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IN THE WORKERS' COMPENSATION COURT
FOR THE STATE OF MONTANA
WC COURT NO. 2003-0840

CATHERINE E. SATTERLEE, **Petitioner,** vs. LUMBERMAN'S MUTUAL CASUALTY COMPANY, Respondent/Insurer for BUTTREY FOOD & DRUG, Employer.	**WC Claim No.: 788CU041791**
JAMES ZENAHLIK, **Petitioner,** vs. MONTANA STATE FUND, Respondent/Insurer for EAGLE ELECTRIC, Employer.	**WC Claim No.: 03-1997-06362-9**
JOSEPH FOSTER, **Petitioner,** vs. MONTANA STATE FUND, Respondent/Insurer for ALLEN ELECTRIC, Employer.	**WC Claim No.: 3-95-17425-3**

DOCKET ITEM NO. 371

SATTERLEE'S RESPONSE TO THE STATE FUND'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT

The Montana Supreme Court dismissed the appeal of this matter without prejudice in order to return it to the Workers' Compensation Court for resolution of two issues: Whether § 39-71-710, MCA, violates Satterlee's right to due process; and secondly, whether § 39-71-710, MCA, unconstitutionally or impermissibly discriminates against Satterlee based on age. Satterlee submits that for the same reasons § 39-71-710, MCA, violates her right to equal protection, the statute also violates her right to due process, and it unconstitutionally discriminates against her based on age. The Insurers argue that these issues were decided, but the Insurers are wrong.

THE LAW OF THE CASE DID NOT RESOLVE THE OTHER CONSTITUTIONAL CLAIMS

The Supreme Court confirmed that "Satterlee has two remaining constitutional challenges to §39-71-710 MCA based on substantive due process and age discrimination that **the WCC has yet to consider**." Opinion, p. 8 (emphasis added). Thus, it is apparent that the Supreme Court did not find the law of the case to be controlling in the disposition of the two other constitutional issues. Consequently, it is incumbent on this Court to issue a substantive decision on the two other constitutional issues before the Supreme Court will allow the appeal pursuant to Rule 54(b) M.R.Civ.P.

The cases cited by the Insurers are of no help, and they are distinguishable. There is no attempt being made to amend prior pleadings or to ignore prior rulings on substantive issues. As indicated by the Supreme Court, this Court must decide two other constitutional issues before the Supreme Court considers certification. If it does not so decide, this matter may well be returned again for further decision.

SECTION 39-71-710, MCA, VIOLATES SATTERLEE'S RIGHT TO SUBSTANTIVE DUE PROCESS

The Insurers argue that this Court found a rational basis for § 39-71-710, MCA, to defeat Satterlee's equal protection challenge. Therefore, the Insurers contend that the same analysis should be applied to substantive due process and age discrimination. Brief, p. 8. The Insurers argue that no genuine issues of material fact remain, so the Court is faced with questions of law. Brief, p. 6. Thus, the Insurers reason, they should be granted summary judgment on these two remaining issues.

Satterlee agrees, and the Insurers concede, that Satterlee's statement of facts is uncontroverted. Brief, p. 3, fn. 2. Conversely, Satterlee has consistently challenged the Insurers' "undisputed facts" as exaggerated and untrue. *Petitioner's Reply Brief in Support of Motion for Partial Summary Judgment,* p. 15, WCC #255. Thus, the only facts before this Court are Satterlee's undisputed facts, which state as follows:

1. Catherine Satterlee was injured on July 25, 1992, and the insurer accepted liability for the claim. The WCC initially denied PTD benefits for Satterlee, but this Court reversed and remanded the case for entry of judgment in Satterlee's favor. *(Satterlee v.*

Lumberman's Mutual Casualty Co., 280 Mont. 85, 929 P.2d 212 (1996)). Satterlee turned age 65 on September 30, 1999 and her PTD benefits were terminated pursuant to §39-71-710, MCA. *Answer to Amended Petition for Hearing*, WCC #16.

2. James Zenahlik was injured on December 28, 1996 and his claim was accepted by the Insurers, but his PTD benefits were terminated pursuant to §39-71-710, MCA when he reached age 65. *Response to Amended Petition for Hearing*, WCC #13.

3. Joseph Foster was injured on April 12, 1999 and his claim was accepted by the Insurers, but his PTD benefits were terminated pursuant to §39-71-710, MCA when he reached age 65. *Response to Amended Petition for Hearing*, WCC #13.

Based upon these facts, and these facts alone, Satterlee agrees with the Insurers that this Court is only faced with questions of law pertaining to these claimants, and without regard to other claimants or costs.

The Montana Supreme Court recently stated: "Generally, substantive due process analysis applies when state action is alleged to unreasonably restrict an individual's constitutional rights." *Montanans for Justice v. State ex rel. McGrath*, 2006 MT 277, ¶ 29, 334 Mont. 237, 146 P.3d 759. Furthermore, the Court has held that statutes "must be reasonably related to a permissible legislative objective" to pass substantive due process scrutiny. *Powell v. State Comp. Ins. Fund,* 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877.

