that was rejected in Reesor, it should be rejected here. They say it's to induce older workers to retire to allow younger workers a advance in employment; again, rejected in Reesor, and should be rejected here.

And they say that -- it's an economic argument -- is to reduce the cost of work comp premiums. Your Honor, that argument was made in Schmill, Stavenjord, Henry, and Reesor, and rejected in each of those cases. It is not fair, nor is it equal protection, to deny somebody, based on age, permanent total disability benefits.

Essentially, Your Honor, hundreds of pages of arguments have been made. The same arguments have been made in each of these cases, and they have been repeatedly rejected by the

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Montana Supreme Court.

Reesor explained why workers compensation benefits and SSRI benefits are not comparable. Workers compensation is a wage loss system, and available only if a worker is injured. SSRI is not a wage loss system, and is triggered by reaching a certain age. And that's the difference.

Therefore, Your Honor, we conclude that providing PPD benefits to a younger person in the Reesor situation -- but that this is what the Supreme Court wrote in Reesor, and you can just take this and put in PTD for PPD, and put Satterlee for Reesor, because it's identical -- "We conclude that providing PPD benefits for a younger person in Reesor's situation, and limiting Reesor benefits based on his age violates the equal protection clause, and that there has been a failure to demonstrate a rational basis for the infringement of such constitutionally protected right." This was based on the same arguments made previously.

Your Honor, in Reesor, the Court held, and Putnam in their brief conceded, that there is no -- the chronological age and corresponding

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eligibility for SSRI are unrelated to a person's ability to engage in meaningful employment.

Stavenjord and both Schmill were covered by Mr. Murphy, but Your Honor, they essentially do the same thing, and it's a line of cases that starts with Henry, Stavenjord, Schmill, and Reesor, that say that you've got to treat people equally under the Work Comp Act.

It's important to note, too, Your Honor, that the Social Security Administration has recognized that SSRI was never intended to be a worker's sole retirement. As we pointed out in our brief, it replaces about 40 percent of a person's average income, and most financial advisors say that retirees will need about 70 to 80 percent of their work income to live comfortably in retirement.

What happens to folks is this -- and I hate this example, but I want to articulate it. The 50 year old person who is injured takes three hits, because of their injury, under the current law. They don't have any disposable income or way to contribute to their retirement plan, so when they get to 50 or 65, or retirement age, they don't have anything after that. And these are

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oftentimes the best earning years of their life.

They don't contribute to Social Security retirement, or Social Security at all, so when they get there, they have a reduced amount of Social Security benefits, and then they lose their permanent total disability benefits, oftentimes sending many of them into untenable economic positions.

Your Honor, essentially Respondents disregard Reesor, and argue that if Petitioners prevail, the cost will be prohibitive, and too much of burden on the state of Montana. Although couched in different terms, this is all about money and economics. And the fact of the matter is the cost should not be at the expense of quality. There's a certain amount of money to go around the work comp system, and it needs to be distributed equally, and not in violation of the constitution.

Therefore, Your Honor, we believe that this Court should find that 39-71-710 violates equal protection, and find it unconstitutional as it applies to permanent total disability benefits and rehabilitation benefits. Thank you.

THE COURT: Mr. Luck.

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MR. LUCK: May it please the Court, Counsel. Good afternoon, Your Honor. My name is Brad Luck, appearing on behalf of the Montana State Fund.

As we indicated to the Court in our phone conference, I've been asked by the other Defense Counsel to, for organizational purposes, take the lead here today. I'm not sure if it's because I was the oldest one, or they figured that they had briefed it so well that I couldn't mess it up on oral argument. Probably both.

Just to give you a little feel for the organization of where we want to go, I'm going to spend about maybe a half hour talking about several topics, coming at this in a little bit different fashion. I want to talk about some basic workers compensation constitutional considerations; and legislative intent considerations; talk about why Reesor isn't controlling in this case; discuss some of the standard constitutional analysis; and then treat some of the other issues.

Mr. Jones is going to follow me, and he's going talk a bit about the study and affidavit filed on behalf of Dr. Polzin, and his

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statistics. Mr. Boyher and Mr. Ward are going to speak for a few minutes on the impact of the case on self-insurers in Montana business. And Mr. Heringer is going to do clean-up work, and make a long list of all the things I forgot to talk about; and then also talk about the delegation of authority issue for a few minutes.

I have to tell you, in getting ready for these arguments, I read and reread the briefs in several of the cases, and I'll honest with you, my head was spinning quite a bit, and I know what the Court is going to be going through when it tries to deal with these problems.

It would be impossible to do it, and it's unnecessary for me to repeat all those arguments. Like I said, I would like to come at this a little bit different, and follow a little bit different tack.

I also have to say, though, at the outset, this has to be one of the best briefed cases on both sides that I've been involved with in a long time. I think it says a lot for the system, for the Court, and both the Claimants' Counsel and the Defense Counsel's efforts in this case, and I think the information is so well

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developed before you. Hopefully we won't throw that off today with some of our arguments.

At the outset, I have to say that we believe that this is the most important case that's been presented to this Court. Just your luck, early on in your tenure.

THE COURT: You couldn't have done this last year?

MR. LUCK: It's presented, and it's important for any number of reasons. We believe it will fundamentally determine the course of the system of workers compensation for years to come, in one of two directions. It could create significant problems through the entire system, generating also into the State's General Fund. On the other hand, it could be a shining example of the judiciary's acceptance of the review of its place, and the constitutional prerogative of the place of the Legislature to set benefits and define entitlements, and to acknowledge and accept and apply the traditional and accepted constitutional approaches to reviewing social legislation.

I'm struck by the sheer magnitude of it all, and the responsibility that we all have,

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because I do think it's that important. I think we all would agree we're going to the very core of the system as we work through this case. It seems like the arguments and considerations might be very complicated, and if one reads the briefs for awhile, you think that's the case.

However, I believe that fundamental to the Court's consideration are some very basic concepts. We would respectfully submit to the Court that a basic consideration of workers compensation law constitutional analysis and legislative intent leads to the inescapable conclusion that Section 710 as it applies to permanently totally disabled claimants is constitutional and a legitimate exercise of the Legislature's prerogative. So I'm going to talk about those three things first: Workers com, constitutional law, and legislative intent.

First, in relation to workers compensation, the most fundamental principle in workers compensation is the payment for disability caused by industrial injury. The whole system is about disability caused by industrial injury.

Prior to the time someone heals up, reaches maximum medical improvement, everyone is

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treated the same. Their wages are replaced, and their medical benefits are paid. Once they reach medical stability, the concepts of normal labor market take over. Ever since the version of the Act in 1981 through today, which is the parameters of this case, there's been some concepts, some form of normal labor market considerations, and the difference between permanent total and permanent partial has always depended upon, and the benefits have been determined by, the effect of the industrial injury on the disability, on your ability to earn wages in the normal labor market.

I went through the blue books last night for several different things, because this spans 1981 to today, and the first thing I noticed was that the phrases are basically the same, but there's three or four differences that are used: Normal labor market, open labor market, job pool, and regular employment. Regardless of the label we use, it's the basis of workers compensation, this normal labor market consideration, where we look at age, education, work experience, and physical condition, and determine what your entitlement is, whether you're permanently

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partially disabled, or permanently totally disabled.

As an aside, it's interesting to note that age has always been an accepted consideration of that calculation.

If you could work after an industrial injury, but had some effect on your ability to work, you're permanent partial disability disabled; if you couldn't, you were permanetly totally disabled, and that's determined on your ability to participate in the normal labor market. You either have earnings and earning potential in that normal labor market, or you don't, and you're compensated accordingly. Benefits always relate to loss of ability to participate in the labor market. Injury that's compensated by workers compensation always results in a partial or total loss, gauged on your ability and willingness to participate in the normal labor market.

So with that fundamental understanding, we move to Section 710.

As the Court very correctly pointed out in the questions to Mr. Murphy, Section 710 is a definitional statute that goes to the core of the workers compensation principles. If we look at

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the legislative history, we see it was designed that way by the Legislature in 1981, and they knew what they were doing.

