IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2019 MTWCC 12

WCC No. 2013-3235

SUSAN HENSLEY

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Appealed to the Montana Supreme Court No. DA 19-0523 – 09/12/2019
Affirmed 12/16/20 -- 2020 MT 317

Summary: Upon reaching MMI for her shoulder injury, Petitioner returned to work without an actual wage loss. She received a 4% whole person impairment rating, which is a Class 1 impairment under the AMA Guides, 6th Ed. Respondent did not pay her an impairment award because § 39-71-703(2), MCA (2011), does not provide for the payment of impairment awards if an injured worker's impairment is rated as a Class 1 impairment and the worker suffers no actual wage loss. Because this statute provides that an injured worker with a Class 2, 3, or 4 impairment without a wage loss has a right to an impairment award, Petitioner asserts it is facially unconstitutional under the equal protection clause in Mont. Const. art. II, § 4. Petitioner also asserts that by denying her a remedy for her permanent injury, § 39-71-703(2), MCA (2011), violates her right to due process under Mont. Const. art. II, § 17.

Held: Section 39-71-703(2), MCA (2011), is not facially unconstitutional under the equal protection clause because a claimant with a Class 1 impairment rating is not similarly situated to a claimant with a Class 2, 3, or 4 impairment rating due to the difference in the severity and frequency of their symptoms and functional limitations. And, nevertheless, there is a rational basis for treating these classes differently. This Court does not address Petitioner's due process claim because this Court cannot grant her the remedy she seeks, which is payment of an impairment award.

¶1 Petitioner Susan Hensley challenges Respondent Montana State Fund's (State Fund) denial of liability for an impairment award under § 39-71-703(2), MCA (2011), which provides that a claimant with a Class 1 impairment under the AMA Guides, 6th Ed. and no wage loss, is not entitled to an impairment award while a claimant with a Class 2, 3, or 4 impairment and no wage loss is entitled to an impairment award. Hensley asserts that this provision violates her right to equal protection under Mont. Const. art. II, § 4, and her right to due process under Mont. Const. art. II, § 17. State Fund asserts that under the entire framework of the 2011 Workers' Compensation Act (WCA), § 39-71-703, MCA, is constitutional. For the reasons that follow, this Court agrees with State Fund and grants its summary judgment motion and denies Hensley's summary judgment motion.

History of Montana's Reliance upon the
Guides to the Evaluation of Permanent Impairment to Calculate Impairment Awards

¶2 As part of the 1987 reforms to the WCA, the Legislature provided for an impairment award,[1] which was based on the whole person impairment rating under the "current edition of the Guides to Evaluation of Permanent Impairment published by the American Medical Association,"[2] (the *Guides*), a book that provides physicians with a method to rate the level of impairment an injury or disease has caused a person. At the time, the "current edition" of the *Guides* was the 2nd edition. The level of impairment is expressed as a percentage, which is deemed the "whole person impairment" rating.

¶3 The AMA Guides, 5th Ed., which was the current edition of the *Guides* from 2000 to 2008, defines "impairment" as: the "loss, loss of use, or derangement of any body part, organ system, or organ function."[3] The AMA Guides, 5th Ed., defines "impairment percentages or ratings" as, "[c]onsensus-derived estimates that reflect the severity of the impairment and the degree to which the impairment decreases an individual's ability to perform common activities of daily living . . . ."[4] The AMA Guides, 5th Ed., defines "whole person impairment," as "[p]ercentages that estimate the impact of the impairment on the individual's overall ability to perform activities of daily living, excluding work."[5]

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[1] § 39-71-703(1)(a), MCA (1987).

[2] § 39-71-711(1)(b), MCA (1987).

[3] L. Cocchiarella, MD, MSc, *et al*. (eds.), *American Medical Association Guides to the Evaluation of Permanent Impairment*, 5th ed., p. 601, AMA Press, 2005 (AMA Guides, 5th Ed.).

[4] AMA Guides, 5th Ed., p. 601.

[5] AMA Guides, 5th Ed., p. 603.

¶4 Under § 39-71-703 and -711, MCA (1987-2009), a physician would assign a whole person impairment rating under the current edition of the *Guides* when a claimant reached maximum medical improvement (MMI), the "point in the healing process when further material improvement would not be reasonably expected from primary medical treatment."[6] The amount of the claimant's impairment award was calculated by taking the claimant's whole person impairment rating, which is expressed in terms of a percentage, and multiplying it by the maximum number of weeks for permanent partial disability (PPD) benefits, as set forth in the applicable version of § 39-71-703, MCA, for the claimant's date of injury, and then multiplying the number of weeks by the claimant's PPD rate. The product was the monetary value of the claimant's impairment award. For example, a claimant who had a 4% whole person impairment rating under the 2009 WCA, with the maximum PPD rate of $302 for Fiscal Year 2009, had the right to an impairment award in the amount of $4,530.[7]

¶5 The Montana Supreme Court has explained that the purpose of an impairment award is to compensate the injured worker for a loss of function to her body:

> Impairments awards are based on a worker's impairment rating, which is a purely medical determination of the loss of physical function of the body caused by the injury. § 39-71-711, MCA (1991 and 1997). The impairment rating is the physical component on which the disability is based. Disability benefits compensate the worker for losses related to their inability to work. An impairment award is paid to compensate the worker for the loss of physical function of his or her body, which may have ramifications beyond just the workers' ability to return to work.[8]

¶6 Under the WCA from 1987 through 2009, an injured worker who could return to regular employment who received a whole person impairment rating had the right to an impairment award, even if she did not suffer an actual wage loss.[9] For example, § 39-71-703(2), MCA (2009), states:

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[6] *See, e.g.*, § 39-71-116(18), MCA (2009).

[7] 375 weeks x 4% = 15 weeks. 15 weeks x $302 = $4,530.

[8] *Rausch v. State Comp. Ins. Fund (Rausch I)*, 2002 MT 203, ¶ 21, 311 Mont. 210, 54 P.3d 25 (citations omitted).

[9] In *Rausch I*, the court held that under the 1991 and 1997 versions of the WCA, PTD claimants were entitled to an impairment award. But in *Rausch v. State Comp. Ins. Fund (Rausch II)*, 2005 MT 140, ¶ 14, 327 Mont. 272, 114 P.3d 192 (citation omitted), the court held that under the 1987 and 1989 versions of the WCA, PTD claimants were not entitled to an impairment award because § 39-71-703, MCA (1987 and 1989), "limits impairment awards to PPD claimants only."

> When a worker receives an impairment rating as the result of a compensable injury and has no actual wage loss as a result of the injury, the worker is eligible for an impairment award only.

