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## PREVIEW; Hensley v. Mont. State Fund: *Class is in session, or is it? Constitutionality of Impairment Awards under Montana's Workers' Compensation Act*

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**PREVIEW; Hensley v. Mont. State Fund: Class is in session, or is it?  
Constitutionality of Impairment Awards under Montana’s Workers’  
Compensation Act**

**Noah Goldberg-Jaffe\***

The Montana Supreme Court is scheduled to hear oral arguments in this matter on July 8, 2020 at 9:30 a.m. in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Justice Building, Helena, Montana. E. Kiel Duckworth will likely appear on behalf of the Appellant Susan Hensley. Bradley J. Luck will likely appear on behalf of the Appellee Montana State Fund.

**I. INTRODUCTION**

This case involves the intersection of labor, employment, and constitutional law. Its question presented is whether § 39–71–703(2)<sup>1</sup> violates the equal protection clauses of the Montana Constitution<sup>2</sup> and the United States Constitution.<sup>3</sup>

**II. FACTUAL AND PROCEDURAL BACKGROUND**

In 2012, Appellant Susan Hensley suffered a glenoid labral tear while working normally in her capacity as a paramedic.<sup>4</sup> Montana State Fund (“State Fund”) insured Hensley’s employer and accepted liability for her workers’ compensation claim.<sup>5</sup> Hensley received reconstructive surgery and returned to maximum medical improvement (“MMI”) in 2013 when a doctor assigned her a 4% whole person impairment percentage.<sup>6</sup> Under § 703(2), this is a Class 1 impairment.<sup>7</sup> Hensley had no actual wage loss as she returned to work with the same wage rate as before her injury.<sup>8</sup> Pursuant to § 703(2), State Fund refused to pay Hensley’s impairment award of \$5,192.<sup>9</sup> In her suit in Workers Compensation Court (“WCC”), Hensley argued that she was denied equal protection from the law because

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<sup>1</sup> MONT. CODE ANN. § 39–71–703(2) (2019) [hereinafter § 703(2)] (The statute, § 39–71–703, was amended in 2015, but no changes were made to § 703(2); however, the Court will use the 2011 version of the statute, as it was in effect at the time of the original suit).

<sup>2</sup> MONT. CONST. art II, § 4.

<sup>3</sup> See generally U.S. CONST. amend. XIV, § 1; Appellant’s Brief at \*1, *Hensley v. Mont. State Fund*, (Mont. Jan. 10, 2020) (No. DA 19-0523) [hereinafter Appellant’s Brief]; Appellee Montana State Fund’s Answer Brief at \*1, *Hensley v. Mont. State Fund*, (Mont. Feb. 10, 2020) (No. DA 19-0523) [hereinafter Appellee’s Brief].

<sup>4</sup> Appellant’s Brief, *supra* note 3, at \*2.

<sup>5</sup> *Hensley v. Mont. State Fund*, 2019 MTWCC 12, ¶¶ 25–26 (Montana Workers’ Compensation Court 2019).

<sup>6</sup> *Id.* ¶¶ 24–30; Appellee’s Brief, *supra* note 3, at \*3–4.

<sup>7</sup> Appellee’s Brief, *supra* note 3, at \*3–4.

<sup>8</sup> *Hensley*, ¶ 32. “‘Actual wage loss’ means that the wages that a worker earns or is qualified to earn after the worker reaches maximum healing are less than the actual wages the worker received at the time of the injury.” MONT. CODE ANN. § 39–71–116(1) (2019).