If we look through the blue books, we see that virtually every version of Section 710 states that a person meeting this definition is considered to be retired, and when retired, benefits are reduced. That's very important. Virtually every version of 710 says when you reach these requirements, you're considered retired; and when you're retired, your benefits are reduced.

The reason that part is so important is because this fundamental consideration of normal labor market -- Are you participating? Are you precluded from participating? How much are you precluded from participating? -- is central to every single workers compensation disability entitlement.

By leaving the labor market, by being defined as being retired, you're no longer in the normal labor market, and that is the key to Section 710. It's a definitional statute, exercises the prerogative of the Legislature to define benefits, not to discriminate on the basis of age.

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In 1981, it was most clear, and I think that's an interesting point. The language in 1981 said when you are eligible or are receiving those benefits as defined, you're -- quote -- "considered to be retired, and no longer in the open labor market." If we look at the legislative history, and if we look at the actual language that was passed in 1981, we see that the Legislature was keying in exactly on this idea of normal labor market, and defining who is in and who is out; and if you're out and retired and not part of the normal labor market, you're no longer entitled to any permanent total disability benefits.

710 is not about age discrimination. It's not even about age. It's about defining who is in the labor market, and who is not; who is retired, and who's not. It's about leaving the normal labor market by entitlement, and it's about the legislative prerogative to make those kinds of classifications.

Both Mr. Murphy and Mr. Hunt spoke about a lot of recent Supreme Court cases. They didn't mention Rausch II. The second Rausch case -- we call it "FFR," but Rausch is the first name. The

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second Rausch case has some very important information in it. As a footnote, I would say the first Rausch case indicates, in discussing impairment awards and determination of impairment award and when they were paid, the first Rausch case takes for granted that Section 710 as to permanently totally disabled people is appropriate. It wasn't the issue, but they had to calculate that into their discussion in order to say when benefits are terminated at that point, you still get your PPD.

So it didn't even rise up on the radar screen in that case, in Rausch I; and in Rausch II, the Court said that permanent total disability provides a continuous higher benefit paid over the work life of the totally disabled claimant. Again, the key to all of this is the work life. The key to all of this is retirement. When you're retired, you have no more work life, you've been classified by the Legislature. And again, classifications are inexact. You can have a classification, and it may not fit all circumstances, and other people could work.

The point is the Rausch Court was acknowledging, both in Rausch I and Rausch II, the

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viability of the purpose of that statute as a definitional statute. And the key is work life.

So by definition, and pursuant to the fundamental concepts of workers compensation law, those considered to be retired by definition are no longer entitled to total disability benefits.

Your Honor, this very simple fact must permeate all of our discussions, and all of our approaches to any other issue in this case.

The second area of basic consideration is the mandatory and unquestioned principles of constitutional interpretation. Regrettably, we see them in cases sometimes solely for window dressing, and they're not followed.

Given the core significance of this case, I respectfully submit that these principles are not window dressing, and they're very necessary, and they're applicable and appropriate in this particular case, and they must be heeded, given the significance of this case.

We would call the Court's attention to Powell, Meech, Stratemeyer, Ingraham, McClanathan, and Rausch II. Some of the principles that come from these cases: Avoid constitutional questions whenever possible -- the significance of looking

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at this case as a definitional statute; that every presumption is in favor of upholding the statute -- if any doubt exists, it must resolve in favor of constitutionality, and a lack of constitutionality needs to be proven beyond a reasonable doubt.

The question is not whether it's possible to condemn a statute, but whether it's possible to uphold it, and to not set aside a statute if there are any set of facts that can be seen to justify it.

In relation to social legislation, and particularly to workers compensation, these principles: That the Legislature has great leeway in social and economic legislation; that the power of the Legislature to fix the amounts, times, and manner of payment of Workers Compensation benefits is not doubted. That's in the Ingraham case.

Promoting the financial interests of business in the state; potentially improve economic conditions is a legitimate state goal. Meech.

And McClanathan: The Legislature may pass laws that attempt to avoid duplication of benefits, and benefit the employer.

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All of these general principles of constitutional law, and these very specific constitutional principles that apply in the state of Montana, pursuant to the Montana Supreme Court in relation to workers compensation benefits, are very important and critical, and in fact, assist the Court in dispositive considerations.

Following up on one of Mr. Murphy's comments, if you take a close look at the Meech case, Meech was about the wrongful discharge from employment law, and whether it was constitutional. It was in that context, when the Legislature protracted a civil litigant's rights and damages, that Meech made the statements about restricting those rights, the legislative prerogative to do that, and most importantly, the legislative choice to do that to benefit the broader good of the state and the state's economy. So it is appropriate for the Legislature, whether it's workers compensation or general tort law, to exercise that prerogative.

This brings me to the third basic consideration: Legislative history and legislative intent. The legislative history of Section 710 is before the Court, and it's clear

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that the purpose was to reduce benefits when the claimant was retired and out of the open labor market, and to preclude permanent total disability from becoming a pension program. Clearly within the Legislature's constitutional power.

We'd add that to the specified purposes of Section 39-71-105. I think the Reesor Court and Claimant's Counsel have cited repeatedly only one of the tenets of the purpose clause in Section 105, and that is to provide some fair compensation to the claimant.

The end of that very sentence indicates that the wage loss benefits are not intended to make an injured person whole, they're intended to assist the worker at a reasonable cost to the employer.

Interestingly in Reesor, when Justice Regnier repeated the legislative intent, he left off the last portion of that, that the purpose was to assist a worker at a reasonable cost to the employer.

105 also says that employers should be able to provide coverage at reasonably constant rates; that the act must be construed according to its terms, and not liberally in favor of any

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party; and finally, that it's within the Legislature's authority to define the limits of the workers compensation and occupational disease system.

I mention that because it seems like in the cases, all we see is the reference to replacing wages. On equal footing with the requirement to replace wages and have it be fair, although not complete, is the Legislature's specific directive that we can set them where we feel it's appropriate, but we need take into account the cost to the employer, and we need to take into account reasonably constant rates.

Why is that important? Is that just a business situation? Is that just an insurance situation? Of course not. The integrity of the system, the strength of the system, is good for workers; it's good for their employers, which keeps them at work; it's good for the economy of the state, and brings everybody else to work.

We saw the significant difficulties that were created in the early 1980s up to 1987 of a system in shambles, and the purpose of the changes that were made in 1987 and the limitation on some benefits is to draw a proper balance between doing

what you can to replace wages, for as long as you can, at a fair rate, and making sure we're being realistic and have our eyes open in terms of the entire system.

THE COURT: While you take a breath, let me take a minute to interrupt you then. If I understand -- and I know it just wasn't your argument, but there were a lot of arguments that were probably even more explicit, and these are somewhat maybe an alternative -- that, one, Reesor isn't controlling because we're talking about the next part of this sentence as opposed to the first part, that we're talking about PTD as opposed to PPD; or alternatively, basically the Court got it wrong in Reesor. Do I understand that correctly?

MR. LUCK: If the question is why don't we follow Reesor, why isn't it simply dispositive, as Counsel would argue, I think there are many reasons beyond that. I think they got it wrong, but I think the record wasn't developed to the point of getting it right. The deficiencies in the decision -- and it is a decision, and we need to follow it, but --

THE COURT: Obviously -- It probably goes without saying, but I know numerous times in

here, various parties have said this was a divided majority, it was four/three, and they might take a different look at it if it goes up again. That's obviously not the case. Whether I think they got it wrong or got it right, if I determine that the analysis is applicable to permanent total disability benefits as well as PPD, then I'm really left with no choice to but follow what the Reesor Court says.

MR. LUCK: I understand that, and let me try to talk you out of blindly following it, because I think there are several reasons why Reesor is inapplicable to permanent total disability benefits.

First of all, it is a true that it was a four/three decision, and the record wasn't developed in the same fashion as this case was. This case is much different in terms of going up. And clearly the problems created by Reesor, or the discussion created by that decision, molded the concepts of presenting a different record. The record is totally different. So I think it's a very close call.