¶7 In 2008, the American Medical Association published the AMA Guides, 6th Ed.[10] Under § 39-71-711(1)(b), MCA (2007-2009) — which provides that impairment rates "must be based on the current edition of the Guides to Evaluation of Permanent Impairment published by the American medical association" — the AMA Guides, 6th Ed., became the standard to use when calculating a claimant's impairment rating for claimants who reached MMI after the date of publication.[11]

¶8 The AMA Guides, 6th Ed.'s, definitions of "impairment," "impairment rating," and "whole person impairment" are similar to those in the AMA Guides, 5th Ed. The AMA Guides, 6th Ed., defines "impairment" as:

> A significant deviation, loss, or loss of use of any body structure or function in an individual with a health condition, disorder, or disease.[12]

The AMA Guides, 6th Ed., defines "impairment rating" as:

> Consensus-derived percentage estimate of loss of activity, which reflects severity of impairment for a given health condition, and the [degree] of associated limitations in term[s] of Activities of Daily Living (ADLs).[13]

And, the AMA Guides, 6th Ed., defines "whole person impairment" as:

> Percentages that estimate the impact of the impairment on the individual's overall ability to perform Activities of Daily Living, excluding work.[14]

The AMA Guides, 6th Ed., explains, "The whole person impairment is a percentage based on a consensus of opinion from multidisciplinary medical specialties and cumulative

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[10] R. Rondinelli, MD, PhD, *et al*. (eds.), *American Medical Association Guides to the Evaluation of Permanent Impairment*, 6th ed., AMA Press, 2008 (AMA Guides, 6th Ed.).

[11] *Drake v. Mont. State Fund*, 2011 MTWCC 2, ¶ 26 (ruling that the impairment rating was to be calculated on the current edition of the Guides on the date the claimant reached MMI).

[12] AMA Guides, 6th Ed., pp. 5 and 611.

[13] AMA Guides, 6th Ed., p. 612.

[14] AMA Guides, 6th Ed., p. 615.

experience. The whole person impairment rating ranges from normal (0%) to totally dependent on others for care (90+%) to approaching death (100%).[15]

¶9 Unlike the earlier editions, the AMA Guides, 6th Ed., contains "Impairment Classification Grids," under which whole person impairments are placed into one of five classes based upon the severity of the person's loss of function for the condition at issue. The goal of the classification system is to "yield maximal internal consistency of impairment ratings across organ systems."[16]

¶10 Table 1-5 in the 6th edition is the "Generic Template for Impairment Classification Grids," which is the format used throughout the AMA Guides, 6th Ed., for the classification system. A copy of this table is attached as Appendix A.

¶11 In this table, the lowest class in the Impairment Classification Grids is Class 0, which includes those who are asymptomatic, or who have "intermittent symptoms that do not require treatment." A person assigned a Class 0 impairment will have a 0% whole person impairment rating.

¶12 In terms of increased severity of the impairment, the next class is Class 1. A person with a Class 1 impairment will have "[s]ymptoms controlled with continuous treatment" or "intermittent, mild symptoms despite continuous treatment." On physical examination, a person with a Class 1 impairment will have "[p]hysical findings not present with continuous treatment" or "intermittent, mild physical findings." A person with a Class 1 impairment will either have no objective evidence of injury or "intermittent mild abnormalities." For a musculoskeletal injury, a person with a Class 1 impairment will have "[p]ain/symptoms with strenuous/vigorous activity" and be "[a]ble to perform self-care activities independently." In general terms, a person with a Class 1 impairment will have a "minimal" whole person impairment rating.

¶13 A person with a Class 2 impairment will have, "[c]onstant mild symptoms despite continuous treatment" or "intermittent, moderate symptoms despite continuous treatment." On physical examination, a person with a Class 2 impairment will have "[c]onstant mild physical findings despite continuous treatment" or "intermittent moderate findings." A person with a Class 2 impairment will have objective evidence of injury. For a musculoskeletal injury, a person with a Class 2 impairment will have "[p]ain/symptoms with normal activity" and be "[a]ble to perform self-care activities with modification but

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[15] AMA Guides, 6th Ed., p. 19.

[16] AMA Guides, 6th Ed., p. 11.

unassisted." In general terms, a person with a Class 2 impairment will have a "moderate" whole person impairment rating.

¶14 A person with a Class 3 impairment will have "[c]onstant moderate symptoms despite continuous treatment" or "intermittent, severe symptoms despite continuous treatment." On physical examination, a person with a Class 3 impairment will have "[c]onstant moderate physical findings despite continuous treatment" or "intermittent severe findings." A person with a Class 3 impairment will have objective evidence of injury. For a musculoskeletal injury, a person with a Class 3 impairment will have "[p]ain/symptoms with less than normal activity (minimal)" and "[r]equires assistance to perform self-care activities." In general terms, a person with a Class 3 impairment will have a "severe" whole person impairment rating.

¶15 Finally, a person with a Class 4 impairment will have [c]onstant severe symptoms despite continuous treatment" or "intermittent, extreme symptoms despite continuous treatment." On physical examination, a person with a Class 4 impairment will have "[c]onstant severe physical findings despite continuous treatment" or "intermittent extreme findings." A person with a Class 4 impairment will have objective evidence of injury. For musculoskeletal injuries, they will have "[p]ain/symptoms at rest" and be "[u]nable to perform self-care activities." In general terms, a person with a Class 4 impairment will have a "very severe" whole person impairment rating.

¶16 To calculate a whole person impairment rating under the AMA Guides, 6th Ed., the impairment evaluator[17] must first determine that the person is at MMI.[18] The impairment evaluator then uses the "key factor" for the condition and determines the impairment class for the patient's diagnosis, which will have a range of impairment ratings, which are further broken down into a grade based on the severity of the loss of function.[19] The impairment evaluator then determines where the patient falls in the range of impairment ratings based on: (1) the history of the patient's clinical presentation history, i.e., their subjective reports; (2) the physician's physical examination findings, giving greater weight to those findings

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[17] § 39-71-711(2), MCA (2011), provides that impairment ratings may be rendered by a licensed physician, osteopath, chiropractor, physician's assistant, dentist, and advanced practice registered nurse. *See also* AMA Guides, 6th Ed., p. 19 (stating, "The Guides is written by medical doctors for other medical doctors as a tool to translate human pathology resulting from a trauma or disease process into a percentage of the whole person. This is achieved using criteria that are consistent with the pathology. Thus, to ensure reliable impairment estimates, the assessing doctor must possess the requisite medical knowledge, skill, and abilities.").

[18] AMA Guides, 6th Ed., p. 24.

[19] AMA Guides, 6th Ed., p. 12.

that are "more objective";[20] (3) objective test results, e.g., imaging studies or electrodiagnostic studies; and (4) for musculoskeletal injuries, the patient's functional history, which is the functional impact of the condition.

¶17 Throughout the AMA Guides, 6th Ed., there are grids in the chapters for each body system or area, from Class 0 to Class 4.[21] As examples, the Shoulder Regional Grid, Table 15-5, is attached as Appendix B, the Knee Regional Grid, Table 16-3, is attached as Appendix C, and the Lumbar Spine Regional Grid, Table 17-4, is attached as Appendix D.[22]

¶18 Because of concerns over the high cost of Montana's workers' compensation system, the 2011 Legislature made several amendments to the WCA, including changes to the statutes under which impairment awards are calculated.[23]

¶19 The 2011 Legislature amended § 39-71-711(1)(b), MCA, to provide that impairment ratings "must be based on the sixth edition of the American medical association Guides to the Evaluation of Permanent Impairment." I.e., the legal standard is no longer the "current edition" of the *Guides* and when the American Medical Association publishes the 7th edition of the *Guides*, Montana will continue to use the AMA Guides, 6th Ed., until the Legislature amends § 39-71-711, MCA, if it decides to do so.