<sup>9</sup> *Hensley*, ¶¶ 33–34.

similarly situated Class 2 workers received an impairment award while she did not.<sup>10</sup>

Hensley and State Fund filed cross motions for summary judgment.<sup>11</sup> The WCC granted State Fund's motion for summary judgment and denied Hensley's motion for summary judgment.<sup>12</sup> The WCC held that § 703(2) is constitutional because the classes established in that section are not similarly situated, and there is a rational basis for treating those classes of workers differently.<sup>13</sup> Therefore, the WCC held, State Fund is not liable for Hensley's impairment award.<sup>14</sup>

### III. SUMMARY OF THE ARGUMENTS

The *AMA Guides to the Evaluation of Permanent Impairment* (“*Guides*”) are the standard resources for evaluating permanent impairment from work related injuries in the United States.<sup>15</sup> Each state decides how closely to follow the *Guides*, and which edition best fits its needs.<sup>16</sup> In 2011, Montana updated § 703(2) to follow the 6th Edition of the *Guides*.<sup>17</sup> In the 6th Edition, the AMA sought to improve consistency in providing impairment awards by adding a rating system with four impairment classes to determine impairment, Class 1 being the least impairment.<sup>18</sup> Class is determined by four available factors: (1) history of clinical presentation; (2) physical findings; (3) clinical studies or objective test results; and (4) functional history or assessment.<sup>19</sup> Then, one factor is given the “key factor” designation, which ultimately determines class.<sup>20</sup> A worker's history of clinical presentation is typically the “key factor,” making the other three factors, and the whole person impairment percentage, irrelevant.<sup>21</sup>

Section 703(2) lays out the Class-based impairment award allocation rules on which the parties' arguments hinge.<sup>22</sup> Before the 2011 update to § 703(2), any permanently impaired worker returning to work

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<sup>10</sup> *Id.* ¶ 1.

<sup>11</sup> *Id.* ¶ 37.

<sup>12</sup> *Id.* ¶ 67.

<sup>13</sup> *Id.* ¶ 57.

<sup>14</sup> *Id.* ¶ 70.

<sup>15</sup> Brief of Amicus Curiae Workers Injury Law & Advocacy Group at \*7–8, January 10, 2020, No. DA 19-0523; Appellee's Brief, *supra* note 3, at \*9.

<sup>16</sup> Brief of Amicus Curiae Workers Injury Law & Advocacy Group at \*8.

<sup>17</sup> Appellant's Reply Brief at \*9, *Hensley v. Mont. State Fund*, (Mont. Feb. 24, 2020) (No. DA 19-0523) [hereinafter Appellant's Reply Brief]; 2011 Mont. Laws Ch. 167 (to be codified at MONT. CODE ANN. § 39-71-703(2)).

<sup>18</sup> Appellee's Brief, *supra* note 3, at \*10–11; Brief of Amicus Curiae Workers Injury Law & Advocacy Group at 9.

<sup>19</sup> Appellant's Reply Brief, *supra* note 17, at \*17–18; Appellee's Brief, *supra* note 3, at \*11–12.

<sup>20</sup> Appellee's Brief, *supra* note 3, at \*12.

<sup>21</sup> *Id.*

<sup>22</sup> MONT. CODE ANN. § 39-71-703(2) (2011).

was eligible to receive an impairment award.<sup>23</sup> After 2011, because of the revision to § 703(2), a worker with a Class 1 impairment and no wage loss was no longer eligible for an impairment award; a worker with a Class 2, 3, or 4 impairment was still eligible for an impairment award regardless of wage loss.<sup>24</sup>

Both parties follow a similar equal protection analysis to determine the constitutionality of § 703(2): (1) determine whether there are similarly situated classes that are being treated differently; (2) assign appropriate level of constitutional scrutiny; and (3) apply rational basis review.<sup>25</sup> Rational basis scrutiny is used by both Hensley and State Fund.<sup>26</sup>

#### A. *Appellant's Argument*

First, Hensley argues that they preserved all issues relating to the “key factor” analysis of impairment classes because all parties agreed at trial that anything in the *Guides* was in the record.<sup>27</sup> Hensley argues that § 703(2) is facially unconstitutional because there is no rational basis for separating individuals into similarly situated classes and treating them differently.<sup>28</sup> She contends that workers with a Class 1 impairment and no wage loss, and workers with a Class 2 impairment and no wage loss are members of sufficiently similar classes. Thus, the fact that they receive unequal treatment by § 703(2) is an equal protection violation.<sup>29</sup>