There are statements in Reesor that you could argue with. The fact that age never has any

effect on employment, logically, that doesn't seem make much sense, and I think with the statistics that we're able to provide and show here, we see that age does have an effect on employment, and it can be proven statistically. That's just one example.

It's not just window dressing either that Reesor applied to permanent partial disability, and this case relates to permanent total. The Rausch II Court told us that permanently totally disabled claimants are totally differently than permanently partially disabled claimants. They're not similarly situated. The severability here leaves that decision covering only the permanent partial disability.

Not only did Rausch say that they're totally different, we know that by the way they're treated in the Workers Compensation Act, and we know that they're not similarly situated.

Ultimately, it comes down to: A permanently partially person can work. A permanently totally disabled person cannot. No record. The record in Reesor was nothing like the record in this case for the considerations.

Reesor doesn't treat, doesn't consider

the significant considerations of the legislative intent set out in 105 that I just talked about, and part of this record brings that into focus, and that is th devastating effect of finding this statute unconstitutional as it relates to permanently totally disabled claimants.

Reesor didn't mention Meech and Stratemeyer, both cases, setting forth constitutional principles, not the least of which is: The Legislature has the ability, under an equal protection analysis, to take into consideration the economic effect of the system, of the law, and the classifications, and that's most appropriate. It didn't consider McClanathan, which said that it was okay for the Legislature to avoid duplication of benefits, and to benefit the employer.

Perhaps most importantly -- and the Court was asking Mr. Murphy about this right at the outset -- Reesor indicates that 710 is about age. That is absolutely wrong when considered in relation to the definitional statute that it is. It relates to entitlement to Social Security or other related benefits. It relates to entitlement to benefits. Age is not a factor. People the

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same age -- they could be 75 -- one could be on Social Security and the other could not. That other person is going to get lifetime benefits because of the safety net created by the continuing basis of workers compensation.

THE COURT: Age is a component of the determination of eligibility for Social Security benefits.

MR. LUCK: It's impossible to have a logical discussion about retirement if age isn't a factor, but it isn't the -- as said in Reesor -- the sole only factor. It has to be a component of retirement. But the fact of the matter is if it's 710 we're focusing on, 710 just creates the definition of who is retired and who is not, and those that are not continue for the rest of their life to receive those benefits.

Back to the constitutional principles. That is exactly what happened. But it also fits appropriately from a constitutional analysis to find that justification of the legislative classifications and prerogative.

All in all, Reesor is just a totally different case. It goes far beyond the permanent partial disability, and is not the same as

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permanent total disability.

As a final statement in relation to those basic considerations, if we just focus on those basic considerations, we have the importance of the labor market concept and disability. We have retirement taking a set of claimants out of the normal labor market, therefore out of the definition of being entitled to disability, and we apply the accepted basic constitutional principles, that all tends to support the constitutionality of 710.

THE COURT: Let me ask you one other question, because you touched on, and I was looking, and the original 1981 statute did make a specific reference to, in addition to when they're retired, made reference to the normal labor market or --

MR. LUCK: Open labor market.

THE COURT: Excuse me. And I apologize if I missed this in here. But when exactly was that taken out, and is there a legislative history specifically as to why that was removed, and is it significant that they removed that term?

MR. LUCK: No, I don't think it's significant in relation to the long term. I think

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it's significant in relation to tying into that legislative history and its fundamental concept that 710 as enacted was for that purpose. But the important words that have been there since 1981 through today are: If you meet this definition, you're considered retired. If you are retired, then. Those words have stayed the same, and it's the effect of the classification on the disability system that I think is critical, and that's been absolutely consistent.

THE COURT: And I understand that. And I guess my question was: When they took the words "open labor market" out, that specific reference to this person is no longer part of the open labor market, or the words to that effect, when that was removed from Section 710, was it just deemed -- I understand sometimes statute language just gets taken out, and they tighten it up. Is there any legislative history as to whether -- if it was significant when it was in there in the beginning, for purposes of analyzing the legislative intent, then is it significant when they removed it?

MR. LUCK: I don't know about the legislative history. And as I indicated before, I don't think it's significant. I know I've been

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doing this through this period from 1981 forward, and we've had to deal with different words that mean the same thing. We had job pools, and we had normal labor markets, and open labor markets, and the ability to work. And it all comes down to: "Based on your age, education, work experience, and physical condition, what are you able to do? What is your loss in that market?," whatever label we put on it.

I've still got a few more minutes. I knew once I got going, I'd go too long. They might be happy to have less time.

I want to turn the traditional discussion, but not get into the real technical in terms of the classes. I think some of the arguments that were made by some of the defendants that there are three classes are worth considering. We didn't make that argument, but there is certainly some interesting possibilities, and the points that are made there are very strong. For purposes of my discussion, I agree with these guys, for the purpose of today's discussion.

There are two classes: People that are totally disabled and entitled; people who are

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totally disabled and not entitled. And by definition, I'm including the total rehabilitation people in all of this discussion, because the same analysis applies there.

Given this discussion that we've had, it's clear that there's no conceivable way those two classes can be similarly situated. One class is in the labor market, capable of being in the labor market by definition, in classification; and the other class is defined out. The other class is defined as being retired. So we have this class is retired, this class is not. Every fundamental consideration of normal labor market and workers compensation entitlement is different between those two classes. They cannot stand as similarly situated.

And Professor Polzin and Mr. Jones will probably talk about that, but Professor Polzin's information provides some demographic information that also shows how differently situated those people are, and Mr. Jones will talk about that.

I was going to talk about some of the statistics, but Larry can talk about those.

They're is not similarly situated, but they are appropriately treated. Equal protection

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doesn't apply because we don't have the fact that the classes similarly situated. But there is a legislative plan and a legislative classification that's appropriate that takes care of both classes. We might argue with it. There's a lot of constitutional quotations we see in the briefs about: "We may not like the way they did it, it may not have been perfect, it may not be fair to some parts of the group," but overall the Legislature has that ability to make those classifications.

And here it's rational and makes sense because we're talking about the basic principles of retired versus not retired.

Even if they are similarly situated, that rational basis comes through in the fashion. They simply are different kinds of claimants in different categories, and it's appropriate for the Legislature to have chosen not to use the permanent total disability system as part of a pension plan when people are otherwise covered by a safety net.

Ingraham told us that the power of the Legislature to fix the amount, time, and manner of payment of benefits in workers compensation is not

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doubted. The analysis was done, and the rational basis was found.

It's simply a benefit entitlement choice. It's a proper classification. It's no different, Your Honor, than several of the classifications that we don't even think about to question in the Workers Compensation Act. When someone reaches maximum medical improvement, their status changes. You only get 350 weeks of permanent partial disability. That's pretty arbitrary, but that's one of those choices of benefits that the Legislature made. You only get 104 weeks of retraining benefits. A lot of people could argue that you should have more. It used to be unlimited. But that's a choice that the Legislature made, just like 710.

And maybe the best example is defining beneficiaries in the Workers Compensation Act. If your father dies, and you are a beneficiary, you receive beneficiary benefits through age 18 if you're not going to school, and to 22 if you're going to school. If you're 23, and you've lost your parents, and you're out on your own, compare that to someone that's 22, that may not be fair. The fact of the matter is it's one of those hard

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choices that needed to be made by Legislature in establishing our workers compensation benefits, and the act is full of them.

710 is just one more definitional statute, a choice of benefits. It's good for the system. It needs to be done that way. It's appropriate.

Quickly on to the effects. We've provided for the Court a lot of financial data. I'm not going to harp on the numbers, but it's important when we consider the economic impact of a decision invalidating 710 for permanent total disability benefits. It will bankrupt the State Fund, and it will bankrupt the system. We'll be in for another go around in some manner parallel to what happened after 1987.

One of differences this time, of course, is that with the State Fund, the Old Fund money is General Fund money. And if 710 is found to be unconstitutional for permanent total disability claimants, and is retroactive, it could cost the General Fund a lot of money. And I'm not going to go into the figures. They're all there.

As an aside, there's been some question about the evidentiary nature of these affidavits.