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[20] AMA Guides, 6th Ed., pp. 12 and 407.

[21] Chapters 3 through 17 of the AMA Guides, 6th Ed., are for the body systems and areas for which a patient can be assigned a whole person impairment rating. The titles of the chapters are as follows: Chapter 3, Pain-Related Impairment; Chapter 4, The Cardiovascular System; Chapter 5, the Pulmonary System; Chapter 6, The Digestive System; Chapter 7, The Urinary and Reproductive Systems; Chapter 8, The Skin; Chapter 9, The Hematopoietic System; Chapter 10, The Endocrine System; Chapter 11, Ear, Nose, Throat, and Related Structures; Chapter 12, The Visual System; Chapter 13, The Central and Peripheral Nervous System; Chapter 14, Mental and Behavioral Disorders; Chapter 15, The Upper Extremities; Chapter 16, The Lower Extremities; and Chapter 17, The Spine and Pelvis. Because the majority of workers' compensation claims in Montana are musculoskeletal injuries, this Court has focused on Chapters 15 through 17.

[22] Most of the grids in the AMA Guides, 6th Ed., provide whole person impairment ratings. However, from Chapters 15 through 17, which cover musculoskeletal injuries, some of the grids provide "regional impairment ratings ([e.g.], percent impairment of upper or lower extremity)," which is then converted to a whole person impairment rating. AMA Guides, 6th Ed., p. 21.

[23] HB 334 (2011). Citing *S.L.H. v. State Comp. Mut. Ins. Fund*, 2000 MT 362, ¶ 29, 303 Mont. 364, 15 P.3d 948 and *Wilkes v. Mont. State Fund*, 2008 MT 29, ¶ 25, 341 Mont. 292, 177 P.3d 483, State Fund argues that Hensley cannot prevail on an argument that her rights to equal protection were violated because she would have received an impairment award under the 2009 WCA. While State Fund is correct, it is attacking a straw man, as Hensley did not make such an argument. Rather, Hensley makes only a facial equal protection challenge to § 39-71-703(2), MCA (2011), meaning that she challenges this statute "on its own terms." *See State v. Spina*, 1999 MT 113, ¶ 85, 294 Mont. 367, 982 P.2d 421 (citation omitted) (explaining that when a law is challenged "on its face," "the law by its own terms classifies persons for different treatment.").

¶20 For PPD benefits, the Legislature changed the definition of "permanent partial disability" to incorporate the AMA Guides, 6th Ed. Section 39-71-116(27), MCA (2011), states:

> "Permanent partial disability" means a physical condition in which a worker, after reaching maximum medical healing:
>
> (a) has a permanent impairment, as determined by the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, that is established by objective medical findings for the ratable condition. The ratable condition must be a direct result of the compensable injury or occupational disease and may not be based exclusively on complaints of pain.
>
> (b) is able to return to work in some capacity but the permanent impairment impairs the worker's ability to work; and
>
> (c) has an actual wage loss as a result of the injury.

¶21 Under the 2011 WCA, every permanently partially disabled worker — i.e., a claimant who can return to regular employment but who has an actual wage loss as a result of an injury and a whole person impairment rating, which is not based exclusively on complaints of pain and which is supported by objective medical findings, under the AMA Guides, 6th Ed., including a claimant with a Class 1 impairment — is entitled to an impairment award as part of their PPD award.[24] Thus, in relevant part, § 39-71-703, MCA, states as follows:

> (1) If an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award if that worker:
>
> (a) has an actual wage loss as a result of the injury; and
>
> (b) has a permanent impairment rating as determined by the sixth edition of the American medical association Guides to the Evaluation of Permanent Impairment for the ratable condition. The ratable condition must be a direct result of the compensable injury or occupational disease that:
>
> (i) is not based exclusively on complaints of pain;
>
> (ii) is established by objective medical findings; and
>
> (iii) is more than zero.

The claimant's PPD award is calculated with the claimant's weekly PPD rate — which is $66^{2}/_{3}$% of the claimant's wage at the time of injury, with the maximum set at half the State's

[24] § 39-71-703(1), (5), MCA (2011).

average weekly wage[25] — by the formula set forth in § 39-71-703(3), (4), and (5), which states:

> (3) The permanent partial disability award must be arrived at by multiplying the percentage arrived at through the calculation provided in subsection (5) by 400 weeks.
>
> (4) A permanent partial disability award granted an injured worker may not exceed a permanent partial disability rating of 100%.
>
> (5) The percentage to be used in subsection (4) must be determined by adding all of the following applicable percentages to the whole person impairment rating:
>
> (a) if the claimant is 40 years of age or younger at the time of injury, 0%; if the claimant is over 40 years of age at the time of injury, 1%;
>
> (b) for a worker who has completed less than 12 years of education, 1%; for a worker who has completed 12 years or more of education or who has received a graduate equivalency diploma, 0%;
>
> (c) if a worker has no actual wage loss as a result of the industrial injury, 0%; if a worker has an actual wage loss of $2 or less an hour as a result of the industrial injury, 10%; if a worker has an actual wage loss of more than $2 an hour as a result of the industrial injury, 20%. Wage loss benefits must be based on the difference between the actual wages received at the time of injury and the wages that the worker earns or is qualified to earn after the worker reaches maximum healing.
>
> (d) if a worker, at the time of the injury, was performing heavy labor activity and after the injury the worker can perform only light or sedentary labor activity, 5%; if a worker, at the time of injury, was performing heavy labor activity and after the injury the worker can perform only medium labor activity, 3%; if a worker was performing medium labor activity at the time of the injury and after the injury the worker can perform only light or sedentary labor activity, 2%.

¶22 However, the 2011 Legislature changed the law for claimants who do not suffer a wage loss. The 2011 WCA provides that a claimant with no actual wage loss — i.e., a claimant who is not permanently partially disabled — and a Class 1 impairment rating is not entitled to an impairment award. But, a claimant with no actual wage loss and a Class 2, 3, or 4 impairment rating is entitled to an impairment award. Section 39-71-703(2), MCA (2011), states:

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[25] § 39-71-703(6), MCA (2011).

> When a worker receives a Class 2 or greater class of impairment as converted to the whole person, as determined by the sixth edition of the American medical association Guides to the Evaluation of Permanent Impairment for the ratable condition, and has no actual wage loss as a result of the compensable injury or occupational disease, the worker is eligible to receive payment for an impairment award only.

