

IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 19-0523

SUSAN HENSLEY,

Petitioner and Appellant,

vs.

MONTANA STATE FUND,

Respondent and Appellee.

On Appeal from the Workers' Compensation Court,
2019 MTWCC 12, Honorable David Sandler Presiding

APPELLANT'S BRIEF

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STATEMENT OF THE ISSUE

Whether the Montana Workers' Compensation Court ("WCC") erred by not recognizing that § 39-71-703(2), MCA (2011) (hereinafter "§ 703(2)"), unconstitutionally denies injured workers equal protection under the law.

STATEMENT OF THE CASE

Thousands of maimed Montana workers are categorically denied impairment benefits while similarly maimed workers are paid in full. The disparity in benefits is based on an irrational and arbitrary scheme. This is a classic equal protection denial.

The WCC's decision is based on a fundamental misunderstanding of "impairment" as defined within the *Am. Med. Assn., Guides to the Evaluation of Permanent Impairment*, (6th ed., AMA 2008) (hereinafter "*Guides*"). This misunderstanding requires reversal.

I. Procedural History

Appellant, Susan Hensley ("Hensley"), filed a Petition for Hearing on October 4, 2013, seeking an Order from the WCC that § 703(2) denies her equal protection of the law and is therefore unconstitutional. Dkt. 1. Hensley also requested payment of her 4%, Class I, whole person permanent impairment. Dkt. 1. Respondent and Appellee Montana State Fund ("MSF") opposed Hensley's petition. Dkt. 5.

The parties stipulated to facts, contentions, and WCC proceedings. Dkt. 27. Each party filed an opening brief and a response brief. Dkts. 33-35, 37. Following briefing, the WCC heard oral argument on January 1, 2015. Dkt. 58.

On August 22, 2019, the WCC granted MSF's motion for summary judgment and denied Hensley's motion for summary judgment, entered as 2019 MTWCC 12, and the WCC's Order was certified as final for purposes of appeal. Dkt. 54; App. 1-40. On September 12, 2019, Hensley appealed the WCC's subject Order. Dkt. 55.

II. Factual History

Hensley received a 4% permanent impairment rating for her surgically repaired glenoid labral tear. By operation of § 703(2), Hensley has not received an impairment award for her permanent medical impairment. This is a facial and as applied constitutional challenge to § 703(2), which reads:

39-71-703. Compensation for Permanent Partial Disability

.....

(2)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.

Thousands of other impaired Montana workers are likewise denied impairment benefits under § 703(2).

SUMMARY OF ARGUMENT

Injured workers' "exclusive remedy" is Montana's Workers' Compensation Act ("WCA"). § 39-71-411, MCA. Impaired workers who return to work are similarly situated. Yet, § 703(2) clumsily manufactures two arbitrary groups to cut costs. Some impaired workers are paid in full while others receive nothing.

Equal Protection law condemns categorical discrimination, without rational basis. The WCC misapplied the Montana Supreme Court's equal protection precedent in finding § 703(2) constitutional. This Court has repeatedly struck down similar unconstitutional workers' compensation statutes.¹

The purpose of an impairment award is to compensate a claimant for permanent physical impairment. Impairment awards are consistent with the return to work goal of the WCA.²

¹See Section II.B.

²"Impairment award benefits are designed to compensate a claimant who is able to return to work and re-commence earning a wage." *Rausch v. State Fund (Rausch II)*, 2005 MT 140, ¶ 23, 327 Mont. 272, 114 P.3d 192. Also quoted by Justice Mckinnon in *Goble v. Mont. St. Fund*, 2014 MT 99, ¶ 30, 374 Mont. 453, ¶ 30, 325 P.3d 1211, ¶ 30.

"The payment of an award to a claimant who returns to work is consistent with the Act's stated purpose of returning injured workers to the work force." *Goble*, ¶ 30.

"Thus, PPD benefits are designed for the worker who is able to return to work in the worker's job pool, but nevertheless suffers impairment or partial wage loss or both." Justice Mckinnon in *Goble*, ¶ 30.

Impairments vary only in degree. All permanently impaired claimants, regardless of degree, are forever burdened by a significant work-related physical loss. The law must rationally afford benefits consistent with underlying medical foundation. Benefits measured by impairment must be afforded equal respect by the law, and not selectively ignored.

The "Class" basis for Montana's discrimination, the only state in the country to utilize "Class" as a basis to deny impairment benefits in the United States, is fatally flawed. "Class" within the *Guides* is an arbitrary organizational tool not intended for benefit determination. "Class" is but one factor determining whole person impairment, ultimately expressed as a percentage. In short, "Class" is not a measure of impairment. Depriving workers of benefits based on "Class" while ignoring measurable impairment percentage is irrational.

STANDARD OF REVIEW

The WCC's Order is a conclusion of law. Dkt. 54; App. 1-40. This Supreme Court reviews conclusions of law for "correctness." *Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶ 10, 353 Mont. 265, ¶ 10, 222 P.3d 566, ¶ 10.

ARGUMENT

I. The History of Impairment Awards in Montana

Impairment percentages estimate the degree of loss of physical function. App. 42. Prior to the 2011 § 703(2) amendment, all permanent impairments triggered benefits. A 0% impairment received nothing, and a 1-99% impairment received benefits consistent with the degree of impairment. Now, under § 703(2), post-2011, the law is at odds with the percentage concept underlying all impairment ratings.

Impairment benefits depend on a medical impairment rating expressed as a percentage. Benefits are paid in accordance with the percentage; however, as of 2011, a factor new to the 6th edition of the *Guides* called "Class" now controls benefit entitlement for some injured workers, yet is irrelevant to others. See subject § 703(2).

The purpose of impairment awards is to compensate injured Montana workers for functional losses. This Court explained the purpose of an impairment award as follows:

Impairment 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 worker's ability to return to work.

Rausch v. State Fund (Rausch I), 2002 MT 203, ¶ 21, 311 Mont. 210, ¶ 21, 54 P.3d 25, ¶ 21.

An impairment rating is: (1) a purely medical determination; (2) unrelated to wage loss; and, (3) compensates for loss of physical function. *Rausch I*, ¶ 21.

Montana's impairment benefits are calculated using a mathematically definite formula. Claimants with a lower impairment percentage receive a smaller award whereas those with a higher impairment percentage receive greater award. The benefit formula is found at § 39-71-703(3), MCA (2011). For instance, a 1% impairment equals 1% of 400 weeks (4 weeks); a 10% impairment receives 10% percent of 400 weeks (40 weeks). Each 1% impairment is paid as 4 weeks of benefits based on the claimant's wage rate. "Class" has no impact on the impairment award formula found in § 703(3).

