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HENSLEY V. MONTANA STATE FUND: A SHIFT IN THE GRAND BARGAIN OF WORKERS' COMPENSATION

Brian Hagan*

I. INTRODUCTION

The general purpose of workers' compensation in Montana "is to provide, without regard to fault, wage loss and medical benefits to a worker suffering from a work-related injury or disease."[1] The comprehensive system offers a variety of benefits tailored to the circumstances of the injured party, ranging from prescription coverage[2] to burial expenses.[3] In *Hensley v. Montana State Fund*,[4] appellant Susan Hensley received disability benefits as well as medical care, including surgery, for her on-the-job shoulder injury with Polson Ambulance.[5] If not for a change to the Workers' Compensation Act (the Act) in 2011, Hensley would have qualified for an additional benefit called an impairment award.[6] The issue before the Court was whether section 39-71-703(2) of the Act violated Hensley's right to equal protection by not providing her an impairment award.[7] The Court held that classifying injured workers by the severity of their injury rationally related to the statute's legitimate objective of providing impairment awards to those with significant loss of physical function.[8]

This Note examines the impact the Court's decision in *Hensley* has on Montana law. Specifically, this note assesses the sea change in deference to legislative cost containment policy and an increasingly fragmented framework of remedies for injured workers, which in turn exposes employers to unexpected liabilities. In Part II, this Note addresses *Hensley*'s background, explaining the pertinent change made to the Act and how the revision affected Hensley's circumstances. Part II concludes by summarizing the lower court's holding. Part III reviews the methodology used by the Montana Supreme Court in deciding the constitutionality of the statute and ex-

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1. MONT. CODE ANN. § 39-71-105(1) (2019).

2. § 39-71-727.

3. § 39-71-725.

4. 477 P.3d 1065 (Mont. 2020) (plurality).

5. *Id.* at 1068–69 (plurality).

6. *Id.* at 1069–70 (plurality).

7. *Id.* at 1069 (plurality). S*ee generally* MONT. CONST. art. II, § 4 ("No person shall be denied the equal protection of the laws.").

8. *Hensley*, 477 P.3d at 1076, 1078–79 (plurality).

plores how the plurality opinion and Justice Gustafson's dissent reached different conclusions using the same approach. Part IV discusses Justice Sandefur's dissent related to the *quid pro quo* foundation of workers' compensation law, and Justice Shea's special concurrence. This Note concludes by asserting that future litigation is unavoidable until lost benefits underlying the promise of workers' compensation restore to both employees and employers.

II. Background

A. Impairment Awards and the Revision of the Workers' Compensation Act

An impairment award is compensation for a worker's "loss of physical function to his or her body."[9] This is distinguishable from any monetary benefits an injured party may receive related to that worker's inability to work.[10] The impairment award recognizes the cost of an injury beyond the workplace.[11]

Impairment awards are not a new convention of the Montana workers' compensation benefit structure. These awards have gone under other names, such as dismemberment indemnity awards or disability benefit awards,[12] but the provision of compensation for the loss of physical function unrelated to wage loss co-extends with the history of the Act.[13]

Before 2011, all injured employees who sustained a permanent bodily impairment were eligible for an award as compensation under § 39-71-703.[14] Workers with wage loss as a result of an injury received permanent partial disability (PPD) awards.[15] Workers who did not suffer wage loss as a result of an injury received impairment awards.[16] The difference in these awards was that injured workers with wage loss received compensation in the form of an increased permanent impairment rating based on certain factors such as age and type of labor.[17] Injured workers with and without wage loss, however, received a permanent impairment rating.[18]

The legislature required the use of the latest edition of the *American Medical Association (AMA) Guides to the Evaluation of Permanent Impair-*

9. Rausch v. State Comp. Ins. Fund, 54 P.3d 25, 30 (Mont. 2002).
10. *Id.*
11. *Id.*
12. *Hensley*, 477 P.3d at 1094–96 (Sandefur, J., dissenting).
13. *Id.*
14. Mont Code Ann. § 39-71-703 (2009).
15. § 39-71-703(1).
16. § 39-71-703(2).
17. § 39-71-703(5).
18. § 39-71-703.