¶23 Hensley now challenges this subsection on equal protection grounds, asserting that the denial of an impairment award to a person with a Class 1 impairment and no wage loss, while granting an impairment award to a person with a Class 2 impairment and no wage loss, is facially unconstitutional under Mont. Const. art II, § 4. She also asserts that depriving her of an impairment award undercuts the *quid pro quo* on which the WCA is based, thereby violating her right to due process under Mont. Const. art II, § 17.

Undisputed Facts[26]

¶24 On January 11, 2012, Hensley suffered a shoulder injury in the course of her employment as a paramedic for Polson Ambulance. Her job is heavy duty labor.

¶25 At the time of Hensley's industrial accident, State Fund insured her employer.

¶26 On January 30, 2012, Hensley filed a workers' compensation claim for her injury. State Fund accepted liability.

¶27 Larry Stayner, MD, diagnosed a glenoid labral tear. Dr. Stayner surgically repaired Hensley's shoulder on March 29, 2012.

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[26] These undisputed facts come from the parties' Joint Stipulation of Facts, Contentions, and Stipulated Procedure (Joint Stipulation) at 1-4, except as otherwise noted. Typically, in a facial challenge, this Court does not consider the facts of the claim. *See, e.g.*, *Caldwell v. MACo Workers' Comp. Trust*, 2011 MT 162, ¶ 69, 361 Mont. 140, 256 P.3d 923 (Baker, J., dissenting) (emphasis and alterations in original) (citations omitted) (explaining, " '*The difference* [between a facial challenge and an as-applied challenge] *is important.* If a court holds a statute unconstitutional on its face, the state may not [apply] it under any circumstances, unless an appropriate court narrows its application; in contrast, when a court holds a statute unconstitutional as applied to particular facts, the state may [apply] the statute in different circumstances.' . . . 'Facial challenges, unlike as applied challenges, do not depend on the facts of a particular case.' "). However, in the Joint Stipulation, the parties stipulated that, in addition to the stipulated facts set forth therein, the parties may refer to any of the contents of the legislative history produced by Montana State Fund; any report issued by the National Council on Compensation Insurance, Inc., and the Montana Department of Labor and Industry regarding House Bill 334, Montana State Fund's discovery responses and documents produced; any information the Court orders produced as a result of Hensley's Motion to Compel Discovery; and the AMA Guides, 6th Ed.

¶28 However, Hensley suffered multiple post-surgical difficulties in her left arm. On October 11, 2013, Hensley saw Dr. Stayner and reported "mild tingling and numbness into the arm, but overall she is feeling good. She says mostly if she turns her neck she is sore in the trapezius area. She is working full at work and really can do most activities she needs to do." However, Dr. Stayner's examination revealed that she had, "a great deal of triggering in the trapezius and rhomboid musculature."

¶29 On May 10, 2013, Dr. Stayner released Hensley to return to work, "full shifts, no restrictions on lifting, but we will ask for backup, so that she can have some help and some backup when she is in the field for lifting, to make her feel more comfortable."

¶30 On June 5, 2013, Dr. Stayner found Hensley at MMI for her industrial injury. Under the AMA Guides, 6th Ed., he assigned her a 4% whole person impairment rating. This impairment rating is a Class 1 impairment.

¶31 State Fund paid Hensley $33,156.81 in medical benefits and $34,169.70 in temporary total disability (TTD) benefits.

¶32 Hensley returned to her time-of-injury employer without suffering an actual wage loss.

¶33 State Fund has not paid Hensley's impairment rating.[27]

¶34 Hensley's PPD rate is $324.50. Her 4% impairment award, if payable, is valued at $5,192.[28]

Analysis and Decision

¶35 This case is governed by the 2011 version of the Montana WCA since that was the law in effect at the time of Hensley's industrial accident. [29]

¶36 For this Court to grant summary judgment, the moving party must establish that no genuine issues of material fact exist and that the moving party is entitled to judgment as

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[27] Hensley's Motion for Summary Judgment and Brief in Support at 1.

[28] Per § 39-71-703, MCA (2011), 400 weeks x 4% = 16 weeks. 16 weeks x $324.50 = $5,192.

[29] *Buckman v. Mont. Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

a matter of law.[30] In the present case, the parties have stipulated that this matter is appropriate for summary judgment.

¶37 The parties filed cross-motions for summary judgment regarding the issues raised by Hensley in her Petition for Trial. Hensley raised the following issues, as restated by this Court:

> Issue One: Does § 39-71-703(2), MCA (2011), violate Hensley's right to equal protection under Mont. Const. art. II, § 4?
>
> Issue Two: Does § 39-71-703(2), MCA (2011), violate Hensley's right to due process under Mont. Const. art. II, § 17?
>
> Issue Three: Is Montana State Fund liable for payment of Hensley's impairment award?
>
> Issue Four: Is Montana State Fund liable for payment of Hensley's costs and attorney fees?[31]

Issue One: Does § 39-71-703(2), MCA (2011), violate Hensley's right to equal protection under Mont. Const. art. II, § 4?

¶38 The party challenging the constitutionality of a statute bears the heavy burden of proving the statute unconstitutional beyond a reasonable doubt.[32] "The question of constitutionality is not whether it is possible to condemn, but whether it is possible to uphold the legislative action which will not be declared invalid unless it conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt."[33]

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[30] ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

[31] Petition for Trial. Hensley further asked this Court for "such additional relief as the Court may deem appropriate." As this Court has previously held, this Court cannot fashion a remedy for additional relief. *See Erving v. Hartford Accident & Indem.*, 2012 MTWCC 4, ¶ 45; *Wright v. Ace Am. Ins. Co.*, 2010 MTWCC 11, ¶ 82. Therefore, this Court will not consider this issue in the present case.

[32] *Henry v. State Comp. Ins. Fund*, 1999 MT 126, ¶ 11, 294 Mont. 449, 982 P.2d 446.

[33] *Stratemeyer v. Lincoln Cnty.*, 259 Mont. 147, 150, 855 P.2d 506, 508-509 (1993) (citation omitted).

¶39 Mont. Const. art. II, § 4 provides, "No person shall be denied the equal protection of the laws." "The basic rule of equal protection is that persons similarly situated with respect to a legitimate governmental purpose of the law must receive like treatment."[34]

¶40 Montana's courts follow a three-step process when analyzing an equal protection challenge.[35] The first step is to identify the classes involved and determine if they are similarly situated.[36] If the classes are not similarly situated, then there is no equal protection violation because, "[d]iscrimination cannot exist in a vacuum; it can be found only in the unequal treatment of people in similar circumstances."[37] The second step is to determine the appropriate level of scrutiny to apply to the challenged statute.[38] The Montana Supreme Court has consistently held that the rational basis test applies when considering equal protection challenges to workers' compensation statutes.[39] The final step is to apply the appropriate level of scrutiny to the challenged statute.[40] The rational basis test requires that (1) the statute's objective was legitimate, and (2) the statute's objective bears a rational relationship to the classification used by the legislature.[41]

¶41 Under the first step, the equal protection clause does not preclude different treatment of different groups or classes of people so long as all persons within a group or class are treated the same.[42] Thus, the party challenging a statute must first demonstrate that "the state has adopted a classification that affects two or more similarly situated groups in an unequal manner."[43] The Montana Supreme Court has explained that two groups are similarly situated if, under the statutes at issue, they are equivalent in all

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[34] *Rausch II*, ¶ 18 (citation omitted).