Consistent with the *Rausch I* definition of impairment, the WCA statutorily defines impairments as:

39-71-711. Impairment evaluation -- ratings. (1) An impairment rating:

- (a) is a purely medical determination and must be determined by an impairment evaluator after a claimant has reached maximum healing;
- (b) must be based on the sixth edition of the American medical association Guides to the Evaluation of Permanent Impairment;
- (c) must be expressed as a percentage of the whole person; and,

- (d) must be established by objective medical findings and may not be based exclusively on complaints of pain.

Impairments are purely medical, based on objective medical findings, and expressed as a percentage that represents the "whole person." § 39-71-711, MCA. "Class" is not a measure of impairment.

A. "Whole Person" Impairment Percentage

Notable in Montana law and the *Guides* is the "whole person" concept. § 39-71-711(1)(c), MCA; App. 44. To ensure fair allocation of benefits, impairments for various body parts must be normalized or converted to a "whole person" standard. A broken finger is less impairing than a broken back, and the "whole person" conversion is a way to make sure all impairment percentages represent overall realistic impairment. Montana law requires "whole person" percentages for calculating benefits. The *Guides* provide mechanisms for converting all impairments to a "whole person" percentage.

Per Montana law, the "whole person" figure is expressed as a percentage. § 39-71-711(1)(c), MCA. The "whole person" impairment percentage is the final figure for benefit determination. § 39-71-703(3), MCA.

B. Impairment Percentage is the Ultimate Product of the *Guides*

An impaired claimant is rated with a percentage of impairment using the *Guides*. The *Guides* define impairment as follows:

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

App. 42 at § 1.3d (emphasis added). All impairments constitute a permanent and "significant" loss. App. 42 at § 1.3d; § 39-71-116(21), MCA.

The *Guides* prescribe the method to formulate impairment ratings, expressed as a percentage, which then derives an impairment award under § 39-71-703(3), MCA. The 6th edition of the *Guides* is the latest edition in a lineage of AMA impairment guides. All editions layout a method to determine the ultimate impairment rating. The *Guides* define "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).

App. 45 (emphasis added).

The *Guides* 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.

App. 44 (emphasis added).

Impairment percentage is the ultimate product intended by the *Guides*. Impairment percentage measures the severity of an injured worker's permanent injury, which is then inserted into the § 703(2) benefit formula to determine compensation.

C. Using "Class" to Determine Benefits Under § 703(2) is Arbitrary, and a Gross Misapplication of the Guides.

Put simply, the *Guides* is not about "Class," it is about assigning impairment expressed as a percentage. "Class" **does not** represent impairment. It is merely one step in determining impairment percentage, rather than a meaningful distinction. Certainly "Class" was never meant to dictate benefits. Impairment "Class" is a novel concept that first appeared in the subject *Guides* 6th Edition, yet is used in § 703(2) as an absolute threshold for impairment benefit entitlement. It is unequivocal that impairment percentage is more reliable and medically meaningful than "Class." Critically, a higher "Class" **does not** necessarily indicate greater impairment.

The *Guides* introduced classification grids and "Class" as part of the method to arrive at the above defined impairment percentage. Sample grids are included in App. 48, 52. The Classes range from 0-4. Class 0 means no impairment, whereas Classes 1-4 indicate a significant, permanent impairment.

The *Guides* clearly did not intend for "Class" to be an independent medical and/or scientific basis for benefit denial, and in fact disclaims its foundation:

The ICF has created a functionally based taxonomy that links specific conditions to an ordinal level of clinical severity based on (**as yet unverified**) percentages of functions lost as presented in Table 1-3. Although percentages of loss may eventually be assigned to each functional class, **this must await formal validation studies specific to each diagnosis of interest.**

App. 46 (emphasis added).

The evidence basis for impairment percentages assignable to ICF functional levels must await further empirical testing.

App. 61-62.

The "Class" system is unverified medicine and lacks appropriate foundation.³ "Class" is a novel, unverified, method, contrary to the whole person impairment percentage used throughout all versions of the AMA Guides, and uniformly applied in deriving Montana's impairment benefits.

The impairment rating process is outlined in Chapter 1 of the *Guides*, specifically § 1.8. Section 1.8 is attached for the Court's convenience, and is necessary to understand how the WCC erred in its interpretation of the *Guides*. App. 46-51.

³**Impairment class:** 5 classes whenever possible; classes 0 to 4 have been chosen to be consistent with ICF taxonomy." App. 47 (emphasis added).

Per § 1.8b, impairment percentage depends on four distinct medical "Impairment Criteria," also called factors. Each criteria is explained in §§1.8e-h. The impairment criteria are as follows:

- (1) History of Clinical Presentation – historical data to support the diagnosis-based or regional nature of the impairment class.
- (2) Physical Findings – examination findings for each impairment class.
- (3) Clinical Studies or Objective Test Results – specified where applicable for each impairment class.
- (4) Functional History or Assessment – evidence of symptomatic dysfunction and functional loss due to impairment.

App. 47 at § 1.8b.

For any injury, one of the above four factors is deemed the "key factor." App. 47 at § 1.8c(1). The *Guides* say the "key factor" is History of Clinical Presentation for most conditions. App. 47 at § 1.8c(1). The remaining three criteria become "non-key factors." App. 47 at § 1.8c(3).⁴

During examination, the four criteria are each assigned a distinct "Class" of severity. App. 47 at § 1.8c(1); App. 49 at Table 1-6(2). The "Class" for the "key factor" alone determines the appropriate column to utilize within the impairment grid. App. 47 at § 1.8c(1). The "Class" of the remaining three criteria are applied to adjust

⁴Note, the exact application of each of the 4 impairment criteria varies from condition to condition. Some conditions do not use all 4 criteria, but many do. The 4 criteria method outlined in Chapter 1 is the self-described "generic template [that] illustrates the format being encouraged throughout the *Guides*..." App. 47 at § 1.8c.

the impairment percentage within the column to determine the final impairment percentage. App. 47 at § 1.8c(2).

Critically, the "Class" determined by the one "key factor" is the sole determinative factor of the "Class" of impairment. For instance, if the "key factor" is deemed "Class 2," the final impairment is certain to be "Class 2," regardless of the "Class" of the remaining three criteria. "Class" for the "key factor" cannot change regardless of the severity of the "Class" of the other criteria. Under § 703(2), this means the "key factor" alone determines whether an injured worker is entitled to benefits; i.e., whether they have a Class 1 or Class 2 impairment. The *Guides* clearly confirm this fact in § 1.8c, specifically paragraphs 4-5. App. 47, 49.

Strangely, the remaining three "non-key factors" are also assigned "Classes" using the same methodology and scale as the "Class" of the "key factor." App. 49. Thus, regardless of the "Class" of the "key factor," the "Class" of the other three criteria are each distinctly measured for severity using the 0-4 (mild to severe) scale.

