

November 12 2013

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 13-0286

DERRICK GOBLE and
LYNN GERBER,

Petitioners and Appellants,

vs.

MONTANA STATE FUND,

Respondent and Appellee.

On Appeal from the Workers' Compensation
Court of the State of Montana
Honorable James Jeremiah Shea

ANSWER BRIEF OF APPELLEE

Attorneys for Appellee

Thomas E. Martello
Daniel B. McGregor
Special Assistants Attorney General
Montana State Fund
P.O. Box 4759
Helena, Montana 59604-4759
Phone: (406) 495-5267
Phone: (406) 495-5276
Fax: (406) 495-5023
tmartello@mt.gov
damcgregor@mt.gov

Attorneys for Appellants

Thomas C. Bulman
Eric Rasmusson
Bulman Law Associates, PLLC
P.O. Box 8202
Missoula, MT 59807-8202
Phone: (406) 721-7744
Fax: (406) 728-9362
thomas@bulmanlaw.com
eric@bulmanlaw.com

IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 13-0286

DERRICK GOBLE and
LYNN GERBER,

Petitioners and Appellants,

vs.

MONTANA STATE FUND,

Respondent and Appellee.

On Appeal from the Workers' Compensation
Court of the State of Montana
Honorable James Jeremiah Shea

ANSWER BRIEF OF APPELLEE

Attorneys for Appellee

Thomas E. Martello
Daniel B. McGregor
Special Assistants Attorney General
Montana State Fund
P.O. Box 4759
Helena, Montana 59604-4759
Phone: (406) 495-5267
Phone: (406) 495-5276
Fax: (406) 495-5023
tmartello@mt.gov
damcgregor@mt.gov

Attorneys for Appellants

Thomas C. Bulman
Eric Rasmusson
Bulman Law Associates, PLLC
P.O. Box 8202
Missoula, MT 59807-8202
Phone: (406) 721-7744
Fax: (406) 728-9362
thomas@bulmanlaw.com
eric@bulmanlaw.com

TABLE OF CONTENTS

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW.....	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
DERRICK GOBLE	4
LYNN GERBER	7
STANDARD OF REVIEW	9
APPLICABLE LAW	9
SUMMARY OF THE ARGUMENT	10
ARGUMENT	11
A. STATUTORY CONSTRUCTION CHALLENGE	11
B. CONSTITUTIONAL CHALLENGE	18
1. Presumption of Constitutionality	18
2. Equal Protection	20
3. Equal Protection Analysis	21
Similarity of Classes	23
4. Substantive Due Process	26

5. Procedural Due Process	31
6. Montana Constitution Article II, §22	34
 CONCLUSION	 35
 CERTIFICATE OF COMPLIANCE	 36
 CERTIFICATE OF MAILING	 36

TABLE OF AUTHORITIES

Cases

<i>Arneson v. State</i> (1993), 262 Mont. 269, 273, 864 P.2d 1245, 1248)	21
<i>Buckman v. Montana Deaconess Hospital</i> (1986) 224 Mont. 318, 321, 730 P.2d 380, 382	9
<i>Burritt v. City of Butte</i> , (1973) 161 Mont. 530, 508 P.2d 563.....	13
<i>Bustell v. AIG Claims Serv., Inc.</i> , 2004 MT 362, ¶ 11, 324 Mont. 478, 480, 105 P.3d 286, 289	27
<i>Collier v. Barnhart</i> , 473 F.3d 444, 449 (2007).....	28
<i>Cottrill v. Cottrill Sodding Service</i> (1987) 229 Mont. 40, 42, 744 P.2d 895, 897	22
<i>Davis v. Union Pac. R. R.</i> (1997), 282 Mont. 233, 240, 937 P.2d 27, 31.....	18
<i>Donovan v. Graff</i> , 248 Mont. 21, 25, 808 P.2d 491, 494 (1991).....	32
<i>Dunphy v. Anaconda Co.</i> , (1968) 151 Mont. 76, 438 P.2d 660.....	13
<i>Federal Communications Comm. v. Beach Communications, Inc.</i> , (1993) 508 U.S. 307, 314, 113 S. Ct. 2096, 124 L.Ed. 2d 211-221	21, 30
<i>Germann v. Stephens</i> , 2006 MT 130, 332 Mont. 303, 137 P.3d 545	31
<i>Grooms v. Ponderosa Inn</i> , (1997), 283 Mont. 459, 467, 942 P.2d 699, 703	19
<i>Gulbrandson v. Carey</i> (1995), 272 Mont. 494, 901 P.2d 573, 579	21
<i>Hammill v. Young</i> , (1975) 168 Mont. 81, 540 P.2d 971	14
<i>Heisler v. Hines Motor Co.</i> , (1997) 282 Mont. 270, 279, 937 P.2d 45, 50	
	21, 22, 23

<i>Henry v. State Compensation Ins. Fund</i> , (1999), 294 Mont. 449, 982 P.2d 456	22, 23,27
<i>Ingraham v. Wright</i> , (1997) 430 U.S. 651, 664	34
<i>ISC Distributors, Inc. v. Trevor</i> , 273 Mont. 185, 191, 903 P.2d 170, 173, (1995)	31
<i>Johansen v. State, Dept. of Natural Resources</i> , 1998 MT 51, ¶ 24, 288 Mont. 39, ¶ 24, 955 P.2d 653	32
<i>Kadrmus v. Dickenson Public Schools</i> , 487 U.S. 450, 463 (1979)	30
<i>Keller v. Smith</i> , (1978) 170 Mont. 399, 553 P.2d 1002	13
<i>Lewis & Clark County v. State</i> , (1986) 224 Mont. 223, 728 P.2d 1348.....	13
<i>Matter of S.L.M.</i> , (1997) 287 Mont. 23, 951 P.2d 1365, 1371	23
<i>McCuin v. Montana State Fund</i> , 2006 MTWCC 4	23, 26, 29
<i>Meech v Hillhaven West</i> , (1989) 238 Mont. 21, 776 P.2d 488.....	19
<i>Montana Media, Inc. v. Flathead County</i> , 2003 MT 23, 314 Mont. 121, 63 P. 3d 1129	31
<i>Montanans for Justice v. State ex rel. McGrath</i> , 2006 MT 277, 334 Mont. 237, 146 P.3d 759	27
<i>Newville v. State, Dept. of Family Services</i> , 267 Mont. 237, 249, 883 P.2d 793, 800 (1994	27
<i>Nordlinger v. Hahn</i> , 505 U.S. 1, 15, 120 L. Ed.2d 1, 112 S. Ct. 2326 (1992) ..	30
<i>Powell v. State Compensation Ins. Fund</i> , (2000) 302 Mont. 518, 15 P.3d 877	18, 19, 21, 22, 22, 24, 25
<i>Rieckhoff v. Woodhull</i> , 106 Mont. 22, 30, 75 P.2d 56, 58 (1937)	32
<i>Satterlee v Lumberman's Mutual Casualty Co.</i> , 209 MT 368, 353 Mont. 265, 222 P.3d 566	19, 28