[35] *Goble v. Mont. State Fund*, 2014 MT 99, ¶ 28, 374 Mont. 453, 325 P.3d 1211 (citing *Henry*, ¶ 27).

[36] *Goble*, ¶ 28 (citing *Henry*, ¶ 27).

[37] *Goble*, ¶ 29 (quoting *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995)).

[38] *Goble*, ¶ 28 (citing *Henry*, ¶ 27).

[39] *Goble*, ¶ 35 (citations omitted).

[40] *Goble*, ¶ 28 (citing *Henry*, ¶ 27).

[41] *Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶ 18, 353 Mont. 265, 222 P.3d 566 (citing *Henry*, ¶ 33).

[42] *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 22, 302 Mont. 518, 15 P.3d 877.

[43] *Powell*, ¶ 22.

relevant respects other than the factor constituting the alleged discrimination.[44] The court has also explained:

> We do not operate on a blank slate regarding the appropriate classification for our equal protection analysis. We begin by considering "the statute's purpose in order to determine the threshold question of whether the statute created a discriminatory classification—i.e. a classification that treats two or more similarly situated groups in an unequal manner."[45]

¶42 Hensley argues that § 39-71-703(2), MCA (2011), creates two classes: (1) permanently physically impaired claimants with a Class 1 impairment, without wage loss; and (2) permanently physically impaired claimants with a Class 2 impairment, without wage loss. Hensley also argues that the only reason for denying an impairment award to a claimant with a Class 1 impairment and no wage loss is cost containment, which is insufficient by itself to justify disparate treatment.[46]

¶43 Relying upon *Reesor v. Montana State Fund*[47] and *Satterlee v. Lumberman's Mutual Casualty Co*.,[48] Hensley maintains that these classes are similarly situated.

¶44 In *Reesor*, the Supreme Court addressed an equal protection challenge to the clause in § 39-71-710, MCA, providing that PPD benefits terminated when a claimant was considered "retired," i.e., receiving or eligible to receive full social security retirement benefits.[49] The court held that the statute created two classes: "(1) PPD eligible claimants who receive or are eligible to receive social security retirement benefits; and (2) PPD claimants who do not receive and are not eligible to receive social security retirement benefits."[50] The court held that these classes were similarly situated because "both classes have suffered work-related injuries, are unable to return to their time of injury jobs, have permanent physical impairment ratings and must rely upon § 39-71-703, MCA, as their exclusive remedy under Montana law."[51] The court explained that the only

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[44] *Goble*, ¶ 29 (citations omitted); *Satterlee*, ¶ 16.

[45] *Caldwell*, ¶ 19 (citing *Oberson v. U.S. Dep't of Agric.,* 2007 MT 293, ¶ 19, 339 Mont. 519, 171 P.3d 715).

[46] *Caldwell*, ¶ 34.

[47] 2004 MT 370, 325 Mont. 1, 103 P.3d 1019.

[48] 2009 MT 368, 353 Mont. 265, 222 P.3d 566.

[49] *Reesor*, ¶ 7.

[50] *Reesor*, ¶¶ 10, 12.

[51] *Reesor*, ¶ 12.

identifiable distinguishing factor between the classes was eligibility for social security retirement, which was based on their age.[52] Relying upon the policy of the WCA to provide wage-loss benefits that bear a reasonable relationship to actual wages lost as a result of an industrial injury, the court ultimately held that there was no rational basis for limiting wage-loss benefits on the basis of age and that the section of § 39-71-710, MCA, providing that PPD benefits terminated on eligibility for or receipt of full social security retirement benefits violated the equal protection clause.[53]

¶45 In *Satterlee*, the Montana Supreme Court addressed an equal protection challenge to the clause in § 39-71-710, MCA, providing that PTD benefits terminated when the claimant "retired," i.e., when the claimant received social security retirement benefits or was eligible to receive full social security retirement benefits.[54] The court held that the statute created two classes: "(1) PTD eligible claimants who receive or are eligible to receive social security retirement benefits; and (2) PTD claimants who do not receive and are not eligible to receive social security retirement benefits."[55] Following *Reesor*, the court held that these classes were similarly situated, with the only distinguishing factor being the age of the claimant.[56] However, the court held that *Reesor* did not control because of the differences between PPD benefits and PTD benefits.[57] The court ultimately held that based on the policy of the WCA, there is a rational basis to terminate PTD benefits when a worker is considered retired, explaining: "While this may not always seem fair, it is not unconstitutional. By acting to terminate benefits as it does, § 39-71-710, MCA, rationally advances the governmental purpose of providing wage-loss benefits that bear a reasonable relationship to actual wages lost."[58]

¶46 Hensley argues that this case falls under *Reesor* and *Satterlee* because both classes at issue in this case have suffered work-related injuries, are able to return to work with no actual wage loss, have a whole person impairment rating, and rely on § 39-71-703, MCA (2011), as their exclusive remedy. Hensley contends that the only

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[52] *Reesor*, ¶ 12.

[53] *Reesor*, ¶¶ 19, 25.

[54] *Satterlee*, ¶¶ 11, 12.

[55] *Satterlee*, ¶ 15.

[56] *Satterlee*, ¶ 16. *See also Caldwell*, ¶ 16 (in a challenge to the clause in § 39-71-710, MCA, providing that vocational rehabilitation benefits terminated upon retirement, the classes were (1) those vocational rehabilitation eligible claimants who are eligible to receive social security retirement benefits, and (2) those who are not eligible to receive social security retirement benefits).

[57] *Satterlee*, ¶¶ 22, 23.

[58] *Satterlee*, ¶ 28.

differentiating factor is that one class has a Class 1 impairment while the other class has a Class 2 impairment. She asserts that because the claimants in Class 1 and Class 2 have whole person impairment ratings, differing only in degree, they are similarly situated. In essence, Hensley argues that the Legislature violated the equal protection clause when it drew the line between Class 1 and Class 2 because both classes have impairments; she maintains that the only permissible place for the Legislature to draw the line is between Class 0 and Class 1.

¶47 State Fund first argues that Hensley does not correctly identify the classes. It maintains that by looking at § 39-71-703(2), MCA (2011), in isolation, Hensley's identification of the classes is too narrow. State Fund points to the definition of PPD in § 39-71-116(27), MCA (2011) — which requires that the claimant have an actual wage loss — and argues that Hensley improperly disregards the issue of actual wage loss. State Fund asserts that since a claimant with a Class 1 impairment and an actual wage loss — i.e., a claimant who is permanently partially disabled — has the right to an impairment award, the impairment class from the AMA Guides, 6th Ed., is not the distinguishing factor. Rather, State Fund argues that the distinguishing factor is actual wage loss. Thus, State Fund argues the classes are: (1) claimants with an actual wage loss and a whole person impairment rating, including those with a Class 1 impairment, i.e., PPD claimants, and claimants with a Class 2, 3, or 4 impairment and no actual wage loss at MMI, but who have a sufficiently severe impairment to likely impact their ability to earn wages in the future; and (2) claimants without an actual wage loss but who have a Class 1 impairment, i.e., claimants who are not permanently partially disabled but who nonetheless have a Class 1 impairment, which will likely not impact their ability to earn wages.