ment (the *Guides*) for determining the baseline impairment rating.[19] The *Guides* define an impairment rating as an estimated permanent loss of function, expressed as a percentage, of the whole person not to exceed 100%.[20] This percentage, multiplied by two-thirds of the injured worker's weekly wages,[21] and 375 (an imputed number of weeks that the award covered), resulted in the award amount given to the worker.[22]

A 2011 revision to the Act revoked this benefit for a class of injured workers.[23] Beginning with the sixth edition of the *Guides*, the AMA introduced a new classification system for injured workers: impairment classes.[24] These classes were the AMA's attempt to corral disparate injuries into five classes of severity ranging from zero ("no functional problem") to four ("complete problem with total functional loss").[25] The classes considered injury attributes such as when symptoms presented ("Class 2 = Symptoms with normal activity (independent)") or objective medical findings ("Class 4 = Very Severe Problem").[26] The 2011 revised statute, which remains unchanged, provided an impairment award only to those injured workers in impairment Class Two or greater.[27] Such qualified workers then proceeded to the step which used the percentage permanent impairment rating to calculate their award.[28] The result was injured workers with an impairment Class One, even if they had a whole person percentage impairment rating greater than zero, did not receive an award.[29]

B. The Impact of the Act Revision on Hensley

Susan Hensley's doctor rated her shoulder injury as a 4% whole person impairment.[30] Using the new grid provided by the *Guides*, her doctor placed her in impairment Class One.[31] Before the 2011 revision, Hensley would

19. § 39-71-703(1)(b).

20. § 39-71-703; Hensley v. Mont. State Fund, 477 P.3d 1065, 1071 (Mont. 2020) (plurality).

21. § 39-71-703(6).

22. § 39-71-703(3).

23. *Hensley*, 477 P.3d at 1096 (Sandefur, J., dissenting).

24. *Id.* at 1071 (plurality).

25. *Id.* at 1070 (plurality) (quoting AMERICAN MEDICAL ASSOCIATION, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT 11 (6th ed. 2007)).

26. Appellee Montana State Fund's Answer Brief at 27, *Hensley v. Mont. State Fund*, 2020 WL 1092296 (Mont. Feb. 10, 2020) (No. DA 19–0523).

27. MONT. CODE ANN. § 39-71-703(2) (2011); MONT. CODE ANN. § 39-71-703(2) (2019).

28. MONT. CODE ANN. § 39-71-703 (2011) (The number of imputed weeks increased to 400 with this revision of the statute).

29. § 39-71-703.

30. *Hensley*, 477 P.3d at 1080 (Gustafson, J., dissenting).

31. *Id.*

have received a $5,192 impairment award.[32] Because of the revision, she was not entitled to an impairment award.[33]

Hensley brought suit in the Montana Workers' Compensation Court (WCC).[34] With the exception of some regulatory matters, the WCC is the court of original jurisdiction for claims arising under the Act in Montana.[35] Hensley asserted the statute violated equal protection because workers in impairment Class One did not qualify for an award, while those in Class Two or greater did.[36] The WCC granted summary judgment for Montana State Fund (MSF), the insurer, finding the impairment classes were not situated similarly, and even if they were, the government had a rational basis for treating them differently.[37]

The WCC declined to rule on Hensley's second claim.[38] Hensley asserted the statute, as revised, "undercuts the *quid pro quo* on which the WCA is based, thereby violating her right to due process under Mont. Const. art II, § 17."[39] *Quid pro quo* in workers' compensation parlance refers to the compromise between employers and employees that keeps the program sustainable.[40] Except for some statutory carve-outs, all Montana employers must participate in the program.[41] Because the Act is the exclusive remedy for injured employees, employers avoid the potential for more extensive damages if left to defend themselves against tort actions.[42] Conversely, injured employees may not receive the significant damage awards of tort suits, but they know they will always receive something.[43] The WCC declined to rule on the due process claim, reasoning that instead, the district court should review Hensley's claim in a tort action.[44]

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32. *Id.*

33. *Id.* at 1069 (plurality).

34. Order Granting Respondents' Motion for Summary Judgment ¶ 62, *Hensley v. Mont. State Fund*, No. 2013-3235 (Mont. Workers' Comp. Ct. Aug. 22, 2019), https//perma.cc/QFE6-WZXR [hereinafter Order Granting Respondents' Motion].