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We believe they're solid. The data is there. We filed a clarification that responded to the expert hired by the claimant. But if there's any question about that data, we'll bring those people in for the Court for an evidentiary hearing, and they can say the exact same thing on the record, because it's so pivotal. We can't have this case move forward without that information being part of the record, because it's pivotal that that be part of the consideration.

THE COURT: And the applicability is that it's pivotal whether there was a rational basis for this statute?

MR. LUCK: It's pivotal whether there's a rational basis and what the Legislature was trying to do, because what would the result be if it went out. But it's also extremely important, in analyzing the purpose under 105 of the Legislature, in saying that this system needs to have fairly constant rates, and we need to provide benefits where we balance off, so that it's not unduly expensive. That's good for all of us.

That's one of the things that was missing from Reesor. With this information in the file, and in the record, we understand what the

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financial implications of this are. And I know that it's easy to stand up and say, "This is all about money." It's all about the economy. It's all about the intent of the Legislature. It's about the effect on all of us. A detrimental system in workers compensation hurts the little guy just as much as it hurts the big guy. We saw that after 1987 with the problems with the carriers and with the taxing that occurred.

It is extremely significant that that be part of the consideration and part of the record of this case, because it would be a bankruptcy to the system, and to the State Fund, and have a significant effect on the General Fund. It must be considered as it relates to the viability of 710.

In relation to the stipulation, interestingly, Counsel doesn't believe that Reesor is exactly controlling because they again, like they argued in Reesor, want to have a middle tier scrutiny. In fact, if you look at the decision, I think Mr. Murphy is in error. The Supreme Court did specifically relate to the middle tier request, and indicated that since we apply rational basis in all of these cases, we're going

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to apply it here. That should be dispositive of that issue.

Based on these arguments, it's clear that we were correct, I believe, when we said it likely would take care of the situation, but it didn't. On further analysis, as we got into it, it's clear that there are several distinctions between Reesor in this case, and everybody -- we couldn't have made a stipulation -- even if it was binding, we couldn't have made a stipulation for the rest of the system, and it's the system that we're talking about here.

THE COURT: I assume when you say, "likely but wouldn't," you would have a different view if it went the other way.

MR. LUCK: It's possible. I understand, in all seriousness, I understand that you can take that and have a surface review of the Reesor opinion, interchange the words, like Mr. Hunt asked us to do, and it becomes an easy decision.

If we consider, though, the differences between the cases, and if we consider the record as it is here, and the fundamental concepts of the Workers Compensation Act and constitutional analysis, they're apples and oranges.

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For those reasons, 710, as to any permanent total disability claimants, should be found to be constitutional.

THE COURT: Thank you. Who is next?

MR. JONES: May it please the Court. Larry Jones for Liberty Northwest. Your Honor, Satterlee is not Reesor, the sequel. I can prove that here today beyond a reasonable doubt.

I came to Helena earlier this week, and I reviewed the Court file on Reesor that takes us up to the Supreme Court's decision; and then on remand of course, we've had a lot of common fund proceedings.

But if you take a look at your Court file, one of the things that I'm a little surprised to learn was that the case was submitted to the Supreme Court, and then went up to the Supreme Court on a statement of agreed facts. I didn't know that. And when you take a look at the Supreme Court decision in Reesor, they don't indicate that, from what I can determine here. And I think that's significant, and probably determinative in this case.

I want to refer you to the Reesor Court's language, and Mr. Hunt actually referenced

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it a moment ago. If you turn to the Court's decision, Paragraph 18, the majority states, quote, "As clearly pronounced in section 39-71-105(1) MCA, the primary goal of workers compensation benefits is to establish a wage replacement for injured workers, certainly a legitimate and appropriate governmental interest." That's the passage to which Mr. Hunt referred.

I also would like you to note in your review of this case that at Paragraph 23, we have the following statement again from the four member majority. Quote, "We see no reason why a 40 year old injured worker should receive full PPD benefits pursuant to Section 39-71-703 MCA, and a 65 year old worker with an identical injury should receive an impairment award due to the fact he has reached Social Security retirement age."

As I noted in the brief that I filed, Your Honor, this last passage is for me the psychological driver of the majority's decision. There was an intuitive recognition that the 40 year old injured worker is going to continue to work, if he's permanently partially disabled, he's nowhere near retirement age.

And so when you look at the fact that

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there was stipulated facts, and you look at those two passages, there's only one conclusion you can make, and that's that the majority assumed Mr. Reesor was going to continue working indefinitely, and that's crucial to understanding the factual difference between Reesor and this particular case.

Again, because there were stipulated facts, you can go to them, and there is no fact in Reesor where Mr. Reesor states he's going to work indefinitely. But the Supreme Court makes that assumption, because how else can they justify the decision? If they don't assume that he's going to work indefinitely, there are no lost wages for the permanent partial disability benefits to replace. The driver is replacing lost wages.

Similarly, with the Satterlee, the case that we have here, without that assumption, there are no lost wages for permanent total disability benefits under the Workers Compensation Act to replace. That was an assumption in Reesor.

And what are the facts of our case? Mr. Luck has filed, and I've referenced it, the affidavit of Paul Polzin, who is the Director of the Bureau of Business and Economic Research at

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the University of Montana, a fine institution in Missoula. And it seems like we were belaboring the obvious when we were talking to Dr. Polzin. If you look at Page 5 of his affidavit, Paragraph 20, Sub(c), he states, "After a peak at age 66, there is a steady decline in labor force participation of males receiving Social Security. For those 85 and older, only about 3 percent are in the labor force."

Paragraph 20(d), "For females receiving Social Security after a peak at age 66, there is also a steady decline in labor force participation. For those 85 and older, only about one percent are in the labor force."

Your Honor, I'm going to ask you, if you would, to locate Exhibit 3 to his affidavit. (Indicating)

THE COURT: Okay.

MR. JONES: The methodology Dr. Polzin follows is set out very clearly in his affidavit, and he references the exhibit 3, which if you compare his narrative, they're going to match up. First, if you take a look at the left-hand side where it says males and CLF, that's the civilian labor force referenced in the title of the

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exhibit.

At age 62, of those males receiving Social Security payments, age 62, there are 16.3 percent who are in the civilian labor force.

Mr. Reesor, according to the decision, was 65 when he was injured. And corresponding to Exhibit 3, he was in a group of about 30.8 percent at that age in the civilian labor force who were receiving Social Security benefits and who were working. And as Dr. Polzin notes at age 66, that is the spike for the most persons in the civilian labor force who were working and receiving Social Security disability payments. Mr. Reesor was the one out of three working at that age and receiving Social Security retirement payments.

Thereafter, as we know intuitively, as Dr. Polzin has demonstrated beyond a reasonable doubt, the percentage of people, males, receiving Social Security retirement benefits decreases, so that by age 69, there's only about one in four; at age 72, there's one in five; and so on. So this is a fact that was not present in the Reesor decision, and is contrary to the Court's assumption that people who are working and receiving Social Security retirement benefits are

going to continue to work indefinitely.
There is no factual basis in Reesor for that assumption. In fact, we have evidence here that shows it's exactly the contrary. So if the purpose of the Work Comp Act is to replace lost wages, then it's not happening by putting persons on permanent total disability benefits for a lifetime when they're still retired, because people are falling out of the work force in very predictable and steady ways in this state. And that is the key factual distinction that makes this a completely different case from Reesor.
So I encourage you to take look at those stipulated facts, and to compare this information. And if the driver, as Mr. Hunt has said, is the replacement of lost wages, then there has to be some evidence that wages are being lost in the future that are being replaced by permanent total disability benefits for a lifetime. And as noted by Mr. Murphy, and as our company certainly follows the rule, if they're not on Social Security retirement, they're not eligible. They have lifetime permanent total disability benefits. There is a safety net there.
So not only because I have a head cold,

but because that's all I have to say, Your Honor, that's my presentation.
THE COURT: Thank you.
MR. BOYHER: My name is John Boyher. And unlike the rest of the gentlemen in this room, I am not a workers compensation lawyer. I am here on behalf of the Chamber of Commerce and its 700 members in Montana; the National Federation of Independent Businesses, and its 6,000 members in Montana; and the Montana Contractors Association, and its 250 commercial construction companies located within this state.
The principal part of my short presentation is to try to bring to bear for the Court the potential effect that a ruling in this case finding the statute unconstitutional would have upon both employers and employees within this state.
THE COURT: That hadn't occurred to me yet.
MR. BOYHER: In addition, Judge, I wanted to -- in looking at some of the economic aspects, and following up on what Mr. Luck said and what Mr. Jones said, the statute at issue here -- and I don't believe this was addressed in the