¶48 Relying upon *Wilkes v. Montana State Fund*, State Fund argues that a claimant with an actual wage loss is not similarly situated to a claimant without an actual wage loss. Wilkes worked primarily as a farmer, a heavy-duty job.[59] He operated his farm as a sole proprietorship and did not cover himself with workers' compensation insurance.[60] He also worked part-time as a school bus driver, a light-duty job.[61] After reaching MMI from a serious injury suffered while working as a bus driver, Wilkes was able to return to work as a bus driver, but not as a farmer.[62] He was able to earn the same wage as a bus driver

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[59] *Wilkes*, ¶¶ 4, 5.

[60] *Wilkes*, ¶ 4.

[61] *Wilkes*, ¶¶ 4, 5.

[62] *Wilkes*, ¶ 5.

as he earned before his injury.[63] State Fund denied his demand for PPD benefits on the grounds that he did not suffer an actual wage loss from his bus driving job.[64] Wilkes argued that § 39-71-703, MCA, violated equal protection because it based PPD benefits solely on actual wage loss, and not on other factors such as age, education, and lifting restrictions.[65] He maintained that it creates two similarly situated classes: (1) permanently partially disabled workers with actual wage loss who suffer reduced earning capacity; and (2) permanently partially disabled workers without actual wage loss who nevertheless suffer reduced earning capacity.[66]

¶49 The Supreme Court held that there was no equal protection violation because these classes are not similarly situated. The court cited the policy of the WCA to provide a wage loss benefit that is reasonably related to actual wages lost and stated, "Montana law . . . clearly supports the use of actual wage loss as the primary factor in awarding PPD benefits."[67] The court also explained that while both classes at issue in that case had similarities — e.g., they had industrial injuries, had reached MMI, had a physical impairment and had suffered a loss of earning capacity, and rely on § 39-71-703, MCA, as their exclusive remedy[68] — they were not similarly situated because of the policy underlying the WCA:

> A single difference exists, however, in the form of actual wage loss. The WCC correctly concluded that this difference was fundamental, in light of the Legislature's declaration that "the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of work-related injury or disease." Section 39-70-105(1), MCA. Actual wage loss sufficiently distinguishes the two putative classes.[69]

¶50 In the alternative, State Fund argues that if Hensley correctly identifies the classes in a general way, she does not fully identify the second class because, under the plain

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[63] *Wilkes*, ¶ 5.

[64] *Wilkes*, ¶ 6.

[65] *Wilkes*, ¶ 6.

[66] *Wilkes*, ¶ 11.

[67] *Wilkes*, ¶ 22 (citing §§ 39-71-105; -703, MCA).

[68] *Wilkes*, ¶ 25.

[69] *Wilkes*, ¶ 26. *See also Rausch II*, ¶¶ 20-25 (holding that the equal protection clause does not require the Legislature to provide an impairment award to PTD claimants notwithstanding that PPD claimants were entitled to an impairment award because PTD claimants and PPD claimants are not similarly situated due to the difference in the amount and duration of their wage loss).

language of § 39-71-703(2), MCA (2011), the second class is actually, "permanently physically impaired claimants with a class 2 *or greater* impairment."[70] Thus, State Fund argues that under Hensley's approach, the classes are actually: (1) claimants with a Class 1 impairment, without wage loss; and (2) claimants with a Class 2, 3, or 4 impairment, without wage loss.

¶51 Relying on *Powell v. State Compensation Ins. Fund*,[71] State Fund argues that these classes are not similarly situated. In *Powell*, Powell suffered severe injuries and thereafter required daily domiciliary care.[72] Powell lived at home, rather than in a skilled nursing facility, and his wife provided the care.[73] Powell challenged § 39-71-1107, MCA, which caps the amount of compensation for care provided by a family member, on equal protection grounds.[74] The court concluded that § 39-71-1107, MCA, creates two classes: (1) family member caregivers who are subject to the limitation on compensation; and (2) non-family member caregivers who are not subject to the limitation on compensation.[75] The court concluded that these classes are not similarly situated.[76] The court explained:

> While the care provided by the family member may in some respects be identical to the care provided by a non-family member, it also differs in some important respects. The family member who typically provides care to the claimant is the claimant's spouse who resided with the claimant in the family home prior to the accident. Some of the care needed by the claimant, such as meal preparation, shopping, and cleaning, may have already been provided by the family member prior to the accident. In addition, some of the care provided may be passive supervision which would not preclude the caregiver from carrying on many normal activities during the day or night. It is in this setting that the family member caregiver, unlike a non-family member caregiver, eats, sleeps, fraternizes with family and friends, pursues hobbies, and relaxes. Moreover, family member caregivers provide care on

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[70] Emphasis added.

[71] 2000 MT 321, 302 Mont. 518, 15 P.3d 877.

[72] *Powell*, ¶¶ 4-8.

[73] *Powell*, ¶¶ 8, 15.

[74] *Powell*, ¶ 15.

[75] *Powell*, ¶ 23.

[76] *Powell*, ¶ 26.

> a skill level much lower than that provided by non-family member caregivers in professional licensed nursing facilities.
>
> The non-family member caregiver, on the other hand, provides care as a full-time job, works away from home, and has the sole task of caring for and watching over claimants. Unlike the family member caregiver, the non-family member caregiver cannot pursue other activities while caring for claimants.[77]

The court explained, "These differences justify treating the family member caregiver differently from the non-family member caregiver and for limiting payment to the family member caregiver."[78] Thus, the court concluded that § 39-71-1107, MCA, does not violate equal protection.

¶52 State Fund argues that a claimant with a Class 1 impairment has such minor symptoms and functional limitations as compared to a claimant with a Class 2, 3, or 4 impairment that the two classes are not similarly situated. State Fund notes that those with a Class 1 impairment have a "mild" impairment and argues that on the face of the AMA Guides, 6th Ed., they have "no meaningful functional problems" and that such minor problems would likely not have any effect on a claimant's ability to earn wages, and likely not have any or have only minimal "ramifications beyond their ability to work."[79] Thus, State Fund also argues that if the classes are similarly situated, there is a rational basis for the disparate treatment beyond cost containment. In effect, State Fund argues that it is permissible under the equal protection clause to draw the line between Class 1 and Class 2.

¶53 The Montana Supreme Court has explained, "The goal of identifying a similarly situated class is to isolate the factor allegedly subject to impermissible discrimination. Thus, two groups are similarly situated if they are equivalent in all relevant respects other than the factor constituting the alleged discrimination."[80]

¶54 Here, Hensley correctly identifies the classes at issue under § 39-71-703(2), MCA (2011), although State Fund is correct that the second class includes claimants with Class 3 and 4 impairments. For claimants who have a whole person impairment rating under

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[77] *Powell*, ¶¶ 24, 25.