35. *General Information About the Court*, Mont. Dep't of Labor and Indus. Workers' Comp. Court, https://perma.cc/RKM6-KWWH (last visited Nov. 13, 2021).

36. Order Granting Respondents' Motion, *supra* note 34, ¶ 23. **R**

37. *Id.* ¶ 62.

38. *Id.* ¶ 63.

39. *Id.* ¶ 23; MONT. CONST. art. II, § 17 ("No person shall be deprived of life, liberty, or property without due process of law.").

40. Hensley v. Mont. State Fund, 477 P.3d 1065, 1096 (Mont. 2020) (Sandefur, J., dissenting).

41. *See* MONT. CODE ANN. § 39-71-401 (2019).

42. Stratemeyer v. Lincoln County, 915 P.2d 175, 179 (Mont. 1996) (citations omitted) (*Stratemeyer II*); MONT. CODE ANN. § 39-71-411.

43. *Stratemeyer II*, 915 P.2d at 179.

44. Order Granting Respondents' Motion, *supra* note 34, ¶ 63. *See also* Buerkley v. Aspen Meadows LP, 980 P.2d 1046, 1049 (Mont. 1999) ("[W]here injuries are outside the scope of those covered by the Act, there is no *quid pro quo* and, therefore, the exclusive remedy is unavailable as a defense to tort claims."). **R**

III. The Constitutionality of Montana Code Annotated § 39-71-703 and Justice Gustafson's Dissent

A. The Montana Supreme Court's Equal Protection Analysis

On appeal to the Montana Supreme Court, Hensley brought only the equal protection claim the WCC dismissed.[45] The Court uses a three-step process in reviewing an equal protection claim.[46] This section will discuss how the Court dealt with each step.

First, the Court must "identify the different classes involved and determine whether they are similarly situated."[47] The task is to isolate the factor that potentially discriminates unconstitutionally and find whether the two classes are indistinguishable if that factor is removed.[48] In *Hensley*, the factor was impairment class, and the classes were (1) injured workers with an impairment Class One and (2) injured workers with an impairment Class Two or greater.[49] While the WCC relied on the severity of the injuries in determining the classes were not similarly situated,[50] the plurality in *Hensley* found that when § 39-71-703(2) of the Workers' Compensation Act, the pertinent statute, was construed without the isolated factor (impairment class), the workers were similarly situated in that they all had an impairment and all were eligible for an award.[51]

Second, the Court chooses the appropriate level of scrutiny to test the constitutionality of the statute.[52] In *Hensley*, the Court chose the rational basis level of scrutiny.[53] Court precedent dictates the use of rational basis scrutiny, the most deferential level of scrutiny, for workers' compensation cases because no fundamental right is affected and no suspect classes are involved.[54] Under this level of scrutiny, "a statute is presumed constitutional, and, if the policy behind a law is unclear, a court may consider any

45. Appellant's Brief at 3–4, *Hensley v. Mont. State Fund*, 2020 WL 1092294 (Mont. Jan. 10, 2020) (No. DA 19–0523).

46. Henry v. State Comp. Ins. Fund, 982 P.2d 456, 461–62 (Mont. 1999).

47. *Id.* at 461 (citation omitted).

48. Hensley v. Mont. State Fund, 477 P.3d 1065, 1073 (plurality).

49. *Id.*

50. Order Granting Respondents' Motion, *supra* note 34, ¶¶ 55–56. **R**

51. *Hensley*, 477 P.3d at 1074.

52. *Id.* at 1073.

53. *Id.* at 1074.

54. *See, e.g.*, Duane C. Kohoutek, Inc. v. State, 417 P.3d 1105, 1110 (Mont. 2018); Stratemeyer v. Lincoln County, 855 P.2d 506, 509 (Mont. 1993) (*Stratemeyer I*). An example of a fundamental right in Montana is the right to a clean and healthful environment. Sunburst Sch. Dist. No. 2 v. Texaco, Inc., 165 P.3d 1079, 1092 (Mont. 2007). Some examples of suspect classes are race or national origin. Davis v. Union Pac. R.R., 937 P.2d 27, 31 (Mont. 1997).

possible legitimate purpose that the court can conceive to uphold the statute."[55]