The "Classes" of the "non-key factors" heavily influence the final impairment percentage, within the column determined by the "key factor." App. 47-49. The final impairment rating percentage is thus determined using a holistic combination of the four impairment criteria and each respective "Class."

Any given condition can, and often does, include a variety of "Classes" for each of the four criteria. App. 47. For instance, the "key factor" can be "Class 1," and the remaining criteria can include Classes 0, 1, 2, 3 or 4. The *Guides* provide an example:

The next step requires the examiner to adjust for factors **other** than that considered "key." Non-key factors may include results of Functional History, Physical Examination, and Clinical Studies. If the examiner determines that the other factors affecting the rating are in the same class (Class 2 in this example) that had been used for the key factor rating, the final rating will generally stay in the middle of that class (21% in our example). On the other hand, if the remaining adjustment factors are higher or lower than that used for the key factor rating, the resulting impairment grade will be modified, assuming the adjustment factor was reliable and not used to define the impairment. In our example, if Physical Findings and Objective Test Results (both non-key factors) each place a patient into class 3, the final rating will be class 2, (grade E) 27%. If the Physical Findings correspond to class 3 and the Objective Test Results to class 1, the final rating will be class 1, (grade C) 21%.

App. 47 (emphasis added).

In the above example taken directly from the *Guides*, the injured worker has the following impairment criteria:

- Class 2 (moderate): History of Clinical Presentation
- Class 3 (Severe): Physical Findings and Objective Test Results

The worker is ultimately labeled "Class 2" based solely on the "key factor," even though the worker has other "severe" Class 3 findings. The "non-key factors" cannot

change the "Class" of the "key factor." The "non-key" factors do however determine the final whole person impairment percentage. The "Class" label derived from only the "key factor" is therefore is a poor indication of overall impairment, does not address "whole person," and varies as to condition, injury, and body part.

Pertinent here, the claimant can, and often does, have a "key factor" Class 1 impairment despite having at least "moderate" (Class 2) or "severe" (Class 3) factors. There is no uniformity to ensure all claimants will be afforded the same "key factor," nor do the *Guides* purport one factor as patently more important than the other. The *Guides* are littered with examples of workers labeled "Class 1," who have more severe, non-Class 1, "Classes" for other criteria. Examples for the Court are at App. 63-75 (see specifically, examples: 7-15, 10-21, 11-5, 11-15, 15-3, 15-6, 15-9, 17-2, 17-8, 17-17).

To be clear, for benefit purposes under § 703(2), the "key factor" alone determines the "Class." The "non-key factors" rendered irrelevant by § 703(2) are most typically: (1) objective test results; (2) functional history or assessment; and, (3) physical findings. App. 47-49 at § 1.8b and § 1.8c. Yet "whole person" impairment percentage *does actually* depend on all factors, rendering it more complete and meaningful. The current use of the "Class" threshold in § 703(2) undermines the entire impairment measurement.

D. Conflating "Class" With Impairment Percentage Results in an Irrational Denial of Impairment Benefits.

Class 1 and 2 claimants can sometimes have an identical impairment percentage, and depending on the injury or body part, a Class 1 impairment can have a higher percentage than a Class 2 impairment. At most there is a mere 1% difference between a Class 1 and Class 2 for any given condition

Impairment percentages also vary wildly without rationale within the "Classes." For example, a Class 2 impairment for one condition can be as low as 4%, yet a Class 1 impairment for another condition can be as high as 15%. App. 76-77 at Table 9.7 and Table 10.7. Keep in mind, impairment percentage is defined as the "whole person" impairment. Thus, a person with a greater whole person impairment percentage is *per se* more impaired. Yet under the *Guides*, a person with greater impairment percentage can have a lower "Class."

The *Guides* are rife with examples that illustrate the absurdity of "Class" designation as utilized in § 703(2). Two people with an injury to the exact same body part can have an identical final impairment percentage and yet one gets benefits (Class 2) and the other does not (Class 1). Per Table 15-11, a shoulder impairment of 8% can be Class 1 or 2. App. 78. Thus, one 8% shoulder impairment is paid in

full, and another 8% shoulder impairment is denied benefits entirely due to the arbitrary "Class" structure within the *Guides*.

The "Class" system lacks uniform application and utterly fails to distinguish severity. Impairment percentage does both. When Montana's legislature misappropriated the "Class" system into § 703(2), it arbitrarily tied ultimate benefit determination to an unscientific factor designed solely to aid in determining impairment percentage.

II. § 703(2) Unconstitutionally Violates Equal Protection

Section 703(2) violates the equal protection guarantee in Montana's Constitution and the 14th Amendment of the United States Constitution. U.S. Const. Amend. XIV, § 1. Montana's Constitution guarantees, "no person shall be denied equal protection of the laws." Mont. Const. Art. II, § 4. "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." *Rausch II*, ¶ 18.

This Court "follow(s) a three-step process to analyze an equal protection claim." *Caldwell v. MACO Workers' Compensation Trust*, 2011 MT 162, ¶ 14, 361 Mont. 140, ¶ 14, 256 P.3d 923, ¶ 14. The three steps are:

- (1) Determine whether the statute creates two similarly situated classes who are treated differently. *Caldwell*, ¶ 16.

- (2) Assign the appropriate level of scrutiny. *Caldwell*, ¶¶ 20-21.
- (3) Analyze the statute under the appropriate level of scrutiny. *Caldwell*, ¶ 22.

A. Permanently Impaired Injured Workers Are Similarly Situated

The first step in any equal protection analysis is identifying similarly situated classes. *Henry v. State Compen. Ins. Fund*, 1999 MT 126, ¶¶ 26, 294 Mont. 449, ¶ 26, 982 P.2d 456, ¶ 26; *Reesor v. Mont. State Fund*, 2004 MT 370, ¶ 10, 325 Mont. 1, ¶ 10, 103 P.3d 1019, ¶ 10.

In this case, the similarly situated classes created by § 703(2) are clear. In fact, they are referred to as "Classes" by the statute itself. § 703(2) creates these two similarly situated classes:

- (1) Permanently impaired Class 1 injured workers, without wage loss;
- (2) Permanently impaired Class 2 injured workers, without wage loss.

The sole difference is the Class 1 versus Class 2 "key factor." All members have measurable medical impairment ranging from 1%-99%. All members are permanently impaired. All members are without wage loss. Finally, all members must rely on § 703(2) as their exclusive remedy for their permanent impairment. *Satterlee*, ¶ 16.

