

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**2001 MTWCC 15**

**WCC No. 9907-8274**

**WCC No. 2000-0023**

**WCC No. 2000-0030**

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**ALEXIS RAUSCH, as the Conservator for KEVIN RAUSCH**

**Petitioner**

**vs.**

**STATE COMPENSATION INSURANCE FUND**

**Respondent/Insurer for**

**LARSON LOGGING, INCORPORATED**

**Employer.**

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**CHARLES FISCH,**

**individually and on behalf of others similarly situated**

**Petitioner**

**vs.**

**STATE COMPENSATION INSURANCE FUND**

**Respondent/Insurer for**

**DRY CREEK EXCAVATION**

**Employer.**

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**THOMAS FROST,**

**individually and on behalf of others similarly situated**

**Petitioner**

**vs.**

## STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for  
CLICK'S CONSTRUCTION  
Employer.

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### ORDER AND JUDGMENT REGARDING CONSTITUTIONAL CHALLENGE

**REVERSED & REMANDED 9/05/02**

**Summary of Case:** Three claimants who are permanently totally disabled attack the constitutionality of statutes which provide for an impairment award to permanently partially disabled workers but not to permanently totally disabled ones.

**Held:** The lack of provision for impairment awards for permanently totally disabled workers does not violate equal protection or due process clauses. Permanently totally disabled workers are a separate, distinct class from permanently partially disabled workers and there is no discrimination within that class. The benefits available to permanently totally disabled workers are greater than those available permanently partially disabled workers, and the difference in benefits is rationally related to the differences in disabilities.

#### **Topics:**

**Constitutional Law: Constitutional Challenges: Burden.** One attacking the constitutionality of a statute must prove beyond a reasonable doubt that the law is unconstitutional.

**Constitutional Law: Equal Protection.** Permanently totally disabled workers are a separate, distinct class from permanently partially disabled workers. Within the class of permanently totally disabled workers there is no discrimination as to payment of an impairment award - such award is simply unavailable to all persons who are within that classification.

**Constitutional Law: Equal Protection.** Distinctions between benefits payable to permanently totally disabled workers and permanently partially disabled workers are rationally related to legitimate differences in the nature of their disabilities.

**Constitutional Law: Equal Protection.** While some permanently totally disabled workers have been or may become entitled to an impairment award, that entitlement is the result of their being permanently partially disabled at the time; thus, there is no discrimination among permanently totally disabled workers with respect to impairment awards.

**Constitutional Law: Equal Protection.** Failure to provide impairment awards to permanently totally disabled workers does not violate equal protection rights.

**Constitutional Law: Due Process: Substantive Due Process.** Distinctions between benefits payable to permanently totally disabled workers and permanently partially disabled workers are rationally related to legitimate differences in the nature of their disabilities.

**Constitutional Law: Due Process: Substantive Due Process.** Failure to provide impairment awards to permanently totally disabled workers does not violate substantive due process rights.

**Benefits: Impairment Awards.** While some permanently totally disabled workers have been or may become entitled to an impairment award, that entitlement is the result of their being permanently partially disabled at the time, thus there is no discrimination among permanently totally disabled workers with respect to impairment awards.

¶1 This case involves consolidated petitions of three permanently totally disabled claimants. Each claimant asserts entitlement to an impairment award in addition to the total disability benefits payable under section 39-71-702, MCA (1991 and 1997). In a prior decision, I determined that workers' compensation statutes do not extend impairment awards to permanently totally disabled workers. (*Fisch, Frost and Rausch v. State Compensation Insurance Fund*, 2000 MTWCC 56 (September 13, 2000 Order and Decision Disposing of Non-Constitutional Issues).) However, I reserved ruling on the claimants' constitutional challenge to the statutes in question and asked the parties to further brief the constitutional issues. Briefing is complete and the matter ripe for final determination.

#### Standing

¶2 During the pendency of these claimants, the State Fund offered to pay each of the claimants the impairment awards, but only for the purpose of resolving the present cases. (Order and Decision Disposing of Non-Constitutional Issues, ¶4 (Sept. 13, 2000).) The State Fund did not concede that any of the claimants were entitled to the award. (*Id.*) Claimants Fisch and Frost accepted the offer. (*Id.*) Their acceptance moots their constitutional arguments. "A matter is moot when, due to an event or happening, the issue has ceased to exist and no longer presents an actual controversy." *Shamrock Motors, Inc. v. Ford Motor Co.*, 293 Mont. 188, 193, 974 P.2d 1150, 1153 (1999). Therefore, I consider only the challenge tendered by claimant Rausch.