Third, the Court applies the level of scrutiny when analyzing the statute.[56] Once the rational basis level of scrutiny is chosen, whether the objective of the statute in question is legitimate is the first hurdle in a two-part test that follows.[57] The plurality noted that the Court previously held impairment awards served a legitimate purpose by recognizing the cost of simply losing a percentage of function in one's body.[58] In considering why the impairment award eligibility began with Class Two, the plurality foreshadowed its confidence in the *Guides* by vouching for the "interest in providing benefits that bear a reasonable relationship to the actual functional loss a worker sustains."[59] The plurality buttressed this logic by using the *Guides*' definition of *impairment*—a "significant' deviation or loss."[60]

A rational relationship between the classification and the objective of the statute is the final hurdle in testing constitutionality.[61] The plurality found the statute, as amended, constitutional because using impairment classes to gauge the severity of an injury had a rational relationship to the legitimate objective of the statute.[62] It found the government had a legitimate interest in ensuring the most severely injured, those who could not function normally, benefited from impairment awards.[63] Although acknowledging the imprecision of the *Guides*' impairment classes, the plurality consented to the government's reliance on the methodology, inferring that while the impairment classes may have been imperfect, they were the strongest attempt in an imperfect science to rate the severity of an injury.[64] Therefore, the use of impairment class rationally related to the legitimate objective of providing significantly injured workers impairment awards.[65] Ultimately, the plurality held § 39-71-703(2) was constitutional.[66]

55. William Mac Morris, Note, *A Lack of Deference: Rational Basis with Bite in* Caldwell v. MACO Workers' Compensation Trust, 73 MONT L. REV. 417, 419 (2012).

56. *Hensley*, 477 P.3d at 1073.

57. *Id.* at 1074 (citation omitted).

58. *Id.* at 1075–76 (citing Rausch v. State Comp. Ins. Fund, 54 P.3d 25, 30 (Mont. 2002)).

59. *Id.* at 1076.

60. *Id.* (quoting AMERICAN MEDICAL ASSOCIATION, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT 11 (6th ed. 2007)).

61. *Id.*

62. *Id.* at 1078–79.

63. *Id.* at 1076.

64. *Id.* at 1077–78.

65. *Id.* at 1078.

66. *Id.* at 1077–79.

B. Justice Gustafson's Dissent

In her dissent, Justice Gustafson raised two arguments as to why the plurality opinion was faulty. First, Justice Gustafson asserted there was no legitimate objective in the statute, as amended, because revoking benefits from one class—Class One—to tailor them toward a different class—Class Two or greater—was found unallowable in *Caldwell v. MACo Workers' Compensation Trust*.[67] The second argument asserted that the admittedly unverified nature of the impairment classes implied an arbitrary methodology.[68]

The Court in *Caldwell* held that revoking training benefits from those eligible for Social Security was arbitrary because age does not rationally relate to a worker's "ability or willingness to return to work."[69] MSF, as amicus, argued the associated cost savings enabled the workers' compensation program to tailor benefits to those with the greatest need.[70] The *Caldwell* Court rejected what it hinted as being age discrimination, and found no precedent for such a policy.[71] In contrast, Justice Baker's dissent agreed that providing limited resources to those of working age, rather than those statutorily recognized as retired, was a legitimate government objective.[72] She found that using eligibility for Social Security as a "line of demarcation" rationally related to such an objective.[73]

In *Hensley*, Justice Gustafson applied focus consistent with *Caldwell* on the cost containment considerations of the revision to § 39-71-703(2).[74] In contrast, the plurality opinion, penned by Justice Baker, focused on (1) the objective of the statute as revised—to provide impairment awards to injured workers with *significant* loss of function and (2) the classification system used to distinguish such workers based on the relative severity of injury.[75] *Hensley*'s departure from *Caldwell* signals that this Court is amenable to cost-containment as justification for disparate treatment in situations where a rational "line of demarcation"[76] separates degrees of need.

67. *Id.* at 1079 (Gustafson, J., dissenting) (citing Caldwell v. MACo Workers' Comp. Trust, 256 P.3d 923, 929–30 (Mont. 2011)).

68. *Id.* at 1090–93 (Gustafson, J., dissenting).