[78] *Powell*, ¶ 26.

[79] *See Rausch I*, ¶ 21.

[80] *Goble*, ¶ 29 (citations omitted).

the AMA Guides, 6th Ed., and no actual wage loss, the sole factor that differentiates them is whether their whole person impairment rating is Class 1 or Class 2, 3, or 4. In *Reesor* and *Satterlee*, the court made it clear that there can be two classes of claimants who fall under one of the three main types of benefits for which a claimant is potentially eligible upon reaching MMI, [81] which are: PTD, PPD, and claimants without an actual wage loss.[82] This case concerns only those claimants who fall under the third class. Thus, the classes at issue in this case are (1) claimants with a Class 1 impairment, without wage loss; and (2) claimants with a Class 2, 3, or 4 impairment, without wage loss.

¶55 Based upon the AMA Guides, 6th Ed., claimants with Class 1 impairments are not similarly situated to claimants with Class 2, 3, and 4 impairments. And, nevertheless, there is a rational basis for treating them differently. As set forth in the Generic Template for Impairment Classification Grids, a claimant with a Class 1 impairment will have their symptoms controlled with continuous treatment or, at most, intermittent, mild symptoms. A claimant with a Class 1 impairment will have either no physical findings with continuous treatment or, at most, intermittent, mild physical findings. A claimant with a Class 1 impairment will have either no objective medical findings[83] or, at most, intermittent, mild objective findings. For musculoskeletal injuries, a claimant with a Class 1 impairment will

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[81] *Reesor*, ¶¶ 10, 12 (holding that there were two classes of PPD claimants, distinguished by the sole distinguishing factor of their eligibility for full social security retirement benefits, which was based solely on their age); *Satterlee*, ¶¶ 15–16 (holding that there were two classes of PTD claimants, distinguished by the sole distinguishing factor of their eligibility for full social security retirement benefits, which was based solely on their age). *See also Caldwell*, ¶¶ 16, 18 (holding that there were two classes of vocational rehabilitation eligible claimants, distinguished by the sole distinguishing factor of their eligibility for full social security retirement benefits, which was based solely on their age); *Goble*, ¶ 32 (holding that there were two classes of PPD claimants, distinguished by the sole distinguishing factor of their incarceration).

[82] *See Rausch II*, ¶ 20 (explaining that under the 1987 and 1989 WCA, there were three classes of claimants upon reaching MMI: "PPD, PTD, or not disabled at all." The court identified the third class as claimants that were "not disabled at all" because under the 1987 and 1989 WCA, a claimant with an impairment but no actual wage loss was classified as PPD. Section 39-71-116(14), MCA (1987) and § 39-71-116(13), MCA (1989) state: " 'Permanent partial disability' means a condition after a worker has reached maximum healing, in which a worker: (a) has a medically determined physical restriction as a result of an injury as defined in 39-71-119; and (b) is able to return to work in the workers' job pool . . . but suffers impairment or partial wage loss, or both.").

[83] *See, e.g.*, AMA Guides, 6th Ed., p. 417, Example 15-10 (setting forth the hypothetical of a tree trimmer who fell from a ladder and suffered a shoulder contusion with no abnormalities on x-ray but reported diffuse shoulder pain on moderate activity would have a 1% whole person impairment rating, a Class 1 impairment.). *See also* AMA Guides, 6th Ed., p. 398, Elbow Regional Grid (providing for Class 1 impairment for, "History of painful injury, residual symptoms without consistent objective findings). It should be noted that a claimant with an actual wage loss and a Class 1 impairment rating without any objective medical findings and based solely on a subjective complaint of pain would not be entitled to an impairment award under § 39-71-711(1)(d), MCA (2011), which provides that an impairment rating "must be established by objective medical findings and may not be based exclusively on complaints of pain," or PPD benefits under § 39-71-703(1)(b)(i) and (ii), MCA (2011), which provide that PPD benefits must be based on an impairment rating that "is not based exclusively on complaints of pain" and "is established by objective medical findings . . . ."

not have pain or symptoms until they engage in strenuous or vigorous activity and will be able to perform self-care activities without any modification. State Fund is correct that it is unlikely that such relatively minor problems would have an effect on a claimant's ability to work.

¶56 The line between Class 1 and Class 2 is a clear demarcation of the severity of the claimant's symptoms and functional limitations. A claimant with a Class 2 impairment will have mild symptoms on a "constant" basis or intermittent symptoms that are "moderate" despite continuous treatment. The claimants with a Class 2 impairment will have physical findings and objective medical evidence of their condition. For a musculoskeletal injury, a claimant with a Class 2 impairment will have pain or symptoms with "normal" activity and have to make a modification to perform self-care activities. The claimants with a Class 3 or 4 impairment have even more serious symptoms and functional limitations.

¶57 The Legislature's decision to draw the line between Class 1 and Class 2 is supported by the "underlying justification" of § 39-71-116(27) and -703, MCA (2011),[84] which is to compensate workers who suffer an actual wage loss due to their industrial injury or disease by providing wage-loss benefits for a limited amount of time.[85] It is not until a claimant obtains a Class 2 or greater whole person impairment rating that her symptoms and functional limitations impact normal activities and could reasonably be expected to impact her ability to work and possibly cause an actual wage loss in the future. Moreover, the statute contains a safety net for those claimants with a Class 1 impairment who suffer an actual wage loss — e.g., a claimant who cannot return to her time-of-injury job because it requires strenuous or vigorous activity — as § 39-71-703, MCA, provides that all claimants with a whole person impairment rating and an actual wage loss are entitled to PPD benefits, including an impairment award. In short, under § 39-71-703, MCA (2011), those claimants with either an actual wage loss or an impairment sufficiently severe to likely impact their ability to work are entitled to an impairment award while those claimants with no actual wage loss and an impairment that will likely have no impact on their ability to work are not. Thus, the 2011 Legislature's decision to draw the line between Class 1 and Class 2 for claimants without an actual wage loss is supported by the policy of the WCA, set forth in § 39-71-105(1), MCA (2011), to provide wage loss benefits at a reasonable cost to the employer and that bear a reasonable relationship to actual wages lost. The Supreme Court has made it clear that not every claimant who has a whole person impairment rating from an industrial injury is entitled to an impairment

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[84] *See, e.g.*, *Wilkes,* ¶ 20 (explaining, "The distinguishing factor between the two classes, actual wage loss, plainly relates to the underlying justification of the statute.").

[85] *See, e.g., Caldwell,* ¶ 29.

award,[86] thereby showing that it is not a policy of the WCA to provide an impairment award to every claimant. As in *Powell*, while there are similarities between all claimants with whole person impairment ratings under the AMA Guides, 6th Ed., the differences in severity and duration of symptoms and loss of function between a claimant with a Class 1 impairment and a claimant with a Class 2, 3, or 4 impairment, and the likely impact of those symptoms and loss of function on a claimant's ability to work, justify treating those claimants with no actual wage loss and a Class 1 impairment differently than those claimants with no actual wage loss and a Class 2, 3, or 4 impairment. Because the classes established by § 39-71-703(2), MCA (2011), are not similarly situated, and because there is a rational basis for the disparate treatment beyond cost containment,[87] that provision is not facially unconstitutional under the equal protection clause.

