

WORKERS' COMPENSATION COURT
LEWIS AND CLARK COUNTY

FILED

OCT 24 2005

CATHERINE E. SATTERLEE, et. al.,

-vs-

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

OFFICE OF
WORKERS' COMPENSATION
HELENA, MONTANA

WCC No. 2003-0840

COPY

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

LAURIE CRUTHER, RPR
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DOCKET ITEM NO. 073

1 WORKERS' COMPENSATION COURT
2 LEWIS AND CLARK COUNTY
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5 CATHERINE E. SATTERLEE, et. al.,) WCC 2003-0840

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11 et al.,)
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17 BE IT REMEMBERED, that the above-captioned
18 proceedings was heard at the Offices of the
19 Workers Compensation Court, 1625 Eleventh Avenue,
20 Helena, Montana, on the 7th day of October, 2005,
21 beginning at the hour of 1:00 p.m., before the
22 Honorable James Jeremiah Shea, was reported by
23 Laurie Crutcher, Registered Professional Reporter,
24 Notary Public.
25

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1 A P P E A R A N C E S

2 ATTORNEYS APPEARING ON BEHALF OF THE CLAIMANTS:

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3 MR. JAMES G. HUNT

4

ATTORNEYS APPEARING ON BEHALF OF THE RESPONDENTS:

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MR. LARRY W. JONES

6 MR. JOHN E. BOYHER

MR. LEO S. WARD

7 MR. MICHAEL P. HERINGER

MR. THOMAS E. MARTELLO

8 MR. RONALD A. THUESEN

MS. ANGIE K. JACOBS

9 MR. STEVEN W. JENNINGS

MR. PETER J. STRIZICH

10 MR. BILL VISSER

MR. SHAWN BUBB

11 MR. LAWRENCE HUBBARD

MS. NANCY BUTLER

12 MR. GEOFFREY KELLER

MR. PETER STRAUSS

13 MR. MARK CADWALLADER

MR. MIKE FANNING

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1 Whereupon, the following proceedings were
2 had:

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

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

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

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

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

1 65 years of age, 710 terminated her PTD benefit,
2 whereas a younger woman would receive and continue
3 to receive PTD. I will discuss four points to
4 demonstrate that 710 violates equal protection.

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

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

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

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

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

20 But with this injury, she lost that
21 ability. She lost the ability to work up to age
22 65, and she lost the ability to work after age 65,
23 and that is what is key here. She has the same
24 financial need to work as other people that are
25 working after 65, but she has no way to fulfill

1 it. The loss of that ability is what we're asking
2 for from this Court. Simply put, Social Security
3 Retirement benefits don't cover all of her needs,
4 or all of the needs of a number of people over age
5 65 that are forced to work.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. MURPHY: That's correct, same

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 compensation context.

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

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

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

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

19 THE COURT: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Montana Supreme Court.

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

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

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

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

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

9 It's important to note, too, Your Honor,
10 that the Social Security Administration has
11 recognized that SSRI was never intended to be a
12 worker's sole retirement. As we pointed out in
13 our brief, it replaces about 40 percent of a
14 person's average income, and most financial
15 advisors say that retirees will need about 70 to
16 80 percent of their work income to live
17 comfortably in retirement.

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

1 oftentimes the best earning years of their life.

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

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

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

25 THE COURT: Mr. Luck.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 I went through the blue books last night
15 for several different things, because this spans
16 1981 to today, and the first thing I noticed was
17 that the phrases are basically the same, but
18 there's three or four differences that are used:
19 Normal labor market, open labor market, job pool,
20 and regular employment. Regardless of the label
21 we use, it's the basis of workers compensation,
22 this normal labor market consideration, where we
23 look at age, education, work experience, and
24 physical condition, and determine what your
25 entitlement is, whether you're permanently

1 partially disabled, or permanently totally
2 disabled.

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

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

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

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

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

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

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

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

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

15 710 is not about age discrimination.
16 It's not even about age. It's about defining who
17 is in the labor market, and who is not; who is
18 retired, and who's not. It's about leaving the
19 normal labor market by entitlement, and it's about
20 the legislative prerogative to make those kinds of
21 classifications.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 We'd add that to the specified purposes
7 of Section 39-71-105. I think the Reesor Court
8 and Claimant's Counsel have cited repeatedly only
9 one of the tenets of the purpose clause in Section
10 105, and that is to provide some fair compensation
11 to the claimant.