#### Factual Background

¶13 Kevin Rausch is permanently totally disabled. He has never been deemed permanently partially disabled. These facts are uncontested and are the only facts essential to the Court's resolution of the constitutional challenge.

#### Statutory Background

¶14 Kevin Rausch was injured on July 8, 1992, suffering brain damage and quadriplegia. (2000 MTWCC 56 (Order and Decision Disposing of Non-Constitutional Issues) ¶12 (Sept. 13, 2000).) His entitlement to benefits is therefore governed by the 1991 version of the Montana Workers' Compensation Act.

¶15 The 1991 version of the Workers' Compensation Act, as well as subsequent versions, distinguishes between permanently totally disabled workers and permanently partially disabled workers. Permanently totally disabled workers are those workers who are disabled from any regular employment. §§ 39-71-116(16), 39-71-702, MCA (1991). In other words, they are incapable of working. Permanently partially disabled workers are those workers who can work but whose ability to work is impaired. §§ 39-71-116(15), 39-71-703, MCA (1991).

¶16 Permanently partially disabled workers are entitled to benefits based on several factors, including the percentage of impairment they suffer, their age, their loss of physical ability, their education, and any wage loss. § 39-71-703, MCA (1991). Each factor is assigned a percentage; that percentage is then multiplied by 350 weeks to arrive at the number of weeks benefits must be paid. (*Id.*) The rate of the benefits is of the worker's time-of-injury wages, subject to a cap which is equal to ½ of the State's average weekly wage at the time of the injury. § 39-71-703(4), MCA (1991). At the time of Rausch's injury, the Montana average weekly wage was \$362 and the maximum benefit rate was \$181. (<http://wcc.dli.state.mt.us/CompensationRates.htm>)

¶17 Under the 1991 Act, the benefits payable to permanently totally disabled workers are more extensive than the benefits payable to permanently partially disabled workers. Permanently totally disabled workers are entitled to biweekly benefits so long as they continue to be permanently totally disabled, at least until they begin receiving social security benefits or reach an age entitling them to receive full social security retirement benefits. § 39-71-710, MCA (1991). The rate of benefits for permanently totally disabled workers is identical to the rate for permanent partial benefits ( of wages), however, the cap on benefits is significantly higher -- \$299 rather than \$181. § 39-71-702(6), MCA (1991). There is also a provision for cost of living increases. § 39-71-702(5), MCA (1991).

#### Discussion

¶18 Rausch argues that the legislature's failure to provide for impairment awards to permanently totally disabled workers violates the equal protection clauses of the Montana and United States constitutions, as well as his substantive due process rights under both

constitutions. The burden is on the claimant to prove beyond a reasonable doubt that such failure is unconstitutional. *Powell v. State Compensation Ins. Fund.*, 2000 MT 321, ¶13, 15 P.3<sup>rd</sup> 877, 881.

¶9 In addressing the equal protection challenge, the Court must, as an initial matter, identify the classes involved:

[T]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. The equal protection clause does not preclude different treatment of different groups or classes of people so long as all persons within a group or class are treated the same. **Consequently, when addressing an equal protection challenge, this Court must first identify the classes involved and determine whether they are similarly situated.** If the classes at issue are not similarly situated, then the first criteria for proving an equal protection violation is not met and we need look no further.

*Powell*, 2000 MT at ¶22 (emphasis added, citations omitted).

¶10 As in *Powell*, Rausch's challenge fails because he has failed to establish that permanently totally and permanently partially disabled workers are members of a single class, some of whom are dissimilarly treated. Permanently totally disabled workers represent a separate and distinct class from permanently partially disabled workers. While the members of both classes may have suffered industrial injuries, their disabilities are very different. The class of permanently partially disabled workers consists of injured workers who are able to return to work, and therefore able to continue earning wages. The class of permanently totally disabled workers consists of workers who cannot return to employment on a regular basis, and who are thus incapable of earning meaningful wages.

¶11 The difference between the classes is reflected in the benefits which the legislature has provided for the two classes. Permanently totally disabled workers are entitled to bi-weekly benefits during the entire period of their disability, § 39-71-702, MCA (1991), at least until they begin drawing retirement benefits or become entitled to full social security retirement benefits, § 39-71-710, MCA (1991). The benefits available to permanently partially disabled claimants are more limited. Permanently partially disabled workers are limited to a maximum of 350 weeks of benefits, **including any impairment award.** § 39-71-703(2), MCA (1991). That is approximately 6¾ years. In contrast, a worker who becomes permanently totally disabled at age 25 could receive up 40 years or more of biweekly benefits. As set forth in an earlier paragraph, the biweekly benefits amounts available to permanently totally disabled workers are also greater than the amounts available to permanently partially disabled workers.