Hensley initially argues that because class rating does not represent impairment level, the classes are similarly situated.<sup>30</sup> Based on “key factor” prioritization, a worker with a Class 1 impairment could have a higher whole body impairment percentage than a Class 2 worker.<sup>31</sup> The difference between the two classes is not their level of impairment, but rather their impairment Class.<sup>32</sup> Class 2 workers receive benefits while Class 1 workers do not, even though a higher class does not necessarily equal a higher whole body impairment percentage.<sup>33</sup> These classes are the proper ones for comparison here because those workers with wage loss are not part of the equal protection analysis as they will always get benefits regardless of their impairment ratings.<sup>34</sup> In fact, Hensley argues, using Class distinctions to make allocations “anywhere along the impairment

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<sup>23</sup> Appellee’s Brief, *supra* note 3, at \*5.

<sup>24</sup> § 39-71-703(2).

<sup>25</sup> Appellant’s Brief, *supra* note 3, at \*16–17; Appellee’s Brief, *supra* note 3, at \*21.

<sup>26</sup> Appellant’s Brief, *supra* note 3, at \*3; Appellee’s Brief, *supra* note 3, at \*30.

<sup>27</sup> Appellant’s Reply Brief, *supra* note 17, at \*15.

<sup>28</sup> *Id.* at \*1.

<sup>29</sup> Brief of Amicus Curiae Workers Injury Law & Advocacy Group at \*7; Appellant’s Brief, *supra* note 3, at \*1, 4, 20.

<sup>30</sup> Appellant’s Brief, *supra* note 3, at \*20; Appellant’s Reply Brief, *supra* note 17, at \*3.

<sup>31</sup> Appellant’s Brief, *supra* note 3, at \*9.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at \*9; Appellant’s Reply Brief, *supra* note 17, at \*5.

<sup>34</sup> Appellant’s Reply Brief, *supra* note 17, at \*5.

spectrum” will create similarly situated classes as anyone with a Class rating has some level of impairment.<sup>35</sup>

Hensley then argues that the WCC erred when it said that Montana does have a rational basis for treating those classes of workers differently.<sup>36</sup> Hensley argues that cost cutting was the State’s sole interest in eliminating impairment awards to workers with a Class 1 impairment and no wage loss, and therefore is not legitimate.<sup>37</sup> Hensley argues instead, that § 703(2) allocates benefits based on Class, not on actual level of impairment, as both the law and the *Guides* instruct.<sup>38</sup> Thus, the statute revision does not further the purpose of workers’ compensation programs.

#### A. Appellee’s Argument

State Fund first argues that the Court should disregard Hensley’s “key factor” argument because they contend Hensley did not raise this issue at trial.<sup>39</sup> State Fund then argues that Hensley’s equal protection argument must fail because workers with a Class 1 impairment and no wage loss, and workers with a Class 2, 3, or 4 impairment and no wage loss, are not similarly situated and thus cannot violate equal protection guarantees. Further, they are not even the classes to scrutinize in this case.<sup>40</sup> State Fund asserts that the classes at issue should be Class 1 workers with wage loss versus Class 1 workers without wage loss because those two classes have the same impairment and therefore wage loss is the only differentiating factor.<sup>41</sup> However, State Fund concedes that even if the classes are defined as Appellants argue, they are still not similarly situated because workers with Class 2, 3, or 4 impairment ratings are significantly more impaired, so their differentiating factor is impairment level, not Class.<sup>42</sup>

State Fund next argues that even if the classes are similarly situated, the State had legitimate interests in treating them differently.<sup>43</sup> State Fund argues that the State has the right to cut costs to increase the viability of the entire workers’ compensation system.<sup>44</sup> This, State Fund argues, is a benefit for workers, as it will allow the most impaired workers to have more access to impairment awards.<sup>45</sup> Finally, State Fund argues that cutting costs actually assists the worker at a reasonable cost to the

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<sup>35</sup> Appellant’s Brief, *supra* note 3, at \*9.