¶58 This Court is not persuaded by Hensley's three remaining arguments.

¶59 First, this Court is not persuaded by Hensley's arguments that the AMA Guides, 6th Ed., does not sufficiently define the classes or that the classification system is completely arbitrary. There is no merit to Hensley's argument that there is no difference between Class 1 and Class 2 because "mild" and "moderate" are synonyms. However, these words are not actually synonymous. Moreover, the classification system is not arbitrary on its face because the differences between a Class 1 impairment and a Class 2, 3, and 4 impairment are sufficiently clear and based on a logical progression of the severity and frequency of the claimant's symptoms and functional limitations.

¶60 Second, there is no merit to Hensley's claim that the definition of "impairment" in the AMA Guides, 6th Ed., which states that all impairments are "significant," makes a Class 1 impairment more than "minimal" and overrides the differences between classes. The plain language of § 39-71-703(2), MCA (2011), which references the classes in the AMA Guides, 6th Ed., shows that the 2011 Legislature relied upon the grids setting forth the classes of impairment, not the definition of "impairment." Here again, The AMA Guides, 6th Ed., make the differences between Class 1 and Classes 2, 3, and 4 sufficiently clear.

¶61 Third, Hensley presents hypotheticals which she contends would result in grossly inequitable results and argues that these inequities show that the classification system is flawed. However, real or hypothetical imperfections do not render a classification system

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[86] *Rausch II*, ¶¶ 20-25.

[87] In *Goble*, ¶ 34, the court criticized this Court for concluding that the classes were not similarly situated because there was a rational basis for the disparate treatment. However, in *Powell*, ¶ 26, the court held that the classes were not similarly situated because the differences justified treating them differently. For this reason, this Court analyzed these related issues together.

facially unconstitutional under the equal protection clause.[88] And, Hensley did not show that the regional grids in the AMA Guides, 6th Ed., by their own language, deviate from the classification system in the Generic Template for Impairment Classification Grids; i.e., she did not show that the regional grids in the AMA Guides, 6th Ed., actually classify those who should be in Class 2, 3, or 4, as having a Class 1 impairment.

¶62 In short, while it is possible to condemn § 39-71-703(2), MCA (2011), on fairness grounds, it is possible to uphold it on equal protection grounds because the classes at issue under 39-71-703(2), MCA (2011), are not similarly situated and, in any event, there is a rational basis to treat them differently. In *Stratemeyer v. Lincoln County,* the court explained:

> "This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The legislature 'is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.' If 'the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.' "[89]

State Fund is correct that the Legislature permissibly drew the line between Class 1 and 2, 3, and 4 given the purpose and policy of the WCA. Thus, § 39-71-703(2), MCA (2011), is not facially unconstitutional under Mont. Const. art. II, § 4.

Issue Two: Does § 39-71-703(2), MCA (2011), violate Hensley's right to due process under Mont. Const. art. II, § 17?

¶63 Hensley contends, "that Montana Code Annotated § 39-71-703(2), left her without a remedy for her permanent injury; therefore, the law undermines the historic quid pro

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[88] *Gulbrandson v. Carey*, 272 Mont. 494, 505, 901 P.2d 573, 580 (1995). *See also Oberson*, ¶ 42 (Rice, J., dissenting) (citations omitted) (stating, " 'A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. Such classifications need not be perfect or ideal.' ").

[89] *Stratemeyer*, 259 Mont at 154, 855 P.2d at 511 (quoting *State v. Safeway Stores, Inc.*, 106 Mont. 182, 205, 76 P.2d 81, 87 (1938)). *See also Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 108, 123 S. Ct. 2156, 2160, 156 L. Ed. 2d 97 (2003) (citation omitted) ("The 'task of classifying persons for . . . benefits . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line,' and the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.").

quo and unconstitutionally violates her right to due process of the law."[90] However, as this Court recognized in *Hegg v. Montana State Fund*,[91] the remedy for a violation of equal protection is different than a remedy for a violation of due process. If there is an equal protection violation, this Court can increase benefits so the two classes at issue receive equal benefits; but if benefits under the WCA are insufficient to uphold the *quid pro quo* and, therefore, violate the claimant's right to due process, this Court does not award additional benefits in an amount to uphold the *quid pro quo*. Rather, the remedy is to strike the employer's exclusive remedy defense in a tort claim.[92] This Court further held that was an issue for Montana's district courts, in the tort case against the employer.[93] Thus, as in *Hegg*, this Court will not rule on Hensley's due process claim because this Court cannot award her the remedy she seeks on a due process challenge.

Issue Three: Is Montana State Fund liable for payment of Hensley's impairment award?

¶64 Since this Court has found the denial of an impairment award to injured workers who suffer a Class 1 impairment and no wage loss pursuant to § 39-71-703(2), MCA (2011), is constitutionally permissible, this Court also concludes that State Fund is not liable for payment of an impairment award to Hensley.

Issue Four: Is Montana State Fund liable for payment of Hensley's costs and attorney fees?

¶65 Under § 39-71-611, MCA, an insurer shall pay reasonable costs if the insurer denies liability or terminates compensation benefits for a claim and if this Court adjudges the claim compensable. Since this Court has determined that State Fund is not liable for the payment of an impairment award to Hensley, State Fund is also not liable for Hensley's costs.

¶66 Under § 39-71-611, MCA, an insurer shall pay reasonable attorney fees if the insurer denies liability for a claim for compensation, the claim is later adjudged compensable by this Court, and this Court determines the insurer's actions in denying liability were unreasonable. Here, State Fund has prevailed.

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[90] Joint Stipulation at 4.

[91] 2016 MTWCC 14.

[92] *Hegg*, ¶¶ 32, 33.

[93] *Hegg*, ¶ 32.

ORDER

¶67 Montana State Fund's Motion for Summary Judgment is **granted,** and Hensley's Motion for Summary Judgment is **denied**.

¶68 Section 39-71-703(2), MCA (2011), does not violate an injured worker's right to equal protection under Mont. Const. art. II, § 4.

¶69 This Court declines to rule on Hensley's claim that § 39-71-703(2), MCA (2011), violates an injured worker's right to due process under Mont. Const. art. II, § 17.

¶70 Montana State Fund is not liable for payment of an impairment award to Hensley.

¶71 Montana State Fund is not liable for payment of Hensley's costs.

¶72 Montana State Fund is not liable for payment of Hensley's attorney fees.

¶73 Pursuant to ARM 24.5.348(2), this Order is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED this 22nd day of August, 2019.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Ben A. Snipes / Ross T. Johnson
E. Kiel Duckworth
Matthew J. Murphy
Bradley J. Luck / Tessa A. Keller
Thomas E. Martello

Submitted: February 17, 2015