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

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

22 105 also says that employers should be
23 able to provide coverage at reasonably constant
24 rates; that the act must be construed according to
25 its terms, and not liberally in favor of any

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Reesor doesn't treat, doesn't consider

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

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

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

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

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

9 MR. LUCK: It's impossible to have a
10 logical discussion about retirement if age isn't a
11 factor, but it isn't the -- as said in Reesor --
12 the sole only factor. It has to be a component of
13 retirement. But the fact of the matter is if it's
14 710 we're focusing on, 710 just creates the
15 definition of who is retired and who is not, and
16 those that are not continue for the rest of their
17 life to receive those benefits.

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

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

1 permanent total disability.

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

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

18 MR. LUCK: Open labor market.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 It's simply a benefit entitlement
4 choice. It's a proper classification. It's no
5 different, Your Honor, than several of the
6 classifications that we don't even think about to
7 question in the Workers Compensation Act. When
8 someone reaches maximum medical improvement, their
9 status changes. You only get 350 weeks of
10 permanent partial disability. That's pretty
11 arbitrary, but that's one of those choices of
12 benefits that the Legislature made. You only get
13 104 weeks of retraining benefits. A lot of people
14 could argue that you should have more. It used to
15 be unlimited. But that's a choice that the
16 Legislature made, just like 710.

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

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

4 710 is just one more definitional
5 statute, a choice of benefits. It's good for the
6 system. It needs to be done that way. It's
7 appropriate.

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

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

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

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

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

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

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

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

10 It is extremely significant that that be
 11 part of the consideration and part of the record
 12 of this case, because it would be a bankruptcy to
 13 the system, and to the State Fund, and have a
 14 significant effect on the General Fund. It must
 15 be considered as it relates to the viability of
 16 710.

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

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

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

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

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

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

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

4 THE COURT: Thank you. Who is next?

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

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

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

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

1 it a moment ago. If you turn to the Court's
2 decision, Paragraph 18, the majority states,
3 quote, "As clearly pronounced in section
4 39-71-105(1) MCA, the primary goal of workers
5 compensation benefits is to establish a wage
6 replacement for injured workers, certainly a
7 legitimate and appropriate governmental interest."
8 That's the passage to which Mr. Hunt referred.

9 I also would like you to note in your
10 review of this case that at Paragraph 23, we have
11 the following statement again from the four member
12 majority. Quote, "We see no reason why a 40 year
13 old injured worker should receive full PPD
14 benefits pursuant to Section 39-71-703 MCA, and a
15 65 year old worker with an identical injury should
16 receive an impairment award due to the fact he has
17 reached Social Security retirement age."

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

25 And so when you look at the fact that

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

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

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

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

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

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

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

18 THE COURT: Okay.

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

1 exhibit.

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

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

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

1 going to continue to work indefinitely.
 2 There is no factual basis in Reesor for
 3 that assumption. In fact, we have evidence here
 4 that shows it's exactly the contrary. So if the
 5 purpose of the Work Comp Act is to replace lost
 6 wages, then it's not happening by putting persons
 7 on permanent total disability benefits for a
 8 lifetime when they're still retired, because
 9 people are falling out of the work force in very
 10 predictable and steady ways in this state. And
 11 that is the key factual distinction that makes
 12 this a completely different case from Reesor.

13 So I encourage you to take look at those
 14 stipulated facts, and to compare this information.
 15 And if the driver, as Mr. Hunt has said, is the
 16 replacement of lost wages, then there has to be
 17 some evidence that wages are being lost in the
 18 future that are being replaced by permanent total
 19 disability benefits for a lifetime. And as noted
 20 by Mr. Murphy, and as our company certainly
 21 follows the rule, if they're not on Social
 22 Security retirement, they're not eligible. They
 23 have lifetime permanent total disability benefits.
 24 There is a safety net there.