<sup>36</sup> *Id.* at \*3.

<sup>37</sup> Appellant’s Reply Brief, *supra* note 17, at \*10.

<sup>38</sup> *Id.* at \*8.

<sup>39</sup> Appellee’s Brief, *supra* note 3, at \*17–20.

<sup>40</sup> *Id.* at \*21.

<sup>41</sup> Appellee’s Brief, *supra* note 3, at \*23.

<sup>42</sup> Appellee’s Brief, *supra* note 3, at \*28–29.

<sup>43</sup> *Id.* at \*30.

<sup>44</sup> *Id.* at \*31–32.

<sup>45</sup> *Id.* (Under the 2011 revisions to § 703(2), the Montana Legislature increased the maximum number of weeks a worker can get an impairment award from 375 weeks to 400 weeks).

employer.<sup>46</sup> Therefore, there is a rational basis to treat the classes differently, and no equal protection violation.<sup>47</sup>

#### IV. ANALYSIS

The primary issue before the Court is whether § 703(2) violates the equal protection guarantees of the Montana and United States Constitutions and is therefore facially unconstitutional. The Court historically reviews any WCC grant of summary judgment de novo using the same standard used for a motion for summary judgment.<sup>48</sup> The Court has developed a body of precedent on workers' compensation equal protection violations<sup>49</sup> by first finding similarly situated classes that are treated differently, and then analyzing whether the statute at issue passes rational basis review.<sup>50</sup> The Court will likely apply that same test here.

The Court will first likely decide that Class 1 and Class 2 workers without wage loss are similarly situated. Two classes are similarly situated when they are equivalent in every way, except for the one identifiable factor.<sup>51</sup> For workers with a Class 1 or Class 2 impairment rating and no wage loss, the only identifiable difference is Class, not necessarily impairment. In *Reesor v. Mont. State Fund*, the Court found that when qualifying for social security benefits was the only difference between two workers, they were in similarly situated classes.<sup>52</sup> Similarly, the Class distinctions made here could be the only difference between two workers who have the same level of impairment. The Court will likely reject State Fund's argument that wage loss, rather than impairment Class, is the factor that distinguishes the classes because impairment is unrelated to wage loss.<sup>53</sup> Furthermore, workers with actual wage loss are not at issue because all workers with wage loss are eligible for an impairment award.<sup>54</sup>

The crux of the Court's decision will be whether the State had a rational basis for treating Class 1 and Class 2 impaired workers differently. Under a rational basis review, this question depends almost entirely on whether the Court can find a reason other than cost cutting for the statute's 2011 update. The Court has made clear, and State Fund does not contest,<sup>55</sup>

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<sup>46</sup> *Id.* at \*36.

<sup>47</sup> *Id.* at \*17.

<sup>48</sup> *Goble v. Mont. State Fund*, 325 P.3d 1211, 1216 (Mont. 2014).

<sup>49</sup> See generally *Goble*, 325 P.3d 1211; *Caldwell v. MACo Workers' Comp. Trust*, 256 P.3d 923 (Mont. 2011); *Satterlee v. Lumberman's Mut. Cas. Co.*, 222 P.3d 566 (Mont. 2009); *Wilkes v. Mont State Fund*, 177 P.3d 483 (Mont. 2008); *Rausch v. State Comp. Ins. Fund*, 114 P.3d 192 (Mont. 2005); *Reesor v. Mont. State Fund*, 103 P.3d 1019 (Mont. 2004); *Henry v. State Comp. Ins. Fund*, 982 P.2d 456 (Mont. 2009).

<sup>50</sup> *Goble*, 325 P.3d at 1219.

<sup>51</sup> *Id.*

<sup>52</sup> *Reesor*, 103 P.3d at 1022.