The goal of identifying a similarly situated class is to isolate the factor allegedly subject to impermissible discrimination." *Goble*, ¶ 29. "Thus, two groups are similarly situated if they are equivalent in all relevant respects other than the factor constituting the alleged discrimination." *Goble*, ¶ 29. Similarly situated classes exist when one factor "is the only identifiable differentiating factor between the two classes." *Satterlee*, ¶ 16. Here, that factor is "Class" of impairment. All permanently impaired claimants who return to work without wage loss are similarly situated. The isolated factor is "Class," and the two groups are treated differently because one group receives benefits commensurate with their permanent impairment percentage and the other receives nothing. The analysis should end here.

For comparison, in *Satterlee* and *Reesor*, the Court found that discriminating based on age created two similarly situated classes. *Satterlee*, ¶ 16; *Reesor*, ¶ 25. Age, like "Class" of impairment, is an arbitrary, categorical, bright line cutoff for benefits. There is no certain age that should trigger denial of benefits, just like there is no certain "Class" of impaired workers that should be categorically denied benefits. The only logical cutoff is whether or not impairment exists; i.e., 0% impairment **should** be treated differently. Drawing a line anywhere along the impairment spectrum of 1-99% creates similarly situated classes.

For contrast, in *Rausch II* this Court distinguished permanent partial disability ("PPD") from permanent total disability ("PTD") claimants based on the fact that one can return to work (PPD), and one cannot (PTD). *Rausch II*, ¶¶ 20-25. A person who cannot return to work is presented with a very different situation than a person who can; therefore, the two groups are dissimilar. Here, both Class 1 and Class 2 claimants have purely medical impairment ratings based on objective medical evidence and can return to work. All groups at issue here, per § 703(2), have no wage loss.

When the *Goble* Court found incarcerated claimants *were similarly situated* to non-incarcerated claimants for benefit purposes, it cautioned that courts mistakenly fail to recognize similarly situated classes by jumping ahead steps in the equal protection analysis. *Goble*, ¶ 34. The WCC in *Goble* did just that, and was corrected. The WCC here requires the same correction.

It is critical to isolate the discriminatory factor—here, "Class"—before jumping ahead to the rational basis analysis. The *Goble* Court explained:

The WCC essentially came to the conclusion that the classes presented by *Goble*/*Gerber* were not similarly situated because a rational basis exists for treating incarcerated claimants differently from unincarcerated claimants. By doing so, the WCC subsumed the factor—incarceration—that we are trying to isolate and test against a rational basis. Defining the classes for equal protection analysis can be difficult and tedious, and if not done with clarity of vision, may result

in the class definition swallowing up the factor we are attempting to examine. An inherent problem in evaluating an equal protection challenge to a statute lies in defining the classes in a way which will effectively test the statute without truncating the analysis. Thus, *Goble*/*Gerber* have established that they are similarly situated to unincarcerated PPD beneficiaries by virtue of the provisions of § 703. *Renee*, therefore, does not direct the inquiry here. We conclude the WCC erred in finding that workers who qualify for PPD benefits under § 703 are not similarly situated to workers also meeting the criteria of § 703, but who are incarcerated for a period in excess of 30 days.

Goble, ¶ 34.

Here, the WCC made the same mistake as the WCC in *Goble*. It dove into a quasi-rational basis analysis prior to identifying the similarly situated classes. The WCC "subsumed" the factor - "Class" - that we are trying to isolate and test against rational basis per *Goble*.

The first step of equal protection ends by recognizing that the statute isolates Class 1 versus Class 2 claimants, both without wage loss. Instead, the WCC improperly found dissimilar classes by "truncating the analysis," into one global discussion about rational basis. The WCC here requires the same *Goble* correction. "Class" is the isolated discriminating factor; Class 1 and Class 2 claimants, without wage loss, are similarly situated.

Appellee argued the classes at issue in this challenge should include "Class 2 or greater" (i.e. Classes 2-4). Yet, the *Guides* uses the exact same medical

methodology to distinguish Classes 2, 3, and 4 from *each other* that MSF argues distinguishes Class 1 from Classes 2-4. App. 46-51 at § 1.8. If Classes 2-4 are similar, as MSF insists, then Class 1 has to be similar. Appellee's argument that Classes 2-4 are similar in effect concedes that all classes, including Class 1, are similarly situated. Certainly the *Guides* itself makes no effort to materially distinguish Class 1, and to do so here is improper. Regardless of "Class," everyone with greater than 0% impairment is materially similar.

Section 39-71-711(1), MCA, requires that whole person impairment is "expressed as a percentage." Class 1 claimants have impairment "expressed as a percentage" just like Class 2-4 claimants. All claimants with impairments "expressed as a percentage" under § 39-71-711(1) are in a fundamentally identical position i.e. they are permanently impaired.

Here, "both classes have suffered work-related injuries, are [able] to return to their time-of-injury jobs, have permanent physical impairment ratings and must rely on [§ 703(2)] as their exclusive remedy under Montana law." *Satterlee*, ¶ 16. § 703(2) creates two similarly situated classes, each having a permanent impairment; however, one is paid a full impairment benefit, the other receives nothing.

1. The WCC Decision Contains Inaccuracies

At Appellee's urging, the WCC relied on select and inaccurate details of the *Guide* and got the details wrong. The WCC decision requires correction and necessitates the detailed overview of the *Guides* found in this brief. The WCC wrongly concluded Class 1 claimants are categorically lesser, insignificant, impairments. App. 21-22 at ¶¶ 55-56. Even if the Class 1 claims were categorically less severe, it is by trivial degree so as not to render them dissimilar for equal protection purposes.

Specifically, the WCC decision assumed that the discriminated Class 1 required that all four impairment factors be Class 1, but the *Guides* clarify that only one of the four factors are required to be Class 1. App. 47 at § 1.8c(1.); App. 49 at § 1.8c(4). This misunderstanding is most recognizable at paragraphs 9-15 of the WCC decision. App. 6-7. In actuality, only one factor determines "Class" even though the other factors contribute to the ultimate whole person impairment rating. Generally, functional limitations are irrelevant, physical examination is irrelevant, and objective medical evidence is irrelevant. Under the *Guides*, injured workers treated differently by the statute can even have identical impairment percentages (i.e, Class 1 8% and Class 2 8%), or worse, a Class 1 claimant can have a greater whole person impairment percentage than a Class 2 claimant. App. 76-77; App. 78 at Table 15-11. The line

– "Class" – lacks medical foundation to determine benefits, and is certainly less meaningful than the age cutoff in *Satterlee* and *Reesor*, which was at least loosely related to wage loss. Moreover, at least in *Satterlee* and *Reesor* we know that 66 is older than 65. Here, it is not even true that Class 2 impairment is necessarily more severe than a Class 1.