25 So not only because I have a head cold,

1 but because that's all I have to say, Your Honor,
 2 that's my presentation.

3 THE COURT: Thank you.

4 MR. BOYHER: My name is John Boyher.
 5 And unlike the rest of the gentlemen in this room,
 6 I am not a workers compensation lawyer. I am here
 7 on behalf of the Chamber of Commerce and its 700
 8 members in Montana; the National Federation of
 9 Independent Businesses, and its 6,000 members in
 10 Montana; and the Montana Contractors Association,
 11 and its 250 commercial construction companies
 12 located within this state.

13 The principal part of my short
 14 presentation is to try to bring to bear for the
 15 Court the potential effect that a ruling in this
 16 case finding the statute unconstitutional would
 17 have upon both employers and employees within this
 18 state.

19 THE COURT: That hadn't occurred to me
 20 yet.

21 MR. BOYHER: In addition, Judge, I
 22 wanted to -- in looking at some of the economic
 23 aspects, and following up on what Mr. Luck said
 24 and what Mr. Jones said, the statute at issue here
 25 -- and I don't believe this was addressed in the

1 Reesor opinion. There had been talk about the
 2 issue of termination of the benefits being based
 3 upon age. But I note that the title of the
 4 statute involved here is, "Termination of benefits
 5 upon retirement." It is not termination of
 6 benefits upon reaching age 65. The title of that
 7 statute should be given some effect by this Court.

8 Additionally, I note that Mr. Hunt
 9 correctly quoted from the Reesor opinion, and I
 10 note this portion, "The primary goal of work comp
 11 is to establish a wage replacement for injured
 12 workers, certainly a legitimate and appropriate
 13 governmental interest."

14 What caught my eye was the next passage
 15 from the Court, Your Honor, and that is that, "The
 16 disparate treatment of partially disabled
 17 claimants based upon their age, because they are
 18 receiving or are eligible to receive Social
 19 Security benefits, is not related to that
 20 governmental interest."

21 The Court's inquiry and its statement in
 22 Reesor in my view is incomplete. The issue before
 23 this Court is not whether the statutory policy
 24 bears a rational relationship to that specific
 25 interest, being the goal of wage replacement.

1 Rather under a constitutional analysis, the issue
 2 is whether the statute bears a rational
 3 relationship to any legitimate government
 4 interest.

5 The Supreme Court didn't undertake that
 6 analysis, and that's another reason I think that
 7 this Court can look at Reesor and say, "Well, it
 8 is good as far as it goes." There is additional
 9 information and an additional analysis that this
 10 Court can apply.

11 Mr. Luck touched on this when he
 12 mentioned other judicial decisions from the
 13 Montana Supreme Court including, among others, the
 14 Meech versus Hillhaven case.

15 I want to point out that the
 16 constitutional analysis of the statute does not
 17 limit this Court's inquiry to workers compensation
 18 cases that have gone up to the Montana Supreme
 19 Court. There are many other constitutional
 20 decisions that don't implicate the work comp
 21 statute, but that nonetheless apply.

22 So when we get to the issue, Judge, of
 23 whether the statute has a legitimate or rational
 24 basis, we clearly know that it does. The Meech v.
 25 Hillhaven case demonstrates that. In that case,

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

5 I make that point because both Mr.
6 Murphy and Mr. Hunt, in their argument, point out
7 that the argument from the insurers and the
8 defendants is about money. I've never shied away
9 from the money word in tort proceedings, and I
10 won't do so here. Of course it's about money.

11 That is a legitimate interest for this Court to
12 consider. It's a legitimate interest for the
13 Supreme Court to consider. But most important,
14 it's not only important for the Legislature to
15 consider, but it's within the Legislature's
16 purview to take into account how it would benefit
17 economic opportunities in this state for all, not
18 just for those injured workers.

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

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

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

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

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

1 those within the class."

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

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

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

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

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

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

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

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

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

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

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

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

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

21 Presently and statistically, according
22 to the Small Business Administration, in Montana
23 as of 2002, there is just shy of 33,000 employers,
24 32,972. These include all non-farm businesses.
25 Within those employers, there are 300,636

1 individuals who generate a payroll of \$7.4 billion
2 annually.