Reesor opinion. There had been talk about the issue of termination of the benefits being based upon age. But I note that the title of the statute involved here is, "Termination of benefits upon retirement." It is not termination of benefits upon reaching age 65. The title of that statute should be given some effect by this Court.
Additionally, I note that Mr. Hunt correctly quoted from the Reesor opinion, and I note this portion, "The primary goal of work comp is to establish a wage replacement for injured workers, certainly a legitimate and appropriate governmental interest."
What caught my eye was the next passage from the Court, Your Honor, and that is that, "The disparate treatment of partially disabled claimants based upon their age, because they are receiving or are eligible to receive Social Security benefits, is not related to that governmental interest."
The Court's inquiry and it sstatement in Reesor in my view is incomplete. The issue before this Court is not whether the statutory policy bears a rational relationship to that specific interest, being the goal of wage replacement.

Rather under a constitutional analysis, the issue is whether the statute bears a rational relationship to any legitimate government interest.
The Supreme Court didn't undertake that analysis, and that's another reason I think that this Court can look at Reesor and say, "Well, it is good as far as it goes." There is additional information and an additional analysis that this Court can apply.
Mr. Luck touched on this when he mentioned other judicial decisions from the Montana Supreme Court including, among others, the Meech versus Hillhaven case.
I want to point out that the constitutional analysis of the statute does not limit this Court's inquiry to workers compensation cases that have gone up to the Montana Supreme Court. There are many other constitutional decisions that don't implicate the work comp statute, but that nonetheless apply.
So when we get to the issue, Judge, of whether the statute has a legitimate or rational basis, we clearly know that it does. The Meech v. Hillhaven case demonstrates that. In that case,

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the Montana Supreme Court specifically noted that promoting the financial interests of businesses or the improvement of economic conditions in Montana are legitimate governmental interests.

I make that point because both Mr. Murphy and Mr. Hunt, in their argument, point out that the argument from the insurers and the defendants is about money. I've never shied away from the money word in tort proceedings, and I won't do so here. Of course it's about money. That is a legitimate interest for this Court to consider. It's a legitimate interest for the Supreme Court to consider. But most important, it's not only important for the Legislature to consider, but it's within the Legislature's purview to take into account how it would benefit economic opportunities in this state for all, not just for those injured workers.

One other decision that has not come up, but is very important, I think, is a case that was decided about two weeks ago, and that is the Farrier versus Teachers Retirement Board case, and that decision I think warrants this Court's critical review and its comparison with Reesor, because within that decision, you've got a very

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similar situation as was presented in Reesor. While we're not dealing with disability, we're dealing with individual teachers who retire from the public school system, only to go on to work in the university system. Their retirement benefits are suspended if they go in to work for the university system as a teacher.

Those teachers who lost that benefit sued, and asked the Court to find it unconstitutional, the statute and the Board of Regents' administrative policy, on the grounds that it denied those teachers the equal protection of the law.

Interestingly, Reesor is not cited in this opinion. But the Montana Supreme Court two weeks ago reversed the District Court, and found the statutory policy constitutional. In doing so, it did cite from a couple of work comp cases. One was Henry versus State Comp Fund.

I'm not familiar with the gist of all of the Work Comp decisions, but I do note this statement within the Farrier decision. There the Court said, "We need not deem legislation unconstitutional because it benefits a particular class, so long as the law operates equally upon

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those within the class."

And you've heard the debate here about how many classes are involved, and how one that reaches retirement age and is getting Social Security is treated differently than those who are not. There's nothing wrong with that necessarily under this Farrier analysis.

I point out also, Judge, that the rational basis test was squarely applied there.

THE COURT: Counsel, let me interrupt. On the Farrier analysis, was that primarily based on the allegation of the equal protection affirmity was on age or was it --

MR. BOYHER: It was based upon their retirement as teachers. And the same analysis in Farrier, I think you can read it and read Reesor and say, "I'm not quite sure how we got to where we are," because the opinion in Farrier deals with the same issue here. And what has been discussed thus far is that while age is a component of the statute in 710, it's not the sole component, because people cannot be eligible for Social Security, and still get their disability benefits until death. So age is certainly a component of the Farrier analysis.

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But the Montana Supreme Court, and strangely enough, that opinion is five/zero. Two of the individuals, two of the justices who were with the majority in Reesor are in the majority unanimous opinion in Farrier. That case needs to be taken into account.

Let me move on. In addition to the Meech case that Mr. Luck mentioned, and the promotion of the financial interests of businesses, one of the other legitimate interests that the Legislature takes into account obviously is assuring the financial stability of the workers compensation system, as well as the stability of the tax burdens that are faced by employers and employees.

Neither of these were addressed by the Court in Reesor. Indeed, the Court in the Farrier case addressed exactly that. At Paragraph 11, the Montana Supreme Court in Farrier notes that, "The Teachers Retirement Board maintains that the Legislature reasonably designed its retirement system to condition receipt of retirement benefits on employment decisions of its members, in order to diminish the potential adverse impact on the Teacher Retirement System's funding structure."

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That's precisely the argument I think that the defendants are advancing here, Judge, and that's a legitimate interest for the Legislature.

In addition, the McClanathan case was mentioned by Mr. Luck, and it's also of import in both the Farrier decision, and it should be here. Within McClanathan is this principle: In the absence of an affirmative showing that there is no valid reason behind the classification, the Court is powerless to disturb it. If there is a rational classification between the Teachers Retirement System for those teachers who retire and go on to be teachers within the university system, and those teachers who retire but yet go on to work in another public agency, but not as a teacher, surely that classification can exist in the work comp system as it applies to comp benefits and Social Security eligibility.

I note that while there is some dispute here between the parties about the nature and adequacy of the affidavits, I don't think that there is any legitimate dispute between the parties that this Court's decision potentially could have tremendous impact upon the insurers and employers of this state.

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As to the evidentiary basis for some of the statistics, I submit the Court can take judicial notice of a lot of governmental statistics. One which we cited in the brief that we provided to the Court is the biennial report of the Montana Department of Revenue, its Tax, Policy, and Research Bureau.

And while we're not necessarily dealing with an Old Fund Liability Tax here, I bring this up because of the potential impact on employees directly, and on employers directly, not just through their work comp premiums.

With the Old Fund Liability Tax that came into being in 1993, employers paid a .5 percent tax on payroll. Employees paid .2 percent. We need to take into account the effect that any such potential tax could have on all of the employees within the state, not just those who are represented by the Claimants' lawyers in this case, those who are injured.

Presently and statistically, according to the Small Business Administration, in Montana as of 2002, there is just shy of 33,000 employers, 32,972. These include all non-farm businesses. Within those employers, there are 300,636

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individuals who generate a payroll of $7.4 billion annually.

All of those individuals are entitled to the equal protection of the law. And I would submit to the Court that in considering this case, that it take into account both the injured workers who claim an entitlement here, and who argue for the unconstitutionality; and as well as the employers who are going to be facing potentially a tax, or at least increased insurance premiums; and every employee, injured or not, who can face added burden here as well.

The last point I would like to make here, Judge, one has to do with a statement that was made by Judge Molloy in a case called Burton versus State Farm. Even if this Court has some question about the validity of the Legislature's purpose in making its decision, the Court is not permitted to test the validity of the State's interest, as this is a matter exclusively within the province of the Legislature. Judge Molloy made that statement in Burton v. State Farm which is at 30 MFR 173, it's a federal district 2002 case.