<i>Shea v. North-Butte Mining Co.</i> (1919), 55 Mont. 522, 179 P. 499	19
<i>State ex rel. Cashmore v. Anderson</i> , (1972) 500 P.2d 921, 160 Mont. 175	13
<i>State ex rel. Hardy v. State Board of Equalization</i> , 133 Mont. 43, 46, 319 P.2d 1061, 1063 (1958).....	34
<i>State ex rel. School District No. 8 v. Lensman</i> , (1939) 108 Mont 118, 88 P.2d 67	13
<i>State v. Renee</i> , (1999) 294 Mont. 597, 983 P.2d 893 (1999).....	24
<i>Stratemeyer v. Lincoln County</i> (1993), 259 Mont. 147, 151, 855 P.2d 506, 509	18, 22, 28
<i>T & W Chevrolet v. Darvial</i> (1982), 196 Mont. 287, 641 P.2d 1368, 1370	19
<i>Vance v. Bradley</i> , (1979) 440 U.S. 93, 97, 99 S. Ct. 939, 59 L. Ed. 2d 171	21
<i>W.D. Construction, Inc. v. Board of County Commissioners</i> , (1985) 218 Mont. 348, 707 P.2d 1111	31
<i>Wiard v. Liberty Northwest Ins. Corp.</i> , 2003 MT 295, ¶¶ 30-32, 318 Mont. 132, 140-141, 79 P.3d 281, 286-287	31, 32, 33,
<i>Wimberly v. State Compensation Insurance Fund</i> , 2006 MTWCC 41	15, 26.
<i>Zempel v. Uninsured Employers' Fund</i> (1997) 282 Mont 424, 430, 938 P.2d 658, 662	22

Statutes

§ 39-71-105, MCA	33, 34
§ 39-71-116, MCA	12
§ 39-71-703, MCA	4, 7, 11, 12, 14, 15, 25, 34, 35
§ 39-71-710, MCA	28
§ 39-71-740, MCA	12, 15, 34, 35

§39-71-741, MCA	15, 32
§ 39-71-744, MCA	1, 2, 4, 7, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20,
	26, 29, 31, 34, 35

Other Authorities

J. McGuinness and L. Parlagreco, <i>The Reemergence of Substantive Due Process As A Constitutional Tort Theory, Proof, and Damages</i> (199), 24 New Eng. L.Rev. 1129, 1133	xlii
Mont. Const., art. § 22.....	11
U.S. Const. art II, § 4.....	20
Webster's Dictionary, 3d Ed.	14

Treatises

R. Rotunda & J. Nowak, Treatise on Constitutional Law: Equal Protection, § 18.1 at 5-6 (2d ed. 1992).....	34
---	----

APPELLEE'S ANSWER BRIEF

COMES NOW the Appellee, Montana State Fund, by and through its counsel of record, and submits the following Answer Brief for the Court's consideration.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

State Fund believes Appellants' Issue No. 1 misstates both the applicable facts and the challenged law in that it questions whether § 39-71-744, MCA "requires forfeiture of all benefits by incarcerated workers' compensation claimants." The pertinent language of § 39-71-744, MCA merely states that "a claimant is not eligible for disability or rehabilitation compensation benefits while the claimant is incarcerated." Accordingly, State Fund rephrases this issue as follows:

1. Whether the Workers' Compensation Court correctly determined that § 39-71-744, MCA, rendered incarcerated workers' compensation claimants ineligible for disability or rehabilitation compensation benefits?

With respect to Appellants' Issue No. 2, the State Fund believes this Court lacks jurisdiction to reverse prior decisions of the Workers' Compensation Court that have never been appealed to it. Moreover, there is no need for this Court to take such express action because its ruling in this case, regardless of the result,

will become the controlling precedent. Accordingly, State Fund suggests that this issue simply be deleted.

State Fund has no objection to Appellant's final four issues for review.

STATEMENT OF THE CASE

On November 4, 2010 Derrick Goble (hereinafter "Goble") filed a petition before the Montana Workers' Compensation Court with respect to his injury of July 8, 2004. That filing was given cause number 2010-2615. On March 9, 2012 Lynn Gerber (hereinafter "Gerber") filed a petition before the Montana Workers' Compensation Court with respect to his injury of August 21, 2008. That action was given cause number 2012-2904. Gerber's petition challenged the application of § 39-71-744, MCA by the Montana State Fund (hereinafter "State Fund"). In that same filing, Gerber sought certification as a class action lawsuit. On March 15, 2012 Gerber sought to join Goble's earlier petition with his. The Worker's Compensation Court subsequently denied both the motion for joinder and class action. Both the Gerber and Goble claims went forward individually on the basis that that the State Fund's action in denying ongoing permanent partial disability benefits to incarcerated claimants was not authorized by the statute; was constitutionally violative; and was contrary to public policy. Resolution of these issues was addressed via stipulated facts, briefed cross-motions for summary judgment and oral argument.

On March 28, 2013 the Court granted the State Fund's motions for summary judgment and denied both Gerber and Goble's motions for summary judgment. In a letter to State Fund counsel dated April 4, 2013 Goble and Gerber stated their intent to file a joint notice of appeal unless objected to by State Fund. State Fund had no objection and on April 14, 2013 the Petitioner jointly appealed both cases to this Court.

STATEMENT OF THE FACTS

The parties stipulated to the facts to be considered by the Workers' Compensation Court during its review of the reciprocal motions for summary judgment filed before it. Judge Shea restated these stipulated facts in his "Order Denying Petitioner's Motion for Summary Judgment and Granting Respondent's Motion for Summary Judgment" that was filed in both cases.

To the extent that the Appellants' Statement of Facts differs from either the stipulated facts filed with the Workers' Compensation Court or the restatement of stipulated facts entered by Judge Shea, such representations should be disregarded by the Court as being outside the stipulation of the parties and/or the unchallenged findings of the Workers' Compensation Court.

For the convenience of the Court, the statement of stipulated facts (with citations to exhibits attached at the Workers' Compensation Court level deleted) reads as follows:

GOBLE:

1. On July 8, 2004, Petitioner injured his right shoulder while **in** the course and scope of his employment with ECC Controls, Inc. in Missoula County, Montana.
2. At the time of the injury, Petitioner's employer was enrolled under Compensation Plan 3 of the Workers' Compensation Act and its **insurer** was the Montana State Fund.
3. The Montana State Fund accepted liability for this claim and has paid indemnity and medical benefits.
4. By letter dated June 22, 2006 the Montana State Fund notified Erin Goble, Petitioner's wife, that it was going to terminate payment of indemnity benefits as of May 29, 2006 because of Petitioner's incarceration pursuant to Mont. Code Ann. § 39-71-744.
5. By letter dated March 25, 2009 the Montana State Fund notified Petitioner that he would have been entitled to 120 weeks of PPD benefits pursuant to Mont. Code Ann § 39-71-703 at the rate of \$252.00 per week for a lump sum of \$30,240.00 but he was not entitled to receive these benefits during incarceration pursuant to Mont. Code Ann. § 39-71-744.
6. On November 6, 2006, in *State v. Goble*, Cause No. DC-06-294, Montana Fourth Judicial District Court, Missoula County, Petitioner pled guilty to Count I – criminal possession of dangerous drugs (a felony); Count II – criminal possession of dangerous drugs (a felony); Count III – possession of drug paraphernalia (a misdemeanor); and Count V – aggravated burglary (a felony). Count IV – escape (a felony) was dismissed. On December 18, 2006, the Hon. Ed McLean imposed sentence whereupon Petitioner was incarcerated in excess of thirty (30) days with all counts to run concurrently with each other but consecutively to Cause Nos. DC-04-520 and DC-06-103 as proved below: Petitioner was also charged with the following financial assessments, fees, and fines:
 - A probationary supervision fee to be determined by his Probation Officer;
 - A fee of \$75.00 to be paid to the County Attorney Surcharge Fund;

- A fee of \$200.00 to be paid to the victim-witness advocate program;
- A \$50.00 fee to the Department of Corrections for preparation of the Pre-Sentence Investigation Report;
- A fee of \$100.00 for costs of prosecution;
- A fine to the community service program in the amount of \$85.00;
- A Court technology fee in the amount of \$40.00; and
- A chemical dependency and mental health evaluation at his own expense.