At the very least, the *Guides* show that Class 1 and Class 2 impairments are fundamentally similar, if not identical. All members suffered permanent impairment to varying degrees expressed as whole person impairment. The classes are similarly situated.

2. Class 1 Impairments are Significant

The WCC holding that Class 1 impairments are dissimilar is based on its belief that Class 1 impairments are insignificant. For instance, the WCC said that Class 1 conditions can lack “objective medical evidence of injury.” App. 6 at ¶ 12. Without objective medical evidence, legally there is no workers' compensation claim under Montana law, and by definition impairment. § 39-71-407(3), MCA; § 39-71-711, MCA. Any whole person impairment percentage, even 1% requires by law objective medical evidence.

Here, Hensley underwent surgery for a glenoid labral tear, and ended up with scars and synthetic material in her body.

Other Class 1 examples from the *Guides*:

- (1) Spinal Fusions and Fractures. Table 17-3;
- (2) Full Thickness Rotator Cuff Tear. Table 15-5;
- (4) Leukemia. Table 9.7;
- (5) Liver Disease. Table 6-8;
- (6) Anemia with Rheumatoid Arthritis. Example 9-2;
- (7) Facial Fracture with Permanent Scar. Example 11-9;
- (8) Partial Epilepsy ("unable to drive because of the persistent seizures"). Example 13.3;
- (9) Finger Amputation. Table 15.29.

App. 52-60.

Concluding Class 1 impairments are insignificant such as to render Class 1 impaired workers dissimilar from Class 2 impaired workers is contrary to the *Guides* and reality.

B. Rational Basis Does Not Permit Categorical Discrimination Based Solely on Cost Savings.

Rational basis applies. This Court has consistently applied rational basis to strike down irrational "cost-cutting" workers' compensation laws. *Caldwell*, ¶ 51 (struck down law that allowed age discrimination for vocational rehabilitation benefits); *Reesor*, ¶ 25 (struck down law that allowed age discrimination of PPD benefits); *Henry*, ¶ 45 (struck down law that allowed discrimination of occupational disease claimants versus injury claimant for rehabilitation benefits); *Schmill v. Liberty N.W. Ins. Corp.*, 2003 MT 80, ¶ 23, 315 Mont. 51, ¶ 23, 67 P.3d 290, ¶ 23 (struck

down law that allowed OD claimants to be paid smaller impairments than injury claimants); *Stavenjord v. Mont. St. Fund*, 2003 MT 67, ¶ 48, 314 Mont. 466, ¶ 48, 67 P.3d 229, ¶ 48 (struck down law that capped PPD benefits for OD claimants but not injury claimants).

Injured workers are a disadvantaged minority, at the mercy of the WCA. Injured workers have no cohesive legislative influence or representation. The WCA is the sole, exclusive, remedy for some of Montana's poorest, albeit working, citizens. *Satterlee*, ¶ 16.

C. § 703(2)'s Misappropriation of the Guides' "Class" Scheme Fails Rational Basis.

There is no rational basis to deny benefits to an arbitrarily defined "Class" of permanently impaired claimants. Simply put, compensation for impairment should depend only on measured medical impairment, without an arbitrary, and admittedly unscientific, cutoff.

The construct of the rational basis test is a two-part conjunctive test and, "requires the government to show (1) that the statute's objective was legitimate, and (2), that the statute's objective bears a rational relationship to the classification used by the legislature." *Henry*, ¶ 33. Without a legitimate objective to deny impairments to permanently impaired claimants, § 703(2) is unconstitutional.

Even with a legitimate objective, "a failure to demonstrate a rational basis for the infringement of such a constitutionally protected right" will likewise result in the Court declaring the statute in question unconstitutional. *Reesor*, ¶ 25. Here, the statute fails either conjunctive prong because the government cannot demonstrate a legitimate objective (besides cost savings) and, denying benefits to a class of permanently impaired claimants is not rationally related to a legitimate objective.

Critical to this analysis is a clear understanding of the fundamental purpose of impairment benefits. This Court addressed the function of impairment benefits in *Rausch I-II*, and *Goble*. The analyses in these cases include relevant discussions of the purpose of impairment benefits under the WCA. *Rausch II* (later cited in *Goble*) confirmed:

Additionally, the PPD claimant is entitled to an impairment award, which compensates the claimant for the permanent loss of physical function. This benefit is smaller than the total disability benefit, and is paid over a shorter period of time, but is designed to compensate a claimant who is able to return to work and re-commence earning a wage. The payment of an award to a claimant who returns to work is consistent with the [WCA's] stated purpose of returning injured workers to the work force.

PPD benefits are designed for the worker who is able to return to work in the worker's job pool, but nevertheless suffers impairment or partial wage loss, or both.

Goble, ¶ 30, citing *Rausch II*, ¶ 23.

The purpose of impairment awards is to compensate the worker for loss of physical function, and is important even for those who return to work, like Hensley.

Rausch I also discussed the purpose of impairments at a fundamental level:

The statute's contemplation of when permanent total disability benefits terminate and when impairment award liability continues recognizes the fundamental nature of the impairment award itself. Impairment 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 & 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 worker's ability to return to work. The difference is subtle, yet important. The inclusion of continued impairment award liability in § 39-71-710, MCA (1991 & 1997), indicates the distinct nature of the impairment award from other types of disability benefits.

Rausch I, ¶ 21.

Impairment awards compensate the injured worker for a purely medical loss, based upon the degree of loss. It is a distinct, purely medical benefit. Paying impairment awards to those able to return to work is consistent with the return to work purpose of the Act. *Goble*, ¶ 30. Wage loss is irrelevant. The *Rausch I* and *Goble* decisions leave no room for denying impairment benefits to impaired workers simply because those workers resume working.

1. Impermissible Cost Containment is the Only Legislative Objective Behind Denying Impairment Awards to Some Injured Workers

"It is well settled that the rational basis test requires the government to show the contested statute had a legitimate objective." *Reesor*, ¶ 16. This Court repeatedly confirms "cost containment" alone is not a legitimate basis for discrimination in workers' compensation laws. *Caldwell*, ¶ 34; *Henry*, ¶ 40. "If the Court permitted otherwise, 'cost containment' alone could justify nearly every legislative enactment without regard for the guarantee for equal protection of the law." *Caldwell*, ¶ 34 (quoting *Henry*, ¶ 40). "Not surprisingly, discrimination in the form of offering services to some while excluding others for any arbitrary reason, will always result in lower costs." *Caldwell*, ¶ 35 (quoting *Henry*, ¶ 40). If the government fails to identify a legitimate objective, other than cost containment, the Court must declare the statute unconstitutional.

Only legitimate, non-discriminatory, objectives will pass constitutional muster. This Court has seen through other legislative attempts to disguise the cost containment objective.