I mention it, Judge, because in that

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case, the Unfair Trade Practices Act was attacked as unconstitutional because it allowed first party insureds to sue their insurer only under the UTPA, whereas third party claimants could sue insurers both for violation of the UTPA and under the common law. And in analyzing that case, Judge Molloy said, "I may disagree with the validity of the Legislature's decision in making that classification, but I'm not entitled to test that, because it's within the Legislature's province in terms of its economic legislation to make that distinction."

So on behalf of the NFIB, the Chamber of Commerce, and the Montana Contractors Association, I would ask this Court to uphold the validity of the statute, particularly in light of this recent Farrier opinion. Thank you.

THE COURT: Why don't we take a ten minute recess.

(Recess taken)

THE COURT: We're back on the record. Go ahead.

MR. WARD: Your Honor, my name is Leo Ward. I practice law here in Helena. I was asked by the self-insurance entities for the cities, the

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schools, and the counties to file a brief in this case, which we did, which contains our arguments, and because I don't have any time, I will be brief.

The cities, schools, and he have about 37,000 employees in the state of Montana. They formed self-insurance programs for workers compensation and for general liability in the late 1980s because of an insurance crisis that was occurring. Because of that crisis, we also saw a major change in the law in 1987, which Brad referred to during his discussion.

Because of their size, because of the number of employees they have, they obviously have significant concerns about what's happening in this particular case, for obvious reasons. Mr. Hunt and Mr. Murphy both claim that they could not find a rational basis for the type of legislation that we see in 710. One has to wonder, though, how hard they looked for it, because I don't think you have to look any further than Section 105, which was the section that was referred to in part by the Court in the Reesor case.

As has been pointed out multiple times here already, there is a consideration that must

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be made for reasonable costs in the system, and reasonably constant rates for premiums. This system was developed from the beginning based on a balancing act, and sometimes it falls one way, and sometimes it falls another. But the whole concept of workers compensation is balancing.

As was pointed out by Mr Murphy earlier, the system protects employees because they have money, without having to bring claims against their employers in courts, and wait a long time. Employers are protected because they have or should have reasonably constant rates, reasonable costs in the system, but they give up defenses, just like the employees give up their right to sue. Both sides had to balance out those issues.

Mr. Hunt talked about three hits that the claimants will take potentially in this particular case. I would submit that there's three hits that the employees take.

Everybody here is pretty sophisticated. We all pay insurance premiums for various things. We know how the system works. The money has to come from somewhere. These are not self-funded systems. The insurer charges a premium. That premium is passed to the employer.

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How does the employer pay it? If it's a higher premium, increased rate, they normally pass it on to the general public through goods and services, higher costs, or they reduce their own costs. How do they do that? Well, you don't have any look further than the evening news to see how they do that. They lay off employees often in large amounts to meet their costs. So there's a significant problem with the system when we don't have balance.

Public entities can't do that. They don't sell goods and services. They do it on a very low level. They have to pass off the costs of the system to the taxpayer. That's where the problems come in for those, or they have to reduce services, which could also include layoffs of employees.

That creates three potential hits for the employees in the system. Beyond the danger of losing their jobs because of reduced services, public employees face these three things: The likelihood that they will pay more for goods and services in the market place. That's what they have to pay for the hits that are going to be taken by the general insurers, the employers that

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provide goods and services in the market place. That's the first hit they would likely take if Satterlee goes forward.

The second hit they would likely take is paying the increased taxes, because as public employees, they have to pay taxes just like you and I do, for the counties, for the cities, and for the schools. So they have to pay these increased taxes to fund those premiums for those programs.

And the third hit, as was mentioned earlier, and I don't think it can be overlooked, we had this happen to us before. We had the State Fund's Old Fund Liability Tax. That was on all employees. So these employees could quite likely take all three of these hits.

The system, like I said, is about balance. When you make a decision about this system, you can't ignore the balancing act that is going on here. You can't ignore the fact that there will be consequences for employers and employees that have not been mentioned by the claimants in this particular case for good reason, but they are significant potential consequences that these people will have to deal with.

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I think when you look at the legislation -- and Brad talked about this before, and it's true -- you have to look at the consequences, because that's likely what the Legislature was considering when it drafted the public policy that is set forth in Section 105. They were thinking about these consequences. That's why the Legislature is normally the place where these issues are decided, because they can bring in both sides, and they can have careful deliberations, and they can look at the statistics, and they can create the record, and then they can make the decision of the best way to balance the system, based on the policies that they have in front of them. That's all I have, Your Honor.

MR. HERINGER: May it please the Court, I'm Michael Heringer, attorney for the Respondent Lumberman's Mutual Insurance Company. When we had our conference call, we spoke about having an hour for Respondents. I know we're over that. I would move that I have an additional time to at least provide my portion of the argument.

THE COURT: Do you have any objection?

MR. HUNT: I don't have an objection.

MR. HERINGER: I'll try to make it

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brief. I'll try to tighten this up a little bit.

THE COURT: We counted our break time against you, too.

MR. HERINGER: I represent Lumberman's Mutual. They were the insurer of Buttrey Food and Drug, who was the employer of Catherine Satterlee. She was injured in the course and scope of her employment at Buttrey Food and Drug on July 25, 1992. Ultimately she was deemed permanently totally disabled, and she was paid permanent total disability benefits until age 65, when she became eligible to receive Social Security retirement benefits. That's from a factual standpoint, and we've stipulated to those facts.

It's my intent here to address a couple of the issues. And the first one I want to talk to is whether or not 710 constitutes the improper delegation of legislative authority. The second issue that I want to talk about is regarding the constitutionality of 710, including the issue of the classifications as proposed, and whether there's a rational basis supporting 710.

One issue that I could ask right out of -- Are you still putting forward the delegation issue?

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MR. HUNT: We are.

MR. HERINGER: The reason I ask that, Your Honor, it was mentioned in their opening brief, we responded to it, it was not mentioned in their reply brief. Therefore I was wondering if that argument had been abandoned.

Originally when this case first started over a year ago, when the original petition was filed, the only basis, the main basis in which they made the demand on my client to reinstitute permanent total disability benefits was based on this unconstitutional delegation of legislative authority. What they complained there was that 710 unconstitutionally delegated legislative authority to the federal government, as they allege that the federal government sets the age for entitlement to Social Security retirement benefits.

They argued that there was disparate treatment that could occur as a result of future changes in federal Social Security law would would determine when claimant's permanent total benefits will begin and will end. They claim that this was done without input from our Montana Legislature, and therefore it's unconstitutional.

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In their brief, the only case that they use to support their position was the Lee decision. In Lee, Section 61-8-304 mandated that the Attorney General of the State of Montana declare by proclamation that the state speed limit must be set by the federal government to remain eligible for federal highway funds. The Court found that that statute, which mandated a proclamation to the Attorney General, was a blatant handover of sovereign power because it was a permanent delegation of legislative sovereign power to the federal government.

It's our position that 710 does not impermissibly delegate legislative authority to the federal government. And Lee, the very case that was cited by the Petitioners, we believe actually supports our argument. In that case, the Court openly admits that the Legislature has the authority to adopt by reference federal statutes and federal regulations. The Court in Lee also held that the statute that pegged the speed limit, or were couched in permissive terms versus mandated terms, were constitutionally sound.

The violation in Lee again was that it mandated Montana change the law based on federal

law. There's no language in 710 that delegates any legislative function to the federal government. It merely incorporates by reference the federal law that outlines when a person is entitled to Social Security retirement benefits. This is permissive under Lee.

Therefore, we believe that there is no unconstitutional delegation of legislative authority to the federal government, and we ask for a ruling that the Court find as a matter of law that 710 does not impermissively delegate legislative authority, and rule in our favor on that particular issue.

Regarding the main issue of this case, and while the Respondent's position has been aptly addressed by Counsel, there are a few points I want to make, and one of these comes to the questions that you raised, Judge. Reesor is out there. What do we do with it?