7. On November 6, 2006, in *State v. Goble*, Cause No. DC-06-103, Montana Fourth Judicial District Court, Missoula County, Petitioner pled guilty to Count I – theft (a felony), Count II – theft (a misdemeanor), Count III -criminal possession of dangerous drugs (a felony), County IV – criminal possession of dangerous drugs (a felony), and Count V – driving while license suspended or revoked (a misdemeanor). On December 18, 2006, the Hon. Ed McLean imposed sentence whereupon Petitioner was incarcerated for five (5) years for each of Counts I, III, and IV. On each of Counts II and V, Petitioner was committed to the Missoula County Detention facility for a period of six (6) months.

Petitioner was also charged the following financial assessments, fees, and fines:

- A probationary supervision fee to be determined by his Probation Officer;
- A fee of \$120.00 to the Restitution Unit;
- A fee of \$90.00 to the County Attorney Surcharge Fund;
- A fee of \$250.00 to the victim-witness advocate program;
- A \$50.00 fee to the Department of Corrections for preparation of the Pre-Sentence Investigation Report;
- A fee of \$100.00 for costs of prosecution;
- A fine to the community service program in the amount of \$85.00;
- A Court technology fee in the amount of \$50.00; and
- A chemical dependency and mental health evaluation at his own expense.

8. On December 18, 2006, in *State v. Goble*, Cause No. DC-04-520, Montana Fourth Judicial District Court, Missoula County, Petitioner admitted that he had violated the terms and conditions of his probation for Count I – burglary (a felony), Count II – theft (a misdemeanor), and Count III – criminal possession of dangerous drugs (a felony). Count II had expired. On December 18, 2006, the Hon. Ed McLean revoked Petitioner's prior deferred sentence and sentenced Petitioner to five (5) years of incarceration, with Cause No. DC-06-294 (above) to run consecutively to this cause. Petitioner was also charged the following financial assessments, fees, and fines:

- A restitution fee of \$113.00;
- A fee of \$45.00 to the County Attorney Surcharge Fund;
- A fee of \$60.00 to the victim-witness advocate program;
- A fee of \$813.00 to reimburse Missoula County for his court-appointed attorney;
- A fee of \$100.00 for costs of prosecution;
- A fine of \$600.00;
- A fine to the community service program in the amount of \$85.00;
- A Court technology fee in the amount of \$30.00;
- A probationary supervision fee to be determined by the Probation Officer; and
- A chemical dependency evaluation and mental health evaluation at his own expense.

9. On July 24, 2007, Petitioner pled guilty to the offense of being a felon in possession of a stolen firearm in *United States of America v. Derrick Goble*, Cause No. CR 07-31-M-DWM, United State District Court for the District of Montana, Missoula Division. On November 21, 2007, the Hon. Donald W. Molloy sentenced Petitioner to incarceration for eighty-four (84) months and charged him an assessment fee of \$100.00. His federal sentence was to run consecutively with the sentence Petitioner received in DC-04-520 and concurrently with the sentences he received in DC-06-103 and DC-06-294, Montana Fourth Judicial Court, Missoula County.

10. Petitioner was not advised by either the Federal or State District Court that his workers' compensation indemnity benefits would impacted by Mont. Code Ann. § 39-71-744.

11. Petitioner owes back due child support.

GERBER:

1. On August 21, 2008 Petitioner injured his right shoulder while in the course and scope of his employment with Vanns, Inc. in Missoula County, Montana.

2. At the time of the injury, Petitioner's employer was enrolled under Compensation Plan 3 of the Workers' Compensation Act and its insurer is the Montana State Fund.

3. The Montana State Fund accepted liability for this claim and has paid indemnity and medical benefits. Liability for the claim has never been in dispute.

4. On April 9, 2010, Respondent notified Petitioner that he was entitled to an impairment award based on a 3% impairment rating of 11.25 weeks pursuant to Mont. Code Ann. §39-71-703.

5. By letter dated May 21, 2010 the Montana State Fund notified Petitioner that he was entitled to an additional 48.75 weeks of PPD benefit due to the other factors enumerated in Mont. Code Ann. §39-71-703.

6. By letter dated January 12, 2011, the Montana State Fund notified Petitioner that permanent partial disability (PPD) benefits would be terminated pursuant to Mont. Code Ann. §39-71-744 as of December 28, 2010 because of Petitioner's December 8, 2010 incarceration and the Montana State Fund would take credit for Petitioner's biweekly PPD benefits payable through April 17, 2010 (sic).

7. As a result of application of Mont. Code Ann. §39-71-744 to Petitioner's Mont. Code Ann. §39-71-703 benefits, the Montana State Fund did not pay to Petitioner his final 15.75 weeks of PPD benefits which amounted to \$4,381.02.

8. On September 22, 2010 Petitioner pled guilty of the offense of theft by embezzlement in *State of Montana v. Lynn Dean Gerber*, Cause No. DC-32-2009-480-IN, Montana Fourth Judicial District Court, Missoula County. On December 8, 2010, Petitioner was sentenced with response to this offense which included financial assessments, fees, and fines including:

- to pay a restitution of \$8,000.00;
- to pay a fee of \$500.00 for the Public Defender;
- to pay a fee of \$20.00 to go to the county Attorney Surcharge Fund;
- to pay prosecution costs in the amount of \$100.00;
- to pay a Surcharge IT – Court Information Technology fee in the amount of \$10.00; and
- to pay \$50.00 to the victim-witness surcharge fund and administration fee.

9. On September 22, 2010, Petitioner pled guilty to two felony offenses in *State of Montana v. Lynn Dean Gerber*, Cause No. DC-32-2009-80-IN, Montana Fourth Judicial District Court, Missoula County. On December 8, 2010, Petitioner was sentenced by the Hon. John Warner in the above entitled cause to imprisonment for 20 years with 10 years suspended plus financial assessments, fees, and fines including:

- to pay restitution of \$250.00;
- to pay a fee of \$500.00 for the Public Defender;
- to pay a fee of \$40.00 to go to the County Attorney Surcharge Fund;
- to pay prosecution costs in the amount of \$100.00;
- to enter and successfully complete sexual offender treatment with an MSOTA member clinical therapist at his own expense;
- to undergo annual HIV testing for the next five (5) years, at his own expense;
- to obtain a psychosexual evaluation at his own expense and to follow its recommendations;
- to pay a Surcharge IT – Court Information Technology fee in the amount of \$20.00;
- to pay a fee of \$98.00 to the victim-witness Surcharge Fund; and

- to pay a fee of \$2.00 to the victim witness Administration Fee.
10. Transcripts of the aforementioned sentencing hearing and Judgments with response to the above-referenced sentences Petitioner received in State District Court do not contain any notification to Petitioner that his workers' compensation indemnity benefits would be adversely affected by imposition of said sentences.