By terminating Catherine Satterlee's PTD benefits because of her age, her substantive due process rights were violated because there was no *quid pro quo* for the benefits she was denied after age 65. As the Supreme Court observed in *Stratemeyer*, the *quid pro quo* between employers and employees is central to the Workers' Compensation Act:

> [I]t is axiomatic that there must be some possibility of recovery by the employee for the compromise to hold. The scope of immunity from tort relates to the definition of injury under § 39-71-119, MCA. As Professor Larson observed:
>
> > If . . . the exclusiveness defense is a "part of the quid pro quo by which the sacrifices and gains of employees and employers are to some extent put in balance," it ought logically to follow that the employer should be spared damage liability only when compensation liability has actually been provided in its place, or, to state the matter from the employee's point of view, rights of action for damages should not be deemed taken away except where something of value has been put in their place.

Stratemeyer v. Lincoln County, 276 Mont. 67, 75, 915 P.2d 175, 179, (1996); citing 2A Arthur Larson, *The Law of Workmen's Compensation* § 65.40 (perm. ed. rev. vol. 1995).

In *Reesor v. State Fund*, 2004 MT 370, 325 Mont. 1, 103 P.3d 1019 (2004), the Montana Supreme Court recognized that the identified classes were forced to rely upon the *quid pro quo* or exclusive remedy:

> We agree with Reesor, however, when he asserts that both classes are 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 on §39-71-703,

> MCA, as their exclusive remedy under Montana law. The claimant's age, as a result of eligibility to receive social security retirement benefits, is the only identifiable distinguishing factor between the two classes. Furthermore, chronological age and the corresponding eligibility for social security retirement benefits are unrelated to a person's ability to engage in meaningful employment. Therefore, we conclude the classes are similarly situated for equal protection purposes.

Reesor, ¶ 12.

Pursuant to § 39-71-710, MCA, and *Reesor*, a worker injured after the age of 65 may recover compensation if partially disabled, but a similar worker is denied the right to compensation if she is totally disabled. This is an absurd result that cannot withstand a substantive due process analysis. Thus, there is no rational basis to support this inequity in PTD benefits; therefore, it is unconstitutional.

The Montana Supreme Court previously recognized the absurdity of paying post-retirement PPD benefits to an injured worker that is able to continue working, yet to deny a similar benefit to an injured worker that is unable to continue working. The Supreme Court found that was discriminatory and inequitable. As a result, the Court affirmed the Workers' Compensation Court's decision to award PTD benefits to injured workers after age 65, by holding:

> As noted by the Workers' Compensation Court in *Johnson, supra*, strict construction of Section 39-71-710, MCA, **would result in an absurdity**: A worker injured past the age of 65 may recover compensation if partially disabled but not if totally disabled. We agree with the court's interpretation of Section 39-71-710, MCA, allowing for payment of permanent partial disability benefits to a permanently totally disabled claimant who has reached the age of 65.

Hunter v. Gibson, 224 Mont. 481, 485, 730 P.2d 1139, 1141 (1986) (emphasis added).

In the instant case, the Insurers try to ignore that the Supreme Court found this exact inequity to be "absurd" just a few years ago arguing that it was decided under "liberal construction." Under any standard, whether it is liberal construction or the current standard, an absurd result is an absurd result and therefore it cannot be rational.[1] The statutory result that *Hunter* found absurd previously is the same statutory result that exists today, so that tells this Court that the current statutory scheme is absurd. *Hunter* declared this statutory scheme absurd then, and *Reesor* declares it unconstitutional now. That we have come full circle has nothing to do with "liberal construction." This Court should find this statute unconstitutional because it cannot be rational.

[1] §49-2-308 MCA provides that individuals cannot be discriminated against because of age unless "based upon reasonable grounds." Here, Satterlee submits that a statute that has an absurd result cannot be reasonable.

SECTION 39-71-710, MCA, TERMINATES BENEFITS BASED ON AGE

The Insurers argue that this Court agreed with the Insurers that § 39-71-710, MCA, terminates benefits based on eligibility for retirement or work history and not on age. Brief, p. 8, 11. However, the Insurers completely ignore the issue as defined by the Montana Supreme Court in *Reesor*:

> The issue in this case is whether it is fair to deny men and women full PPD benefits simply because their ***age*** makes them eligible to receive social security retirement or similar benefits. We conclude that the disparate treatment of partially disabled claimants based upon their ***age***, because they are receiving or are eligible to receive social security retirement benefits, is not rationally related to that legitimate governmental interest.

Reesor, ¶ 19 (emphasis added).

Because the Supreme Court defined the issue in *Reesor*, and this Court identified the classes in *Satterlee* pursuant to *Reesor*, the issue is not work history but age.

CONCLUSION

For the same reasons that § 39-71-710, MCA, violates Satterlee's right to equal protection, the statute also violates her right to due process, and it unconstitutionally discriminates against her based on age. The rational basis test cannot be met when applied to either substantive due process or to age discrimination.

DATED this 4th day of February, 2008.

HUNT LAW FIRM

BY: _____
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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of February, 2008, I served a copy of the foregoing **SATTERLEE'S RESPONSE TO THE STATE FUND'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT,** on the following:

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