In my view, it is Reesor that should be limited to its holding. Reesor held that Section 710 was unconstitutional, where permanent partial disability benefits, a whole class or category of benefits, were denied to injured workers who were or were entitled to permanent total disability

benefits. Here a whole class of benefits, a whole category of benefits, are not being denied to any injured worker entitled to permanent total or rehab benefits.

In their brief, the Petitioners' entire argument hinges on one premise, and I want to read right from their brief, Page 15. "Petitioners move for summary judgment without discovery because Petitioners' facts cannot be reasonably controverted, and Reesor is clear that permanent total disability benefits and rehabilitation benefits cannot be distinguished from PPD benefits in Section 710." That is the thin thread upon which their whole case lies.

In his argument, Mr. Luck went through a number of differences between permanent total and rehab benefits and permanent partial benefits, and these differences dictate that you can -- Reesor can still be out there and be held to its holding, and it can be held solely to that, and not affect the decision that is presented to you today.

There are so many differences in permanent total and permanent partial disability benefits that the Court in Rausch goes on for pages. In a number of paragraphs, they talk about

why permanent total is different than permanent partial disability benefits.

THE COURT: Mr. Heringer, I apologize for interrupting, and I have seen that, but is that germane to the real distinction as it pertains to 39-71-710? We're talking a case that's out there that says this statute is unconstitutional and violative of equal protection; and when you're looking at -- it's not even contained in what we're talking about, where it's not even enumerating the benefits in the same statute, enumerating in the same sentence.

It's saying that these are the benefits, and once you're eligible for Social Security, or receiving Social Security or an alternative, then you're considered retired, and once you're considered retired, these benefits -- and it just gives a litany of the various benefits that are received.

And notwithstanding the fact that -- and I know Rausch talks about it, and there are obviously distinctions in the benefits, but are those distinctions determinative of the analysis to really take this out of the holding in Reesor?

MR. HERINGER: Absolutely, it is. And

the reason is because you've got to look at the issue on Reesor. Reesor decided the issue on Reesor. That was on permanent partial disability benefits. It was unconstitutional to deny that category of benefits to those who are permanently totally disabled. That's my whole point.

Reesor is out there. I can say, "You can live with it because it applies only to that holding." They're with a broad brush saying, "Reesor, Reesor, Reesor, unconstitutional, anything else within it," and I'm saying no. And one of the reasons why is because permanent total and permanent partial are different. They're different, and that's fundamental to my argument.

Rausch has come out and said they're different, and they're not similarly situated. They want you to believe that they are. Then the game is over, we all go home, they've got the case in their hands. That's the difference. To me, it's so fundamental. But keep Reesor, because that was what they decided.

THE COURT: I don't have much of a choice to throw it away.

MR. HERINGER: But I'm not asking you to overturn Reesor. I'm saying Reesor is out there,

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keep it, but recognize that those are the differences. And to me the key of this case is permanent total and rehab are different than permanent partial, and they can't get around that, they can't get around Rausch II, and they can't get around that holding that said permanent total is not similarly situated as permanent partial. They can't. It just cannot happen.

So that's to me the biggest thing. Brad brought up the other things, but I wanted to focus your attention on that.

In my brief, and I just want to touch on: I believe there were three classes, and that was Mrs. Satterlee fit in the first class, and those are those who have permanent total claims, and they receive permanent total until they're eligible to receive Social Security retirement benefits.

The second class were those who are not eligible, and they were mentioned in Reesor, and they get permanent total for life.

The third class were those who are injured after they're eligible to receive Social Security Disability benefits. They're specifically provided for in 710. Subsection (2)

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goes directly to that.

And so in my view, you have three classes. They're not the same. They're not the same, and they're not similarly situated.

THE COURT: And just from an equal protection analysis, though, one question I have on that is -- I saw where you cited that. Wouldn't it be, in terms of analyzing the equal protection status of a statute, that you could have multiple classes, but if you had two classes that were similarly identically situated that were being treated disparately, that would be an equal protection violation, notwithstanding the fact that you could have 100 classes, but you've could have two classes of people similarly situated being treated differently. That's still an equal protection violation.

MR. HERINGER: That's basis of the equal protection argument, because you have two classes that are the same, but they're treated disparately.

THE COURT: The presence of a third class doesn't necessarily get you out of an equal protection violation.

MR. HERINGER: No, it doesn't, but what

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it goes to -- Again, what they're trying to do is throw Reesor on us here, and they're trying to say, "Well, they tried all of the rational bases, and that didn't fly in Reesor, and it doesn't fly here." And again, Reesor is out there, but we've got to say, "What are our issues here?" And so if the rational basis test -- In my view, it's the middle tier, it's the deal. That's been without exception. Then you've got to look at the rational basis based on what we have here, whether or not it's unconstitutional based on those classes. I don't accept those, but if that's the way you're going to look at it, that's the way it is.

So you go through the testing. The legislative history of 1981 was not considered, in my view, in Reesor. And in Reesor, in 1981 -- and I provided that to you as attached to an appendix, because it was very important. That wasn't important in Reesor, but it's important in here, because that's where the Legislature said, "Why are we doing this? Why are we changing our law?" They came out and they said it is meant to provide benefits for loss in earning capacity, but it should not become a pension program.

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This was never considered in Reesor because it was not the issue. But that's the legislative history that's right here today. It wasn't factored in in Reesor.

Then come forward to Rausch II. The Supreme Court goes, "What are permanent total?" Those are benefits for the work life, not the life. If they would have gotten loose with their language and said life, then I'd be climbing a tougher hill, but they said work life.

That is consistent with the legislative history. And when you consider that, legislative history alone can provide a rational basis to support if you believe they're two separate classes, and they're treated differently. That provides you with why the government -- its legitimate interest in providing that legislation.

The Petitioners have not come up with anything that counteracts that legislative history. Again, they just say Reesor controls, but Reesor did not look at this particular issue of legislative history. This supports the legitimate government interests that permanent total disability benefits should end when a person is entitled to Social Security benefits.

The financial interests, again, it's different than Reesor. Reesor was whether or not they should get permanent partial. What has been provided to you today is ample evidence that the financial interest -- I'm trying to think of the right word here -- it is a bigger deal.

THE COURT: More compelling.

MR. HERINGER: That's a very good word.

THE COURT: Now you're arguing it should be a compelling state interest?

MR. HERINGER: No. It's a more compelling reason to support that particular deal. The public policy, I put that in my brief. Again, 105 is the weighing, it's a balancing act that was aptly talked about by people before me.

When you look at the financial interests, when you look at the legislative history, when you look at the public policy, and then you look at Rausch II where they say permanent total was meant to be paid for the work life, not the life, it all to me makes more sense that what we're propounding to you is a rational basis to support our particular position.

And as Brad mentioned, benefits change constantly. They changed from the beginning of

the comp act to the end, sometimes in favor of the claimant, sometimes not. They just changed permanent partial from 350. Now the weeks are increased. They had rehabilitation benefits, where before they had other benefits. Death benefits used to be a certain time frame, now they're 500 weeks. Those kind of things. Beneficiaries of death benefits, and those uncertain criteria.

And the point is that our Supreme Court has said it's the Legislature who should do this. After careful consideration, after arguing about it, they're the ones that are allowed to determine what benefits, what benefits is a person entitled to receive at the time they're injured, because that's what dictates the benefits that they get.

Then another reason that you can say Reesor is okay here is the severability clause within the statute when it was enacted. If part of 710 was unconstitutional, that doesn't mean it is wiped out for us on this particular case.

Therefore -- I'm going to try to wrap this up -- we believe that they have failed to establish that 710 impermissibly delegates legislative authority. The Lee decision, the only

case they cite, actually supports us on that particular issue. They have cited no authority to the contrary.

Furthermore, I believe, as I've shown, that Reesor should be held to its holding. Their blanket attempt to say that 710 is unconstitutional is not factually accurate, and not supported by the law. Their entire argument hinges on the statement that under Reesor, permanent total disability benefits and rehab benefits are the same as permanent partial disability benefits, and that's not true. Rausch II settles that, that particular issue. And as has been pointed out, there is very numerous differences between permanent total, and those things.