It should be noted that at the oral argument held on November 27, 2012 the Workers' Compensation Court took judicial notice of the "eligibility" and "entitlement" definitions from Black's free online dictionary. Appellants, however, appear to contend that the representations of counsel, made during the above oral argument, constitute additional "facts" for purposes of review. The representations of counsel made during oral argument are not "facts" relevant to this appellate review and should be disregarded as such by this Court.

STANDARD OF REVIEW

Goble and Gerber correctly identified the applicable standard of review on page 14 of Appellants' Brief.

APPLICABLE LAW

As noted previously, the injury sustained by Goble occurred on July 8, 2004 whereas the injury sustained by Gerber took place on August 21, 2008. The date of injury controls which version of the Workers' Compensation Act (WCA) is applicable to a claim. *Buckman v. Montana Deaconess Hospital* (1986) 224 Mont. 318, 321, 730 P.2d 380, 382. In light of the different dates of

injury, the 2003 version of the WCA applies to Goble's case while the 2007 version of the WCA applies to Gerber's. Fortunately, the language of § 39-71-744(1), MCA (the statute whose interpretation and constitutionality is being challenged by the Appellants) is identical under either version of the WCA. Therefore, for the sake of consistency, all citations will be to the 2007 version of the WCA unless otherwise noted in the body of this brief.

SUMMARY OF THE ARGUMENT

The Workers' Compensation Court's interpretation of § 39-71-744(1), MCA was correct and in accordance with past precedent. All relevant rules of statutory construction were considered by the Court.

Appellants' equal protection challenge must fail because the Appellants cannot establish that any two similarly situated classes of injured workers exist with respect to the constitutional challenge pursued in this case. The Appellants' failure to show that the challenged statutory provision resulted in disparate treatment of two similarly situated classes of individuals is fatal to their equal protection argument.

Substantive and procedural due process challenges similarly fail. Appellants' loss of wages is not as a result of the operation of § 39-71-744, MCA but simply a consequence of their actions in committing crimes which resulted in incarceration removing them from the labor market. Additionally the

legislature's power to fix the manner, method and amount of workers' compensation benefits in enacting § 39-71-744, MCA results in a statute that is reasonable and meets the mandates of rational basis.

Appellants' allegations regarding excessive fines, Article II, § 22 of the Montana Constitution, has no application in the setting of workers' compensation. The basis for this type of challenge lies only in the context of a criminal proceeding. Nonetheless, there has been no "fine" imposed but simply a reasonable determination by the legislature to fix the manner and method of payment of wage loss benefits during incarceration.

ARGUMENT

A. STATUTORY CONSTRUCTION

Goble and Gerber challenge the Workers' Compensation Court's conclusion that the plain meaning of § 39-71-744, MCA is that incarcerateds are not eligible for disability or rehabilitation benefits and the time limits on the payment of such benefits are not extended by a worker's incarceration. In contesting this conclusion Appellants' argue that two statutory provisions, § 39-71-703(1) and § 39-71-744(1), MCA, are applicable to the proper resolution of its statutory interpretation argument. State Fund agrees that these two sections are part of the consideration, but also believes that three additional statutory

provisions play a part as well. Specifically the State Fund asserts that the pertinent portions of the relevant statutes are as follows:

39-71-116(24), MCA: "Permanent partial disability" means a physical condition in which a worker, after reaching maximum medical healing:

- (a) has a permanent impairment established by objective medical findings;
- (b) is able to work in some capacity but the permanent impairment impairs the workers ability to work; and
- (c) has an actual wage loss as a result of the injury.¹

39-71-703(1), MCA: If an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award if that worker:

- (a) has an actual wage loss as a result of the injury; and
- (b) has a permanent impairment rating that: . . .²

39-71-703(7), MCA: An undisputed impairment may be paid biweekly or in a lump sum at the discretion of the worker. Lump sums paid for impairments are not subject to the requirements of 39-71-741, except that lump-sum conversions for benefits not accrued may be reduced to present value at the rate established by the department pursuant to 39-71-741(3).³

39-71-740, MCA: All payments of compensation as provided in this chapter shall be made at the end of each 2-week period, except as otherwise provided herein.⁴

39-71-744(1), MCA: Except as provided in subsection (2), a claimant is not eligible for disability or rehabilitation compensation benefits while the claimant is incarcerated for a period exceeding 30 days in a correctional institution or jail as the result of conviction of a felony or a misdemeanor. The insurer remains liable for medical benefits. A time limit on benefits

¹ 2003 version of the WCA contains identical language, though the provision is found at subsection 39-71-116(23) of the Act.

² The 2003 and 2007 versions of this subsection are identical.

³ This subsection came into effect in 2005 and is, therefore, only applicable to the claim of Appellant Gerber.

⁴ The 2003 and 2007 versions of this statute are identical.

otherwise provided in this chapter is not extended due to a period of incarceration.⁵

The initial step in determining whether State Fund properly applied the legislative mandate of § 39-71-744(1), MCA requires application of the appropriate rules of statutory construction. The goal of all statutory construction is to ascertain and implement legislative intent. See Burritt v. City of Butte, (1973) 161 Mont. 530, 508 P.2d 563 and State ex rel. School District No. 8 v. Lensman, (1939) 108 Mont 118, 88 P.2d 67. Search for that intent begins with the language of the statute itself and, if such language is clear, ends there. Lewis & Clark County v. State, (1986) 224 Mont. 223, 728 P.2d 1348; W.D. Construction, Inc. v. Board of County Commissioners, (1985) 218 Mont. 348, 707 P.2d 1111. In determining legislative intent, resort must first be made to the "plain meaning" of the words used. State ex rel. Cashmore v. Anderson, (1972) 500 P.2d 921, 160 Mont. 175. In other words, where the language of a statute is plain, unambiguous, direct and certain the statute speaks for itself and there is nothing left for the courts to construe. Keller v. Smith, (1978) 170 Mont. 399, 553 P.2d 1002; Dunphy v. Anaconda Co., (1968) 151 Mont. 76, 438 P.2d 660 and cases cited therein. In such a case it is simply the duty of the courts to declare what, in terms or substance, is contained in the statute and to neither insert what has been omitted

⁵ The 2003 and 2007 versions of this subsection are identical.

nor to omit what has been inserted. *Hammill v. Young*, (1975) 168 Mont. 81, 540 P.2d 971.