<sup>53</sup> MONT. CODE ANN. § 39-71-711(1) (2019).

<sup>54</sup> § 39-71-703(1).

<sup>55</sup> Appellee's Brief, *supra* note 3, at \*32.

that the State does not have a legitimate interest to eliminate workers' compensation benefits if cost containment is its only reason for doing so.<sup>56</sup> State Fund contends that together with cost cutting, the government had an interest in increasing the viability of Montana's workers' compensation program and assisting the worker at a reasonable cost to the employer.<sup>57</sup>

The Court addressed these interests in *Caldwell v. MACo Workers' Comp. Trust*. The *Caldwell* Court held that if the State disguises its cost cutting intention to improve the viability of the system, this is not a legitimate interest on its own.<sup>58</sup> The Court also held that eliminating benefits for a class of workers does not further the goal of assisting a worker at a reasonable cost to the employer, and that a reasonable cost does not always mean a lower cost.<sup>59</sup> Here, the Court will likely find that the State eliminated benefits for workers with Class 1 impairment ratings to cut costs; the assertion that § 703(2) may increase the viability of the system does not rationalize its dissimilar treatment of the similarly situated classes. If the Court allowed the State to eliminate workers' compensation benefits whenever it wanted to cut costs, the State would always be able to evade equal protection doctrine by doing so.

Just like in *Caldwell*, the Court is unlikely to find a rational relationship between eliminating awards to workers with Class 1 impairments and assisting impaired workers, the purpose of workers compensation programs.<sup>60</sup> When the State revised § 703(2), the National Council on Compensation Insurance analyzed its potential effect on workers.<sup>61</sup> It found that 1,600 impaired workers with a Class 1 impairment and no wage loss will lose an impairment award, while increasing the 375 week impairment award limit to 400 weeks for the 1,400 workers with a Class 2 impairment or higher.<sup>62</sup> Based on its prior decisions, the Court will likely see the revisions to § 703(2) as cost-cutting measures with little to no rational relationship to providing impaired workers with impairment awards for injuries suffered at their workplace. Because the Court has decided similar issues in the recent past, it is reasonable to assume that it will decide that § 703(2) does not pass rational basis scrutiny.

## V. CONCLUSION

*Hensley v. Mont. State Fund* provides an opportunity for the Court to correct the State's equal protection violation found in § 703(2). If the Court decides there is no rational basis for treating Class 1 and Class 2

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<sup>56</sup> *Caldwell v. MACo Workers' Comp. Trust*, 256 P.3d 923, 928 (Mont. 2011).

<sup>57</sup> Appellee's Brief, *supra* note 3, at \*30, 36.

<sup>58</sup> *Caldwell*, 256 P.3d at 928.

<sup>59</sup> *Id.* at 929.

<sup>60</sup> Brief of Amicus Curiae Workers Injury Law & Advocacy Group at \*2.

<sup>61</sup> Appellee's Brief, *supra* note 3, at \*34.

<sup>62</sup> *Id.* at \*35.

workers differently, then the Court should rule that § 703(2) is facially unconstitutional. However, the Court seems hesitant to overturn the WCC in workers' compensation cases, affirming the lower court's decision in six of the last seven similar equal protection appeals.<sup>63</sup> Therefore, since the WCC held that § 703(2) does not violate equal protection law, the Court may choose to honor its precedent and affirm the lower court's ruling.

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<sup>63</sup> See *Goble*, 325 P.3d at 1215 (affirming the WCC decision); *Caldwell*, 256 P.3d at 924 (affirming the WCC decision); *Satterlee*, 222 P.3d at 577 (Mont. 2009) (affirming the WCC decision); *Wilkes*, 177 P.3d at 484 (affirming the WCC decision); *Rausch*, 114 P.3d at 193 (affirming the WCC decision); *But see Reesor*, 103 P.3d at 1020 (reversing the WCC decision).