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

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

25 I mention it, Judge, because in that

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

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

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

20 (Recess taken)

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

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

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

5 The cities, schools, and he have about
6 37,000 employees in the state of Montana. They
7 formed self-insurance programs for workers
8 compensation and for general liability in the late
9 1980s because of an insurance crisis that was
10 occurring. Because of that crisis, we also saw a
11 major change in the law in 1987, which Brad
12 referred to during his discussion.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 THE COURT: Do you have any objection?

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

25 MR. HERINGER: I'll try to make it

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

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

4 MR. HERINGER: I represent Lumberman's
5 Mutual. They were the insurer of Buttrey Food and
6 Drug, who was the employer of Catherine Satterlee.
7 She was injured in the course and scope of her
8 employment at Buttrey Food and Drug on July 25,
9 1992. Ultimately she was deemed permanently
10 totally disabled, and she was paid permanent total
11 disability benefits until age 65, when she became
12 eligible to receive Social Security retirement
13 benefits. That's from a factual standpoint, and
14 we've stipulated to those facts.

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

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

1 MR. HUNT: We are.

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

7 Originally when this case first started
8 over a year ago, when the original petition was
9 filed, the only basis, the main basis in which
10 they made the demand on my client to reinstitute
11 permanent total disability benefits was based on
12 this unconstitutional delegation of legislative
13 authority. What they complained there was that
14 710 unconstitutionally delegated legislative
15 authority to the federal government, as they
16 allege that the federal government sets the age
17 for entitlement to Social Security retirement
18 benefits.

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

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

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

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

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

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

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

20 In my view, it is Reesor that should be
21 limited to its holding. Reesor held that Section
22 710 was unconstitutional, where permanent partial
23 disability benefits, a whole class or category of
24 benefits, were denied to injured workers who were
25 or were entitled to permanent total disability

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

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

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

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

1 why permanent total is different than permanent
2 partial disability benefits.

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

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

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

25 MR. HERINGER: Absolutely, it is. And

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

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

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

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

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

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

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

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

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

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

1 goes directly to that.

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

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

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

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

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

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

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

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

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

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

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

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

7 THE COURT: More compelling.

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

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

11 MR. HERINGER: No. It's a more
12 compelling reason to support that particular deal.
13 The public policy, I put that in my brief. Again,
14 105 is the weighing, it's a balancing act that was
15 aptly talked about by people before me.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 THE COURT: Has everybody on this side
23 argued?

24 MR. HERINGER: We're done.

25 THE COURT: Time for rebuttal.

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

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

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

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

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

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

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

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

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

1 710 is a definitional statute that is somehow a
2 procedural and not a substantive statute. It is
3 the statute that terminates permanent total
4 disability benefits. It is a substantive
5 non-definitional active statute on which they rely
6 to terminate permanent total disability benefits,
7 and on which they relied to terminate permanent
8 partial disability benefits prior to Reesor.

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

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

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

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

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

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

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

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

4 MR. HUNT: Social Security benefits?

5 THE COURT: Yes.

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

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

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

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

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

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

22 THE COURT: Anything else?

23 MR. MURPHY: I would like to address
24 that question about the presupposing that they're
25 eligible for PTB.

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

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

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

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

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

6 THE COURT: Thank you.

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

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

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

16 * * * * *

1 CERTIFICATE

2 STATE OF MONTANA)

3 : SS.

4 COUNTY OF LEWIS & CLARK)

5 I, LAURIE CRUTCHER, RPR, Court Reporter,
6 Notary Public in and for the County of Lewis &
7 Clark, State of Montana, do hereby certify:8 That the proceedings were taken before me at
9 the time and place herein named; that the
10 proceedings were reported by me in shorthand and
11 transcribed using computer-aided transcription,
12 and that the foregoing -95- pages contain a true
13 record of the proceedings to the best of my
14 ability.15 IN WITNESS WHEREOF, I have hereunto set my
16 hand and affixed my notarial seal
17 this day of , 2005.18
19 LAURIE CRUTCHER, RPR
20 Court Reporter - Notary Public
21 My commission expires
22 March 9, 2008.
23
24
25

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