¶12 Thus, while permanently partially disabled workers may collect an impairment award, that award is only one component of the more limited benefits available to permanently partially disabled claimants. The overall level of those benefits in the broad scheme of things is significantly less than benefits available to permanently totally disabled workers.

¶13 The above discussion should demonstrate that this case is dissimilar to *Henry v. State Compensation Ins. Fund*, 1999 MT 126, 294 Mont. 448, 982 P.2d 456. In *Henry* the Supreme Court struck down on equal protection grounds a failure to extend rehabilitation benefits to permanently partially disabled workers suffering occupational diseases where such benefits are extended to permanently partially disabled workers suffering industrial injuries. The Court in that case found that the class was permanently partially disabled workers and that any distinction based on classifying those workers as suffering from industrial diseases rather than industrial injuries was immaterial under the statutes in question. 1999 MT at ¶28. The distinction between permanently totally disabled and permanently partially disabled workers, however, is material. *Henry* is inapposite, as are those cases cited by Rausch from other jurisdictions which have struck down laws cutting off or limiting permanent total disability benefits to some permanently totally disabled workers.<sup>(1)</sup> Those cases involve distinctions within the class of permanently totally disabled workers.

¶14 Even if permanently partially and permanently totally disabled workers are deemed "similarly situated" for equal protection purposes, see *Henry* at ¶ 28, the equal protection clause requires only that the distinctions be rationally related to legitimate public purposes, *Zempel v. Uninsured Employers' Fund*, 282 Mont. 424, 430, 938 P.2d 658, 662 (1997). Claimant's argument for heightened scrutiny has never been adopted by the Supreme Court. *Id.* Moreover, this Court fails to see any justification for heightened scrutiny. Claimant has cited no constitutional provision or basic right which attaches to a claimant based on the fact that he is permanently totally disabled instead of permanently partially disabled.

¶15 The rational basis for paying different benefits to permanently totally disabled workers should be evident from the previous discussion. The disabilities are different. The loss of wages are different. In recognition of those facts, the legislature has provided broader, more liberal benefits for permanently totally disabled workers. It can hardly be said that it has discriminated against permanently totally disabled workers in favor of permanently partially disabled workers.

¶16 Ultimately, Rausch's argument rests on his assertion that some permanently disabled workers may at some time be deemed permanently partially disabled and therefore become entitled to an impairment award. The State Fund concedes that in fact this occurs. However, the entitlement arises from the fact that the claimant **at the time of the entitlement** is permanently partially disabled, not permanently totally disabled, and is

thus in a different class. The fact that a claimant may at some time fall within a different class, even for a day, and becomes entitled to some benefit not available to others within the class to which he ordinarily belongs, does not render the classification irrational or illegal. Equal protection does not require mathematical precision or perfection in making classifications. *Massachusetts v. Board of Retirement*, 427 U.S. 307, 316 (1976) (citing *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).

¶17 Rausch further argues that failure to pay him an impairment award "violates constitutional guarantees of the procedural and substantive due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Montana's Constitution." (Petitioner Alexis Rausch's Brief Regarding Constitutional Issues at 11.) He cites *Newville v. State Department of Family Services*, 267 Mont. 237, 247, 883 P.2d 793, 799 (1994). Substantive due process guarantees preclude unreasonable, arbitrary or capricious state actions. *Id.* at 250, 883 p.2d at 541. But as set forth in previous discussion, the different benefits provided by the legislature with respect to permanently totally and permanently partially disabled workers is rational, reasonable, and certainly not capricious. Rausch's due process argument is without merit.

#### ORDER

¶18 Rausch's constitutional challenge is without merit and is **denied**.

¶19 This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶20 Any party to this dispute may have 20 days in which to request a rehearing from this Order and Judgment Regarding Constitutional Challenge.

DATED in Helena, Montana, this 20th day of April, 2001.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Lon J. Dale

Mr. Monte D. Beck

Mr. Stephen D. Roberts

Mr. Greg E. Overturf

Submitted: January 16, 2001

1. Rausch cites, for example, *Industrial Claim Appeals Office v. Romero*, 921 P.2d 62 (Colo. 1996), a case in which a Colorado statute required termination of permanent total disability benefits upon reaching age 65, thus, creating an age based distinction among permanently disabled workers.