For example, in *Henry*, an "occupational disease" claimant was denied access to rehabilitation benefits, otherwise available to an "injury" claimant. *Henry*, ¶ 24. The sole distinguishing factor between an "injury" and "OD" is the nature of onset:

one work shift (injury) versus multiple work shifts (OD). §§ 39-71-119 and 39-71-116(23)(a), MCA (1999). This Court agreed that, "[a]ny argument that economic reasons justify treating the two classes differently must be rejected. This court has previously held that cost control alone is no justification." *Henry*, ¶ 40. The *Henry* Court struck down the law as a violation of equal protection because cost containment was the sole objective.

In *Caldwell*, the Court held that denying vocational rehabilitation benefits to "retired" (eligible to receive social security retirement benefits) injured workers violated equal protection. *Caldwell*, ¶ 51. The Court dismissed similar transparent and manufactured objectives deemed "duplicate[s of] the cost containment interest." *Caldwell*, ¶ 48. The *Caldwell* Court used equal protection to strike down the discriminatory law as cost containment was the sole objective. Here, like *Caldwell*, cost containment is the sole objective for § 703(2).

This Court unanimously dismisses cost containment as a legitimate objective of discriminatory legislation. Indeed, the Court does not let money trump the Constitution else "nearly every legislative enactment," however discriminatory, could pass muster. *Caldwell*, ¶ 34.

i. Cost Containment Was the Sole Objective of Enacting § 703(2).

It cannot be reasonably disputed that the sole objective of § 703(2) is to save insurers money. Cutting Class 1 impairments in a dartboard-like manner is a textbook equal protection violation.

Section 703(2) was part of 2011 HB 334's sweeping workers' compensation reform efforts. Dkt. 33, pp. 36-53. The Fiscal Note attached to the final bill states "[t]he department estimates that 1,600 of 3,000 injured workers per year who receive an impairment rating less than Class 2 with no wage loss will no longer receive any permanent partial benefit." Dkt. 33, pp.62-70. The Fiscal Note predicts cost savings at approximately \$8 million per year. Dkt. 33, pp. 62-70. Cost cutting on the backs of injured workers was the sole motivation for § 703(2).

At the WCC level, MSF argued that the entire legislative bill that included the subject law is relevant; however, that is not true for equal protection analysis. Dkt. 34, pp. 14-16. As MSF argues, the fact that other portions of the WCA could provide more benefits to workers erases the singular cost cutting objective of § 703(2). In effect, MSF argues that a blatantly discriminatory law is legitimate if slipped into a bill with other legitimate components.

The equal protection analysis is narrow and "tedious." *Goble*, ¶ 34. Equal protection narrowly focuses only on the classes created by the subject statute, here Class 1 versus Class 2 impaired workers, both working. Any discussion of HB 334 as a whole is a distraction and outside the narrow focus of this Court's equal protection analysis pertaining to § 703(2). MSF tries to move the goal posts to obfuscate the Court's analysis.

For instance, MSF made various irrelevant arguments in its WCC briefing in the sections dedicated to "legitimate governmental objectives." Dkt. 34, pp. 14-16; Dkt. 35, pp. 13-15. MSF argued that categorically denying Class 1 impairments was permissible, because other injured workers were positively affected by other modifications to the WCA as a result of HB 334. However, other portions of HB 334 are irrelevant as the sole issue for the Court is whether equal protection allows discrimination of Class 1 and Class 2 impaired workers.

The "Class" structure of the *Guides* provided an easy, albeit irrational and unscientific, cost-cutting carrot that could be easily and swiftly implemented by insurers. Insofar as cost savings to insurers is a legislative objective, it cannot be supported by arbitrarily denying benefits to thousands of impaired workers. The Constitution requires a more thoughtful approach.

2. Applying Rational Basis to § 703(2) and Other Legally Recognized Objectives

In addition to identifying a legitimate governmental interest, "rational basis requires that ... [§ 703(2)] ... bear a rational relationship to a legitimate governmental interest." *Caldwell*, ¶ 23. Appellee will try, as it must, to rationalize the statute with other non-cost-cutting governmental objectives. Indeed, this Court *has* identified the following legitimate governmental objectives:

- (1) providing wage-loss benefits that bear a reasonable relationship to actual wages lost. *Satterlee*, ¶¶ 30-31; *Caldwell*, ¶ 38; and,
- (2) assisting the worker at a reasonable cost to the employer. *Caldwell*, ¶ 40; *Satterlee*, ¶ 31.

The following are specific reasons why slashing an arbitrary group of impairment benefits is inconsistent with the above legally recognized legitimate governmental objectives.

i. § 703(2) Does Not Advance the Legitimate Governmental Objective of Providing Wage-Loss Benefits Bearing a Reasonable Relationship to Actual Wages Lost

This Court in *Satterlee* and *Goble* recognized that tailoring wage-loss benefits to actual wages lost is a legitimate objective, if done rationally. *Satterlee*, ¶ 31; *Goble*, ¶ 37; § 39-71-105(1), MCA. Yet, this Supreme Court, the *Guides*, and §

703(2) confirm impairment has nothing to do with wage loss. The subject statute *expressly* creates two classes, both without wage loss: (1) Class 1 impairments, without wage loss; and, (2) Class 2 impairments, without wage loss. Wage loss is irrelevant to this case.

In *Satterlee*, the Court held it was reasonable to terminate permanent total disability wage loss benefits at retirement age, because retirement age by definition is when work life ends. *Satterlee*, ¶ 30. Likewise, in *Goble*, the Court agreed it was reasonable to deny wage loss benefits to incarcerated individuals because the actual wage loss is a result of the incarceration, not the work injury. *Goble*, ¶ 37. The wage loss rationales of both *Satterlee* and *Goble* do not apply to this case because impairment awards are "purely medical" and have no relation to wage loss. Impairment awards are not paid based on lost wages, but rather a purely medical process that quantifies objective medical impairment.

In fact, *Goble* and *Satterlee* confirm that payment of impairment actually serves the WCA's purpose of returning the worker to work. *Goble*, ¶ 30; § 39-71-105(3), MCA. Justice Mckinnon wrote "PPD benefits are designed for the worker who is able to return to work in the worker's job pool, but nevertheless suffers impairment or partial wage loss, or both." *Goble*, ¶ 30 (emphasis added). Per *Goble*, impairment benefits are "designed" for impaired, yet working, people like Hensley.

Impairment is also medically irrelevant to wage loss. "Impairment 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." *Rausch I*, ¶ 21 (emphasis added). Impairment, "is a purely medical determination and must be determined by an impairment evaluator after a claimant has reached maximum healing." § 39-71-711, MCA. This benefit is "designed to compensate a claimant who is able to return to work and re-commence earning a wage." *Rausch II*, ¶ 23. Impairments are not tied to lost wages, and are "designed to compensate" a claimant without lost wages.