And therefore for them to prevail, they must prove that the statute is unconstitutional beyond a reasonable doubt; this Court must presume that the statute is constitutional; you must not look for reasons to condemn the statute, but instead search for these reasons to uphold its constitutionality.

We ask that you give the statute a broad liberal construction consistent with the intent of

the Legislature that adopted it, so that it serves the needs of a growing state. The Court must give a reasonable and practical interpretation in accord with common sense. You must answer the question whether it is possible to uphold the statute, rather than whether it is possible to condemn it. You must give every presumption in favor of constitutionality. You must consider whether there is any rational basis to support the challenged statute. And we have provided you with ample evidence and reasons for that today.

And we therefore ask the Court that you deny their motion for summary judgment, and you rule that Section 710 is constitutionally sound. Thank you very much.

THE COURT: Thank you. You get points for citing Shea versus Butte Mining Company. I don't know if I want to be reminded that my poor Uncle Murdy got thrown out of court.

MR. LUCK: I thought about that. That's why I didn't bring it up.

THE COURT: Has everybody on this side argued?

MR. HERINGER: We're done.

THE COURT: Time for rebuttal.

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MR. HUNT: Thank you, Your Honor. I would agree with Mr. Luck. This is a well-briefed case, and certainly a comprehensively briefed case, and I think well-briefed as well.

Your Honor, Rausch does not deal with the two classes that we're talking about here. Reesor deals with the two classes we're talking about here. It is, but for one word, it's the same class. And Reesor defined the classes here, and to look to Rausch or any other case to define the classes, this Court need not do, because they're clearly defined in Reesor.

As the Court said, even if you have another class, if you've got two classes that are similarly situated, those are the two classes to which you look, and those are the two classes here. We could develop classes about bald guys and guys with hair, but they're not relevant here. The two classes that are relevant are those defined in Reesor, and the ones as a result that have been defined here, and the Court is correct in its observation.

Public policy is in this case to reasonably replace wage loss for workers. And Mr. Luck in his argument would have you believe that

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710 is a definitional statute that is somehow a procedural and not a substantive statute. It is the statute that terminates permanent total disability benefits. It is a substantive non-definitional active statute on which they rely to terminate permanent total disability benefits, and on which they relied to terminate permanent partial disability benefits prior to Reesor.

Your Honor, I know that you have probably done this, but I'm going to do it very quickly, and that is look at 710. 710 in the statute, the three types of benefits here -- permanent total, permanent partial, and rehab benefits -- are joined together by commas and a conjunctive. It is very difficult, I think impossible, for Respondents to argue that they aren't somehow connected, joined together, and consequently, if one is unconstitutional, they are all unconstitutional, and it would be an anomaly to decide otherwise.

Your Honor, there was some argument, too, about the statute being a retirement based statute and not an age based statute. The statute connects termination of benefits to Social Security retirement, and it is based on age.

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Social Security retirement eligibility is based on age and age alone for those eligible for Social Security benefits. And it does not, like some other retirement plans, fluctuate in that regard. It's full Social Security, and that happens at a certain age, so it's connected to age.

The other examples that were given in the work comp context, Your Honor, the 350 weeks and 104 weeks, those are not age based examples. Those are examples, or different criteria for the different individuals, and there are all sorts of factors that go into those, unlike Reesor, where the Court said age is the sole criteria under these circumstances.

THE COURT: What about the beneficiary statute, though, that was was raised, where 18 -- those are even more clear than 710, which doesn't use the word age, it uses eligibility for retirement or retirement, where the beneficiary statute specifically does say age. Is there any equal protection issue there?

MR. HUNT: I think there may be, yes.

Your Honor, Mr. Jones argued that the Supreme Court assumed that Reesor would work indefinitely. I don't necessarily get that out of

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the Supreme Court opinion. I didn't quite understand that argument, but I would like to bring that up.

With respect to the Farrier case, the Farrier case was based upon an employment decision of its members. That person decided to go to work somewhere else. It's not an age based decision, and it's not a mandatory situation. If somebody goes and works somewhere else, then they have made the decision not to be under the school retirement plan. So that if somebody does that, the classes are not similarly situated.

THE COURT: Farrier somewhat implicitly implicates age, doesn't it? Because you're talking about retired people.

MR. HUNT: But it's not a specific age like it is with Social Security retirement. That says beyond this age, you do not get any more benefits.

THE COURT: But in Social Security, I know it's a specific age if you have the number of credits. But isn't it conceivable that you could have somebody who reaches that age, but for some reason or another they started working late in life, and have not accrued the number of credits

necessary to be eligible for Social Security retirement, that age is not going to trigger their eligibility for benefits, is it, the age alone?

MR. HUNT: Social Security benefits?

THE COURT: Yes.

MR. HUNT: Those people are outside the two classes defined by Reesor. The two classes defined by Reesor are those eligible for Social Security benefits, and that is age discrimination. We don't dispute, and as Mr. Murphy said, we don't dispute that there are some people who are going to go on to get permanent total disability benefits if they're not eligible for Social Security retirement. So age does not impact them, it impacts the classes that Reesor defined, and the classes that we have defined. Reesor is pretty clear about that.

THE COURT: So this is presupposing, in terms of those classes, we're presupposing that those individuals have accrued credits to make them eligible for Social Security retirement?

MR. HUNT: Correct. Your Honor, I just want to make one reference, and then I'm done, to the delegation of authority statute. In the State Fund's brief at page 17 -- on page 24, they make

the comment that, "Statutes that adopt federal statutes or other standards, and statutes that are contingent upon the happening of some independent event, are a constitutionally challenged statute." That's exactly what happens here. The Legislature has said, "Federal government, you decide when permanent total disability benefits are terminated." We believe that's an unconstitutional delegation of authority.

THE COURT: Just one question. Is there another case besides Lee that is applicable to this argument? I haven't actually done the independent research to look at something beyond Lee. Is Lee pretty much the definitive case on this case?

MR. HUNT: Lee is pretty much the definitive case in Montana. I didn't go out and do the outside research, but obviously the Respondents did a lot of research on it, because there are many other cases. I would assume that one of us would have found it if there were one.

THE COURT: Anything else?

MR. MURPHY: I would like to address that question about the presupposing that they're eligible for PTD.

Those are the only ones that we're talking about, because those that are ineligible for SSRI -- I might have misspoke -- those that are not eligible for SSRI, they're not going to be affected by this statute. The classes we're talking about are those that are eligible.

Secondly, I think that there's been talk about Farrier. I would compliment Mr. Boyher. Not what you thought. I'm not going to criticize you. He was only the defense attorney that cited an opinion of the Supreme Court that came down in the last 15 years. The defense attorneys did not cite Henry; they did not cite Stavenjord; they did not cite Schmill; they didn't talk about the content and the rationale behind those. They talked about old law.

The Farrier case is one that came down, and it does raise some questions about equal protection. It's one of the only other equal protection cases decided by the Court. But those four that I just named are the major equal protection cases that this Court has decided in a half a century, or maybe a century; and I think that the lack of them citing those cases shows what they really are intending, trying to overturn

these cases, which this Court has already acknowledged probably shouldn't be done.

So we appreciate the time the Court has put in, and the opportunity to have everybody speak, and we thank you very much.

THE COURT: Thank you.

MR. LUCK: Do we need to ask the Court to take notice of our brief citing Stratemeyer, Rausch, Schmill, and the rest of them?

THE COURT: They're in the brief. This was very well-briefed, and very well-argued by everybody. I appreciate it. We'll get a decision. We're adjourned.

(The proceedings were concluded at 3:19 p.m.)

* * * * *

CERTIFICATE

STATE OF MONTANA)
: SS.
COUNTY OF LEWIS & CLARK)

I, LAURIE CRUTCHER, RPR, Court Reporter, Notary Public in and for the County of Lewis & Clark, State of Montana, do hereby certify:

That the proceedings were taken before me at the time and place herein named; that the proceedings were reported by me in shorthand and transcribed using computer-aided transcription, and that the foregoing -95- pages contain a true record of the proceedings to the best of my ability.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this day of , 2005.

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 9, 2008.