Utilizing the above rules, it is clear that the plain meaning of the pertinent language supports the ruling of the Workers' Compensation Court. In the context of the instant case, the previously quoted statutory provisions set forth both the time line for determining the claimants' initial "entitlement" to permanent partial disability and the time line for their continuing "eligibility" for such benefits. The plain meaning of these two words can be found in the Third Edition of Webster's II Dictionary. In the context of the instant case, "entitle" means to "furnish with a right" whereas "eligible" is defined as "qualified." The subtle difference between these two words is highlighted by the different times where they come into play in the claim process.

The time sensitive nature of a claimant's "entitlement" to 703 benefits is clear from the plain meaning of the definition of permanent partial disability (after MMI) as well as the language of § 39-71-703(1), MCA (when no longer entitled to temporary total or permanent total disability). Thus, at this junction during the process of a claim (typically after satisfying the requirements of § 39-71-609, MCA) a determination must be made whether the claimant is "entitled" to permanent partial disability (PPD) benefits. In the instant case, Goble and Gerber met all the criteria set forth in § 39-71-703(1) for such benefits and were deemed

to be “entitled” to PPD by the State Fund. These benefits (other than an impairment award after 2005) are not subject to being paid out in a lump sum merely at the request of the claimant. *See* § 39-71-740, MCA. Rather, unless the PPD benefits are paid out as an advance (as a result of the pre-MMI agreement of the parties) or paid as part of a mutually agreed post-MMI settlement, all non-impairment 703 benefits would be paid out on a bi-weekly basis. *See* § 39-71-741, MCA. Similarly, after 2005, an impairment award would be paid out on a bi-weekly basis absent an election by a claimant that it be paid in a lump sum. *See* § 39-71-703(7), MCA.

In light of the above, the expected method of payment for the benefits at issue would be bi-weekly payments, however, per the operation of § 39-71-744(1), MCA neither Goble nor Gerber were “eligible” for a portion of the benefits they were previously deemed entitled to as a result of their extended incarceration. Moreover, in addition to declaring an incarcerated to be ineligible for “disability or rehabilitation benefits” this statute specifically states that “a time limit on benefits otherwise provided in this chapter is not extended due to a period of incarceration.” The plain meaning of this statutory provision clearly precludes the Appellants’ eligibility for ongoing permanent partial “disability” benefits when incarcerated in excess of 30 days. This position is consistent with the Workers’ Compensation Court’s ruling in *Wimberly v. State Compensation*

Insurance Fund, 2006 MTWCC 41 wherein Judge McCarter stated: “Thus, claimant’s “vested right” to impairment benefits was a qualified one and limited by section 39-71-744, MCA, which rendered him ineligible for impairment benefits during his incarceration.” Judge Shea arrived at the same ultimate conclusion with respect to the claims of Goble and Gerber.

Appellants’ further argue against Judge Shea’s reasonable “plain meaning” interpretation of § 39-71-744(1), MCA by suggesting that the phrase “a time limit on benefits otherwise provided in this chapter” refers exclusively to the filing and reporting deadlines set forth under part 6 of the WCA. Such an interpretation is unwarranted because that portion § 39-71-744(1), MCA precluding an incarcerated’s eligibility for disability or rehabilitation benefits is just as much a provision of “this chapter” as the limited provisions of part 6 argued by the Appellants. Clearly, the Legislature’s use of the word “chapter” implies all of Chapter 71, but in the context of this litigation Judge Shea properly concluded that the applicable portion of Chapter 71 being referred to was the language contained within § 39-71-744(1), MCA itself. Moreover, as noted by Judge Shea, the provision from “this chapter” which he deemed applicable in his interpretation of the statute was the bi-weekly payment of “disability and rehabilitation” benefits (respectively provided for under parts 7

and 10 of chapter 71) addressed in the very subsection where “time limit on benefits” was imposed.

Goble and Gerber then challenge Judge Shea’s ruling on the basis that it endorses the improper “confiscation” or “forfeiture” of their disability benefits. Appellants’ efforts to demonize either the statutory language of § 39-71-744(1), MCA or Judge Shea’s decision with such inflammatory terms does nothing to advance their case – particularly when the period of benefit eligibility complained of arose solely as a result of their incarceration for their own criminal behavior.

Appellants then attack Judge Shea’s discussion of “actual wage loss” – ostensibly because they “are unsure of how this pertains to this case.” (Appellants’ Brief, page 21). Appellants’ then go on assail Judge Shea’s discussion of actual wage loss on technical grounds, rather than in the context in which they were rendered – specifically, as a counter to Appellants’ own public policy arguments. In a nutshell, Judge Shea concluded that public policy would support the legislative mandate that Goble and Gerber were no longer eligible for disability or rehabilitation benefits while in extended incarceration – simply because any ongoing “actual wage loss” they suffered was not as a result of their work injury, but rather as a result of their removal from the workforce due to their criminal conviction and resultant incarceration. Appellants’ technical

“wage loss” arguments (Appellants’ Brief, pages 21 – 25) all go to their “entitlement” to the challenged disability benefits – not to their ongoing “eligibility” to receive such benefits after more than 30 days of incarceration.

In light of the above discussion, it is clear that the Workers’ Compensation Court properly applied the plain meaning of the statutory language of § 39-71-744(1), MCA relative to the resolution of this issue.

B. CONSTITUTIONAL CHALLENGE

1. Presumption of Constitutionality

All legislative enactments are presumed constitutional and every intendment in its favor will be presumed, unless its unconstitutionality appears beyond a reasonable doubt. The question of constitutionality is not whether it is possible to condemn, but whether it is possible to uphold the legislative action which will not be declared invalid unless it conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt. *Powell v. State Compensation Ins. Fund*, (2000) 302 Mont. 518, 15 P.3d 877, ¶ 13 (citing *Stratemeyer v. Lincoln County* (1993) 259 Mont. 147, 150, 855 P.2d 506, 508-09, *cert. denied*, 510 U.S. 1011, 114 S. Ct. 600, 126 L. Ed. 2d 566). Every possible presumption must be indulged in favor of the constitutionality of a legislative act. *Powell*, ¶ 13 (citing *Davis v. Union Pac. R. R.* (1997) 282 Mont. 233, 240, 937 P.2d 27, 31). The party challenging the constitutionality of a

statute bears the burden of proving the statute unconstitutional beyond a reasonable doubt. Powell, ¶ 13 (citing Grooms v. Ponderosa Inn (1997) 283 Mont. 459, 467, 942 P.2d 699, 703).

This Court has previously ruled that constitutional challenges to Montana's WCA face a particularly heavy burden. One of the original Montana workers' compensation cases dealing with constitutional issues was Shea v. North-Butte Mining Co. (1919) 55 Mont. 522, 179 P. 499. The reasoning and approach of the Shea Court upon constitutional questions was later approved by this Court in Meech v. Hillhaven West, (1989) 238 Mont. 21, 776 P.2d 488. Shea provides some of the most direct guidance in considering constitutional challenges to workers' compensation statutes:

The causes, from a historical point of view, impelling the enactment of Workmen's Compensation Laws, and the object to be served by them, have heretofore been stated somewhat at length by this court

To every thinking person the object sought commends itself not only as wise from an economic point of view, but also as eminently just and humane . . . Under these circumstances, the rule that an Act of the legislature will not be declared invalid because it is repugnant to some provision of the Constitution, unless its invalidity is made to appear beyond a reasonable doubt, applies with peculiar force.