The *Guides* also confirm wage loss is irrelevant to impairment:

The *Guides* is not intended to be used for direct estimate of work participation restrictions. Impairment percentages derived according to the *Guides'* criteria do not directly measure work participation restriction.

.....

The relationship between impairment and disability remains both complex and difficult, if not impossible, to predict.

App. 42.

For instance, a lawyer or teacher with Hensley's injury would have no wage loss and be able to perform the job, albeit painfully. A carpenter or painter might lose their profession entirely. Wage loss and impairment are distinct and any attempt to connect the two is an arbitrary, "if not impossible," exercise. App. 42.

The *Caldwell* Court dismissed this objective in the context of rehabilitation benefits. Like here, the insurer in *Caldwell* was trying to manufacture a non-existent connection between rehabilitation benefits and lost wages. The *Caldwell* Court wrote:

First, we conclude that the governmental interest in creating a wage replacement system bears little relevance in the context of rehabilitation benefits. Section 39-71-105(1), MCA, sets forth the governmental interest in creating a wage replacement system. *Reesor*, ¶ 18. A related legitimate governmental interest exists in providing wage-loss benefits that bear a reasonable relationship to actual lost wages. *Satterlee*, ¶¶ 30-31. Rehabilitation benefits do not replace lost wages, however, and should be distinguished from the wage replacement system at issue in *Reesor* and *Satterlee*. A disabled worker like Caldwell could receive temporary total disability, permanent total disability, permanent partial disability, or temporary partial disability benefits to replace his or her lost wages. Sections 39-71-701 to -703, -712, MCA. In contrast, rehabilitation benefits, like medical benefits, disfigurement benefits, or funeral benefits, do not replace lost wages. Sections 39-71-704, -708, -725, MCA. The elimination of rehabilitation benefits cannot be understood as serving, or even relating to, the governmental interest in creating a wage-replacement system that bears a reasonable relationship to actual wages lost. We finally note that MACo accepted and paid Caldwell's medical and wage-loss benefits.

Caldwell, ¶ 38.

Impairment benefits, like rehabilitation benefits, medical benefits, disfigurement benefits, or funeral benefits, are separate and apart from wage loss.

Caldwell, ¶ 38.

In *Reesor*, the Court dismissed MSF's attempt to manufacture a relationship between age and wage loss. *Reesor*, ¶ 23. MSF argued that denying PPD benefits based on age was "simply attempting to coordinate the wage loss benefits provided by social security retirement with PPD benefits provided by workers' compensation." *Reesor*, ¶ 20. The Court rejected MSF's argument and held that denying a wage loss benefit because of age offended the WCA's stated legislative objective that wage loss benefits "bear a reasonable relationship to actual wages lost." § 39-71-105(1), MCA. PPD benefits depend on actual wage loss, not age; just like impairment awards depend on medical impairment, not wage loss. Here, like *Reesor*, there is no connection between wage loss and purely medical impairment.

Section 703(2) confirms wage loss is irrelevant. The statute says that Class 2 and greater impairments are paid regardless of wage loss. The statute expressly eliminates wage loss as a factor. The *Guides* confirm that Class 2 is not categorically more severe than Class 1, highlighting § 703(2)'s nonsensical use of "Class" to determine benefits amongst the otherwise similarly situated groups.

MSF, and the WCC, speculated about an abstract relationship between wage loss and impairment. In fact, the WCC's reliance on this speculation was central to its holding. The WCC begins by quoting *Rausch I* for the proposition that impairments are a "purely medical determination" and that "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."

App. 4 at ¶ 5.

Yet, the WCC then contradicts itself, stating:

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.

App. 22 at ¶ 57. This is pure speculation, contrary to Montana law, and inconsistent with the *Guides* explicit disclaimer of this conclusion. If there is a wage loss, the claimant is entitled to the entire spectrum of PPD benefits, outside the scope of this case and an entirely different discussion.

This Court says impairments are "purely medical." The *Guides* confirm there is no relationship between impairment and wage loss. The relationship between "Class" and wage loss is even more tenuous.⁵ The statute excludes wage loss from consideration and wage loss is irrelevant to this case.

⁵Note that "Functional History or Assessment" is a "non-key" factor, thus irrelevant to "Class" as explained above and in App. 46-51. If there was any connection between impairment and wage loss, functional results of an injury would perhaps be the most relevant factor, yet functionality is irrelevant to "Class."

ii. § 703(2) Does Not Advance the Legitimate Governmental Objective of Assisting the Worker at a Reasonable Cost to the Employer

In *Caldwell* and *Satterlee* this Court recognized that assisting the worker at a reasonable cost to the employer could be a legitimate governmental objective if the subject law is related to that objective. *Caldwell*, ¶ 40; *Satterlee*, ¶ 31. Here again, cutting benefits from an arbitrary yet similar group does not relate to the objective.

The *Caldwell* Court likewise found that the subject law was inconsistent with the proffered objective:

We disagree that eliminating rehabilitation benefits relates to assisting the worker at a reasonable cost to the employer. We particularly reject the argument that "reasonable cost to the employer" always means "lower cost to the employer." Such an argument does not constitute a legitimate governmental interest separate from the cost-containment interest.

Caldwell, ¶ 40.

Here, like *Caldwell*, the Class 1 claimant is not "assisted." Instead, Class 1 claimants are denied assistance based on arbitrary line-drawing to lower costs. Denying "Class 1" impairments is not rationally related to worker assistance, and is in fact inconsistent with the return to work goal. *Goble*, ¶ 30.

Satterlee presented a more extreme example of a threat to the viability of the workers' compensation system. In the context of PTD benefits, the *Satterlee* Court

found that lifetime benefits were unreasonable. In *Satterlee*, the claimant argued that PTD benefits should extend beyond retirement, effectively creating a lifetime benefit. The *Satterlee* Court was concerned lifetime benefits could jeopardize the viability of the workers' compensation system. *Satterlee*, ¶¶ 28-30. The *Satterlee* Court distinguished PTD and PPD benefits. Whereas PPD benefits "terminate after a statutorily defined number of weeks," PTD benefits (without termination) would continue until the claimant's death. *Satterlee*, ¶ 28.

Here, there is no similarity between PTD benefits and impairment. Impairment benefits are predictable, finite (max 400 weeks; Class 1 benefits typically less than 52 weeks), and based on a mathematical formula. There is no risk of Class 1 impairments running indeterminately. If payable, Hensley's 4% impairment is worth \$5,192. Class 1 impairments will not threaten the viability of the workers' compensation system. Case in point, the workers' compensation system has been paying all impairment awards irrespective of "Class" for decades and it has not failed.

Wholesale denial of Class 1 claimants does not assist workers in any way. It lowers costs for insurers like MSF, but in a discriminatory and unconstitutional manner, and without rational basis. Impairment awards are a finite and modest form of reasonable assistance.

3. Wholesale Denial based on Degree is Irrational

The legal trigger for impairment benefits must rationally coincide with the medical basis for the underlying impairment. Once purely medical impairment is established (greater than 1%), the law must rely on that scientific determination, and apply it uniformly. Ignoring medical impairment percentage for some (some 8% impairments get nothing), yet relying entirely on the same medical impairment percentage for others (other 8% impairments get full benefits), is inherently irrational and highlights § 703(2)'s misuse of "Class." App. 78.

"Wholesale denial" of benefits is particularly suspect, as opposed to coordinating degree of benefits with degree of loss. *Henry*, ¶ 42; *Stavenjord*, ¶ 42. "Wholesale denials" in the face of actual medically calculated permanent loss is fundamentally unfair.

Montana's impairment benefit is based on percentage, not "Class." § 39-71-703(3), MCA. Class 1 claimants, just like Class 2-4 claimants, have measurable medical impairment expressed as a percentage, determined by the *Guides* using identical medical methods. "Class" is an arbitrary threshold, and impairment percentage is the ultimate figure plugged into the impairment benefit calculation. Unlike "Class," as medical impairment incrementally increases, a person receives

proportionally increased legal benefits. "Class" is not a measure of whole person impairment.

Increasing or decreasing of benefits based on impairment percentage is logical, rational, and constitutional. Indeed, a worker with a Class 1, 5% impairment does not deserve the same amount as a worker with a Class 3, 20% rating. Equal protection *does not* require equal results, rather it requires equal application of the law. Claimants with greater impairment get more, claimants with less impairment get less. Impairment and resultant benefits can constitutionally differ by degree.

However, impairment benefits cannot be categorically denied entirely to one group who have the same type of medical impairment, differing only in degree. See *Henry*, ¶ 42, *Schmill*, ¶ 23, *Stavenjord*, ¶ 42. Under § 703(2), the percentage of impairment, despite being the only reliable indicator of injury severity, is often irrelevant for benefit determination. A 5%, 6%, 7%, etc., impairment, though medically measurable just like Classes 2-4, is legally meaningless if it falls under Class 1.

The Legislature can modify laws to reduce impairment benefits; however, in order to be constitutionally accountable, it must be done without arbitrary discrimination of similarly situated classes. Here, § 703(2) arbitrarily discriminates against those labeled Class 1, instead of properly utilizing medical impairment. For

example, the Legislature could have reduced the number of weeks used to calculate awards (currently 400 weeks), so long as it applied equally across all impairments 1-99%. The key for equal protection is equal application of the law across a similarly situated group. The Legislature is free to make equal changes, for better or worse, to reduce the overall cost of impairment ratings in the workers' compensation system. Understanding this distinction cuts to the heart of equal protection.

Equal protection requires equal application of the law. For impairment benefits, it requires application consistent with degree of purely medical impairment. Less impairment gets less, greater impairment gets greater, but no impaired worker is categorically denied.

4. The "Class" System is an Irrational Basis to Deny Benefits

The *Guides* "Class" system is materially flawed insofar as the Legislature commandeered it as a basis to determine payment of benefits. Whole person impairment percentage, not "Class," is the medically meaningful indication of severity as explained above. Impairment percentage even overlaps for classes, and is sometimes identical, illustrating the failure of the "Class" structure to distinguish severity. A 9% impairment can be Class 1 or 2, depending on condition.⁶ "This

⁶An 9% whole person impairment for lumbar spine in Table 17-4 is Class 1. App. 52. The identical 9% whole person impairment is Class 2 for the entirety of upper extremity conditions per Table 15-11, p. 420. App. 78.

Court has previously held that when construing statutes, the interpretation should be reasonable to avoid absurd results." *Doting v. Trunk*, 259 Mont. 343, 351, 856 P.2d 536, 541(1993). Upholding § 703(2)'s "Class" distinction would lead to absurd results for thousands of injured Montana workers.

Per the *Guides*, impairment percentage typically depends on all four of the distinct impairment criteria, whereas "Class" only depends on one. The "Class 1" label is a non-specific and arbitrary indication of severity. Thus, it is a fallacy to assign absolute legal significance to the "Class 1" label. If dubbed "Class 1" the whole person impairment percentage is rendered meaningless. Thus, giving "Class" more **legal** meaning than impairment percentage, when "Class" is undeniably less **medically** meaningful, is irrational. Rational basis requires a rational relationship between the medical impairment and resulting benefits. The law cannot ignore measured whole person impairment for a class of claimants to deny benefits, especially where claimants can have identical injuries and impairments, but are in different classes. "Simply put, a herniated disc is a herniated disc," regardless of "Class." *Henry*, ¶ 44. Use of "Class" to deny benefits, especially without respect to actual physical impairment, is arbitrary and unconstitutional.

Even if we assume that the "Classes" flawlessly differentiate severity, denying Class 1 impairments is irrational. The *Guides* make no declaration that Class 1 is

materially different than other "Classes," either in functionality or impairment. The *Guides* use the same medical methodology throughout the spectrum of impairment "Classes." The same methods and measurements that differentiate Class 1 from 2, also differentiate Class 3 and 4. At most, the difference between Class 1 and 2 is 1%, sometimes 0%, and sometimes Class 1 is even greater. App. 78 at Table 15-11; App. 76-77.

The "Class" label fails distinguish severity, which is the purported basis for denying impairment benefits to Hensley and other similarly situated claimants. Whole person impairment, not "Class," is the ultimate product of the *Guides*. Misappropriating "Class" from the *Guides* to deny benefits is irrational.

CONCLUSION

Controlling costs is an admirable goal but it must be accomplished constitutionally. Controlling costs cannot be achieved by arbitrarily discriminating against Class 1 impaired claimants. A more thoughtful approach, without unequal treatment of Class 1 claimants, is necessary to satisfy Montana's guarantee of equal protection. Mont. Const. Art II, § 4. Section 703(2) discriminates against Class 1 claimants without a rational basis, and the WCC unfortunately failed to declare it constitutional. Hensley respectfully asks this Court to reverse the WCC and declare § 39-71-703(2), MCA, facially unconstitutional and as applied.

Respectfully submitted this 10th day of January, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes and for quoted and indented material; and the word count, calculated by WordPerfect X3, is not more than 10,000 words, excluding table of contents, table of authorities, certificate of service, certificate of compliance, and any appendix containing statutes, rules, regulations, and other pertinent matters.

DATED this 10th day of January, 2020.

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