Shea, 179 P. at 501. See also T & W Chevrolet v. Darvial (1982) 196 Mont. 287, 641 P.2d 1368, 1370.

Despite this onerous burden, Appellants seek to have the Court overrule Judge Shea and declare § 39-71-744(1), MCA unconstitutional for violating one or more of a number of constitutional rights guaranteed under the Montana Constitution. For the sake of clarity each of these argued constitutional violations will be addressed separately.

2. Equal Protection

The Fourteenth Amendment to the United States Constitution and Article II, Section 4 of the Montana Constitution provide that no person shall be denied equal protection of the laws. When scrutinizing statutes involving social and economic policy under an equal protection analysis, the United States Supreme Court provides the following direction:

Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. (Citations omitted.) The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.

Federal Communications Comm'n v. Beach Communications, Inc., (1993) 508

U.S. 307, 313-14, 113 S. Ct. 2096, 124 L. Ed. 2d 211, 221 (quoting Vance v.

Bradley, (1979) 440 U.S. 93, 97, 99 S. Ct. 939, 59 L. Ed. 2d 171).

This Court has also recognized that a lack of perfection in a statute does not render it a violation of equal protection.

To a certain extent, nearly all legislation sets forth classifications regarding applicability, benefits and recipients; the fact that some of these classifications are imperfect does not necessarily mandate a conclusion that they violate the equal protection clause.

Gulbrandson v. Carey, (1995) 272 Mont. 494, 901 P.2d 573, 579 (citing Arneson v. State, (1993) 262 Mont. 269, 273, 864 P.2d 1245, 1248).

3. Equal Protection Analysis

The equal protection constitutional analysis is essentially a three step process. The first step is to determine the appropriate level of scrutiny to apply to the challenged legislation. When reviewing equal protection challenges, the courts must apply one of three recognized levels of scrutiny; strict scrutiny, middle-tier scrutiny, or a rationality review. See Powell v. State Compensation Ins. Fund, (2000) 302 Mont. 518, 15 P.3d 877.

This Court has repeatedly found that workers' compensation statutes neither infringe upon a suspect class nor involve fundamental rights which would trigger a strict scrutiny argument. See Heisler v. Hines Motor Co., (1997)

282 Mont. 270, 279, 937 P.2d 45, 50 (citing *Stratemeyer v. Lincoln County*, (1993), 259 Mont. 147, 151, 855 P.2d 506, 509; *Cottrill v. Cottrill Sodding Service*, (1987) 229 Mont. 40, 42, 744 P.2d 895, 897. Rather, the Supreme Court has held that the appropriate test to be applied when analyzing workers' compensation statutes is the rational basis test. *Zempel v. Uninsured Employers' Fund*, (1997) 282 Mont 424, 430, 938 P.2d 658, 662 and *Heisler*, 282 Mont at 279, 937 P.2d at 50 (citing *Stratemeyer*, 259 Mont. at 151, 855 P.2d at 509). Moreover, this Court has declined to apply a more stringent standard of review – even when the challenged workers' compensation statute arguably involves an impact upon a fundamental right. See *Henry v. State Compensation Ins. Fund*, (1999) 294 Mont. 449, 982 P.2d 456. Clearly the rational basis test is the proper test to apply in the instant case.

The second step requires the identification of the class or classes at issue. This is the most critical step simply because the equal protection clause does not preclude different treatment of different groups or classes so long as all persons within a group or class are treated equally. If the classes at issue are not similarly situated, there also can be no equal protection violation. *Powell*, ¶ 22.

The third step involves an analysis of whether a rational basis exists for how the classes are defined and, ultimately, how the classes are treated. Where the classes are similarly situated and there is unequal treatment between the

classes or where the individuals within the class are treated unequally, then a rational basis must be shown to uphold the unequal treatment. If the statute which causes the unequal treatment bears a rational relationship to a legitimate governmental interest, then the constitutional challenge is defeated. *Henry*, ¶ 33 (citing *Heisler v. Hines Motor Co.*, (1997) 282 Mont. 270, 937 P.2d 45, 50; *Matter of S.L.M.*, (1997) 287 Mont. 23, 951 P.2d 1365, 1371).

Having already concluded that the rational basis test would be the appropriate level of scrutiny to apply in the instant case, only the latter two steps of the constitutional analysis need to be addressed. In the instant case, however, Judge Shea determined that no similarly situated classes existed and ruled against Appellants on that basis. Consequently, Judge Shea did not even address the final step of the equal protection constitutional analysis.

Similarity of Classes

Goble and Gerber presently maintain that “the WCC should not be allowed” to perform this step in the equal protection analysis because the Workers’ Compensation Court had skipped by this step in prior litigation (*McCuin*). See Appellants’ Brief, page 26 and 27. During oral argument on the parties reciprocal summary judgment motions, Judge Shea acknowledged that he “put the cart before the horse” in *McCuin* and had jumped right to the third step of the equal protection analysis. (TR, page 31). However, just because the

Workers' Compensation Court inadvertently omitted a step in a legal analysis in a prior case does not preclude it from addressing the proper inquiry in the **case at bar**.

Upon considering the second step of the equal protection analysis, Judge Shea concluded that the classes identified by the Appellants were not similarly situated. In support of this conclusion, Judge Shea cited to State v. Renee, (1999) 294 Mont. 597, 983 P.2d 893. In Renee, this Court had concluded that individuals convicted of felonies were not similarly situated to individuals convicted of misdemeanors in the context of an equal protection challenge to different sentencing statutes for these crimes. In light of this expressed rationale, Judge Shea logically concluded that if individuals convicted of felonies were not similarly situated to individuals convicted of misdemeanors in a criminal context, then individuals convicted of felonies would not be similarly situated to individuals not convicted of any crime in the context of workers' compensation.

Goble and Gerber argue that this logical conclusion is inappropriate because workers' compensation is a no-fault system; the appellants weren't asking for sentence reversal or reduction; their employers had workers' compensation coverage; misdemeanors can result in incarceration beyond 30 days; only civil or criminal remedies can be judicially administered; and that

Judge Shea's view of the situation was "overly simplistic." While State Fund acknowledges that the WCA is "no fault" with respect to the role of employee negligence in causing the work-related injury, Appellants' arguments are collectively unsound, irrelevant and immaterial to the issues on appeal.

During the November 27, 2012 oral argument Goble and Gerber attempted to expand their identified classes on the rationale that they were previously unaware that a claimant could secure a lump sum payment of an awarded impairment rating if the claimant so requests. It should be noted that this authority is expressly set forth in § 39-71-703(7), MCA, one of the five relevant statutes previously set forth in this brief by the State Fund. Judge Shea did not permit the requested modification to pleadings. This discretionary ruling by Judge Shea cannot be deemed unreasonable in light of the fact that this authority was set forth in statute and the Goble and Gerber cases has been pending before the Workers' Compensation Court for more than 24 months / 8 months, respectively.

Moreover, as was accurately noted by Judge Shea, the statute authorizing the lump sum payout of an impairment award (if requested by the claimant) was not adopted by the legislature until 2005 and was not available to Goble (whose injury predicated the enactment of that statute). Similarly, the change in the law had no impact upon Gerber because his impairment was fully paid out prior to

his incarceration. Therefore, the Workers' Compensation Court properly held that neither Goble nor Gerber had standing to put forth the change in identified classes raised by Appellants during oral argument.

In light of the above, the Workers' Compensation Court's conclusion that the classes identified by the Appellants are not similarly situated should be affirmed. Should this Court disagree, however, then this matter should be remanded to the Workers' Compensation Court for consideration of the third step of the equal protection analysis – whether § 39-71-744(1), MCA bears a rational relationship to a legitimate governmental interest.

4. Substantive Due Process

Appellants' arguments with regard to due process are the same as those made in *Wimberley v. State Compensation Insurance Fund*, 1994 MTWCC 52 and *McCuin v. Montana State Fund*, 2006 MTWCC 4, repackaged as due process. Nonetheless the conclusion, denying eligibility for disability benefits, is the same under either analysis.

[T]he standards for validity under the due process and equal protection clauses are identical.

The difference in the method of analysis under the due process and equal protection guarantees relates only to whether or not the governmental act classifies persons. . . . When the governmental action relates only to matters of economics or general social welfare, the law need only rationally relate to a legitimate governmental purpose. If the law does not classify individuals, it

will be subjected to the due process guarantee. However, if the means the law employs to achieve its end is the classification of persons for differing benefits or burdens, it will be tested under the equal protection guarantee.

R. Rotunda & J. Nowak, *Treatise on Constitutional Law: Equal Protection*, § 18.1 at 5-6 (2d ed. 1992).

Rational basis is the appropriate level of scrutiny for workers' compensation benefits. *Henry v. State Compen. Ins. Fund*, 1999 MT 126, ¶ 29, 294 Mont. 449, 982 P.2d 456. The right to receive workers' compensation benefits is not a fundamental right; nor does the Act infringe upon the rights of a suspect class. *Bustell v. AIG Claims Serv., Inc.*, 2004 MT 362, ¶ 11, 324 Mont. 478, 480, 105 P.3d 286, 289.

There are two components to due process; substantive and procedural. Substantive due process 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, 334 Mont. 237, 146 P.3d 759.

Substantive due process primarily examines the underlying substantive rights and remedies to determine whether restrictions . . . are unreasonable or arbitrary when balanced against the purpose of the legislature in enacting the statute.

Newville v. State, Dept. of Family Services, 267 Mont. 237, 249, 883 P.2d 793, 800 (1994) (citing J. McGuinness and L. Parlagreco, *The Reemergence of Substantive Due Process As A Constitutional Tort Theory, Proof, and Damages* (1990), 24 New Eng. L.Rev. 1129, 1133)

Satterlee v. Lumberman's Mutual Casualty Co., 209 MT 368, 353 Mont. 265, 222 P.3d 566 indicates that the legislature has always had the power to fix the manner, method, and amount of workers' compensation benefits. The litmus test of the legislature's power under substantive due process is whether the legislation is reasonable. *Id.*, ¶ 33. As Satterlee notes, the legislature need not state a specific reason for its action:

That the legislature did not enunciate this specific purpose does not mean that it should not be considered. As we have stated “[t]he purpose of the legislation does not have to appear on the face of the legislation or in the legislative history, but may be any possible purpose of which the court can conceive.” *Stratemeyer I*, 259 Mont. at 152, 855 P.2d at 510-11. Our role is not to second guess the prudence of a legislative decision. As such we cannot strike down § 39-71-710, MCA, as a violation of substantive due process simply because we may not agree with the legislature's policy decisions. That we have identified at least one “possible legitimate purpose” is enough in this instance for us to conclude that affirming the WCC will not result in an absurdity.

Id., ¶ 34.

In reviewing a substantive due process challenge to the requirement that a worker have a certain number of quarters in order to receive Social Security Disability Insurance (SSDI) and Medicare, the Second Circuit Court of Appeals determined that the legislature, in distributing benefits, had wide latitude to create classifications. Collier v. Barnhart, 473 F.3d 444, 449 (2007) (“[T]he Due

Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.”)

Thus as the preceding cases clearly establish, substantive due process is met if there is a possible legitimate purpose or if there is any basis that is not patently arbitrary. The Workers’ Compensation Court, citing *McCuin*, found a rational basis for § 39-71-744, MCA.

... to allow the payment of benefits to an incarcerated individual would essentially mean the public would bear the cost of an incarcerated individual twice: first, through the payment of benefits; and second, through the cost of McCuin’s room and board while in prison. Moreover, § 39-71-744, MCA, bears a rational relationship to the express legislative purpose of the WCA of providing wage-loss benefits in a reasonable relationship to actual wages lost, and of returning a worker to work as quickly as possible after the worker has suffered an on-the-job injury or disease. A worker who has been incarcerated has removed himself from the competitive labor market by committing a crime; he is therefore not losing wages due to his injury. Similarly, he cannot return to work until released from jail or prison.

Goble at ¶37.

However, even if the perceived basis for enactment of 744 is incorrect, the statute still passes constitutional muster. In determining the purpose of a provision denying workers’ compensation benefits to those incarcerated the Court is not limited to the legislative record. *Kadrmas v. Dickenson Public Schools*, 487 U.S. 450, 463 (1979). Legislatures are not required to engage in

the sort of fact-finding and analysis required of courts. Federal Communications Comm. v. Beach Communications, Inc., 508 U.S. 307, 314 (1993)

[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. *United States Railroad Retirement Bd. v. Fritz*, *supra*, at 179. See *Flemming v. Nestor*, 363 U.S. 603, 612, 4 L. Ed.2d 1435, 80 S. Ct. 1367 (1960). Thus, the absence of "legislative facts" explaining the distinction "on the record," 294 U.S. App. D.C. at 389, 959 F.2d at 987, has no significance in rational-basis analysis. *See Nordlinger v. Hahn*, 505 U.S. 1, 15, 120 L. Ed.2d 1, 112 S. Ct. 2326 (1992) (equal protection "does not demand for purposes of rational-basis review that a legislature or governing decision- maker actually articulate at any time the purpose or rationale supporting its classification"). In other words, a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. See *Vance v. Bradley*, *supra*, at 111. See also *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 66 L. Ed. 2d 659, 101 S. Ct. 715 (1981). "Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Lehnhausen, supra*, at 365 (quoting *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 510, 81 L. Ed. 1245, 57 S. Ct. 868 (1937)).

Id. At 315.

Clearly the legislature can fix and determine entitlement and eligibility to workers' compensation benefits. In doing so, it is entirely reasonable that the legislature determined that incarceration removes **eligibility** for disability benefits even though those persons may be **entitled** to such benefits. This also recognizes that the voluntary and intentional actions of individuals such as

Goble and Gerber in committing serious crimes which removed them from the labor market led to their ineligibility.

5. Procedural Due Process

The mandates of procedural due process are similarly met under § 39-71-744, MCA. The requirement necessary to satisfy procedural due process comes into play only after a showing that a property or liberty interest exists. *ISC Distributors, Inc. v. Trevor*, 273 Mont. 185, 191, 903 P.2d 170, 173, (1995). (see also *Germann v. Stephens*, 2006 Mt 130, 332 Mont. 303, 137 P.3d 545 and *Montana Media, Inc. v. Flathead County*, 2003 MT 23, 314 Mont. 121, 63 P. 3d 1129.) In the present case there has been no showing that Goble and Gerber had a property interest in permanent partial disability benefits. Additionally their entitlement to partial disability benefits remained, subject to non-payment during their incarceration. Post incarceration, their eligibility is reinstated.

The same procedural due process arguments were made in *Wiard v. Liberty Northwest Ins. Corp.*, 2003 MT 295, ¶¶ 30 – 32, 318 Mont. 132, 140-141, 79 P.3d 281, 286-287, and rejected.

¶30 Wiard fails to provide any authority to support his argument, as is required under Rule 23(a)(4), M.R.App.P., that Liberty violated his right to procedural due process by failing to notify him of the existence of the 60-month rule. Settled Montana law establishes that we will not consider an argument for which the litigant has failed to provide support, and thus, we will not consider Wiard's

constitutional argument. *See Johansen v. State, Dept. of Natural Resources*, 1998 MT 51, ¶ 24, 288 Mont. 39, ¶ 24, 955 P.2d 653, ¶ 24.

¶31 The record shows that the DOLI approved the agreement between Wiard and Liberty, pursuant to § 39-71-741(6), MCA (1991), which states: [T]he division has full power, authority, and jurisdiction to allow, approve, or condition compromise settlements for any type of benefits provided for under this chapter or lump-sum payments agreed to by workers and insurers. All such compromise settlements and lump-sum payments are void without the approval of the department. Approval by the department must be in writing. The department shall directly notify a claimant of a department order approving or denying a claimant's compromise or lump-sum payment. The DOLI order approving the agreement did not notify Wiard, or require the insurer to notify Wiard, that his reserved medical benefits were subject to any condition or limited by the operation of statute.

¶32 The Workers' Compensation Act is a statutory scheme. However, no statutory provision requires DOLI to notify claimants that the Act governs all aspects of workers' compensation claims and awards, or that, specifically, a 60-month rule in regard to medical benefits is contained in the Act. The fact that Wiard had no knowledge of the 60-month limitation upon his medical benefits does not alter the operation of the statute in this case. As the Workers' Compensation Court noted:

[Wiard's] ignorance of the law was no excuse. *Donovan v. Graff*, 248 Mont. 21, 25, 808 P.2d 491, 494 (1991); *Rieckhoff v. Woodhull*, 106 Mont. 22, 30, 75 P.2d 56, 58 (1937). If ignorance of the law were an excuse, laws would be applied willy-nilly depending upon the individual's legal knowledge; the result would be legal chaos and there would be no rule of law at all.

Beyond knowledge of the law which is imputed, Goble and Gerber's wage loss is simply a consequence of their incarceration. There is no need to notify a convicted felon that is sentenced to a term exceeding 30 days that he isn't going to work the next day. Their loss of employment is not a penalty for committing the crime imposed by the court but simply a consequence of their unlawful actions. They committed a crime and as a result removed themselves from the labor market. Their situation is no different than someone working at a high paying job who commits a crime and is incarcerated. This individual loses his high paying job as a consequence of his incarceration. In all likelihood upon completion of the sentence, the high wage earner does not resume his employment. Likewise, Goble and Gerber, commit crimes and as a result lose their ability to work at their jobs. They are able to work as a result of their injuries (their claim for benefits are partial and not total) but incur a wage loss as a result of being removed from the labor market due to their incarceration. This is consistent with § 39-71-105, MCA, requiring that: "the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease." However, they remain entitled and eligible to receive medical benefits during and after their incarceration.

6. Montana Constitution Article II, § 22

Article II, § 22 of the Montana Constitution is denominated as “Excessive sanctions”. The same prohibition is also found in the Eighth Amendment to the United States Constitution. It has no applicability to a workers’ compensation case, arising only in a criminal proceeding. *Ingraham v. Wright*, 430 U.S. 651, 664 (1997); *State ex rel. Hardy v. State Board of Equalization*, 133 Mont. 43, 46. 319 P.2d 1061, 1063 (1958).

The characterization of § 39-71-744, MCA as a “fine” stretches credulity. The Worker’s Compensation Act does not impose “fines” on injured workers nor is there a “forfeiture” of benefits. § 39-71-744, MCA, consistent with § 39-71-105, MCA sets forth the timing of wage loss benefits during incarceration. § 39-71-740, MCA, states in relevant part: “all payments of compensation as provided in this chapter shall be made at the end of each 2-week period. . . .” The time for payment of 703 benefits began when Goble and Gerber reached maximum medical improvement (MMI). Permanent partial disability benefits become payable at the time of wage loss determination and MMI. § 39-71-703, MCA states in pertinent part:

- (1) If an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award if that worker:

- (a) has an actual wage loss as a result of the injury; and
- (b) has a permanent impairment rating. . .

Goble and Gerber assert that § 39-71-703, MCA contains no time limit. (Appellants' brief, pg. 19) To the contrary, § 39-71-703, MCA contains a starting point, which is MMI, and an end point which is 375 weeks. In conjunction with § 39-71-740, MCA, in the case of Goble, his permanent partial benefits covered a time period of 120 weeks. (32% of 375 = 120 weeks). Goble's incarceration far exceeded 120 weeks.

CONCLUSION

In light of the foregoing, this Court should affirm the decision of the Workers' Compensation Court. Alternatively, this Court should remand this matter back to the Workers' Compensation Court for consideration of the 3rd step of the equal protection analysis with respect to Appellants' challenge to confirm, on other grounds, the constitutionality of § 39-71-744(1), MCA.

DATED this 12th day of November, 2013.

MONTANA STATE FUND

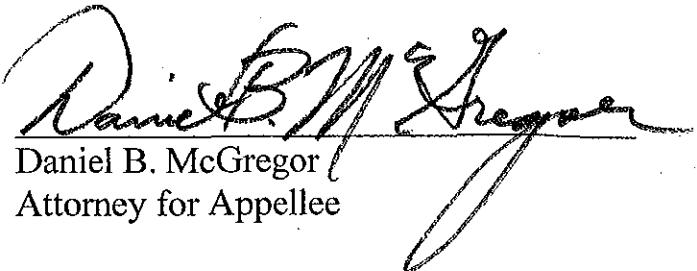
By: Thomas E. Martello
Thomas E. Martello
Special Assistant Attorney General

By: Daniel B. McGregor
Daniel B. McGregor
Special Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 11(4)(e), I certify that this brief is proportionately spaced 14 point Times New Roman text typeface; is double spaced; is 8,628 words, excluding the certificates of service and compliance.

Dated this 12th day of November, 2013.

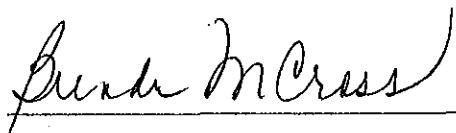

Daniel B. McGregor
Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing on the following party:

Thomas C. Bulman
Eric Rasmusson
Bulman Law Associates, PLLC
P.O. Box 8202
Missoula, MT 59807-8202

by depositing the same in the United States Mail, postage prepaid, on this 12th day of November, 2013.


Daniel B. McGregor