69. 256 P.3d at 931.

70. Amicus Brief at 15–23, *Caldwell v. MACo Workers' Comp. Trust*, 2010 WL 4733968 (Mont. Nov. 12, 2010) (No. DA 10-0427).

71. *Caldwell*, 256 P.3d at 930–31.

72. *Id.* at 933 (Baker, J., dissenting) (citing MONT. CODE ANN. § 39-71-710 ("If a claimant . . . receives social security retirement benefits or is eligible to receive or is receiving full social security retirement benefits or retirement benefits from a system that is an alternative to social security retirement, the claimant is considered to be retired . . . .")).

73. *Id.* at 933.

74. Hensley v. Mont. State Fund, 477 P.3d 1065, 1087–88 (Mont. 2020) (Gustafson, J., dissenting).

75. *Id.* at 1075–78.

76. *Caldwell*, 256 P.3d at 933 (Baker, J., dissenting).

Justice Gustafson's dissent also observed that the *Guides* acknowledged its new impairment class system "as yet unverified."[77] She argued that if a scientific methodology of classifying injured workers was awaiting validation studies, such a methodology remained arbitrary.[78] The law of Montana seeks to protect its citizens from arbitrary government action,[79] but how courts define arbitrariness determines a ruling. "The Ninth Circuit commonly adds to the arbitrary and capricious standard some combination of the following: *unsupported by substantial evidence*, *erroneous with respect to a question of law*, and *bad faith*."[80] The Montana Supreme Court has held that a classification can be imperfect and still not violate the Equal Protection Clause of the Montana Constitution.[81]

The *Guides* used in *Hensley* admitted that impairment and disability "are complex concepts that are not yet amenable to evidence-based definition," and the plurality acknowledged that the methodology was "less than precise."[82] Justice Gustafson noted that Montana was the only state currently using impairment classes to calculate impairment awards.[83] Notwithstanding the imprecise nature of measuring severity, the plurality was satisfied that the impairment classes evolved from objective medical findings and opined that "[r]ational distinctions may be made with substantially less than mathematical exactitude."[84] Ultimately, the Court gave deference to (1) the legislature's presumably *good faith* attempt at tailoring awards to the neediest and (2) the expertise of the American Medical Association, which had enough confidence in the class system to insert it into the sixth edition of the *Guides*.[85]

IV. THE *QUID PRO QUO* FOUNDATION OF WORKERS' COMPENSATION LAW

The holding of the plurality begs the following question: What remedy do injured workers have when placed in impairment Class One? The case of Gary Stratemeyer may offer clues. On May 4, 1990, Deputy Sheriff Gary Stratemeyer responded to a suicide attempt call near Libby, Montana.[86]

77. *Hensley*, 477 P.3d at 1091 (Gustafson, J., dissenting).

78. *Id.* at 1091–93.

79. Godfrey v. Mont. Fish & Game Comm'n, 631 P.2d 1265, 1267 (Mont. 1981).

80. George Lee Flint, Jr., *ERISA: The Arbitrary and Capricious Rule Under Siege*, 39 CATH. U. L. REV. 133, 150 (1989) (citations omitted) (emphasis added).

81. Arneson v. State, 864 P.2d 1245 (1993).

82. *Hensley*, 477 P.3d at 1077 (quoting AMERICAN MEDICAL ASSOCIATION, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT 11 (6th ed. 2007)).

83. *Id.* at 1083 (Gustafson, J., dissenting).

84. *Id.* at 1077–78 (quoting Ward v. Johnson, 277 P.3d 1216, 1221 (Mont. 2012)).

85. *Id.* at 1076–78.

86. Stratemeyer v. Lincoln County, 855 P.2d 506, 507 (Mont. 1993) (*Stratemeyer I*).

When he arrived at the scene, he found a girl who had shot herself in the head being cradled by her father.[87] Deputy Stratemeyer took the girl from her father's arms and attempted to administer CPR.[88] After escorting the ambulance to the hospital, Deputy Stratemeyer learned of the girl's death.[89] In the following weeks, Deputy Stratemeyer could not continue working because he was tormented by the memory of tearing the girl from her father's arms in the last moments of her life.[90]

Because Montana's statutory definition of "injury" contemplates only physical injury,[91] benefits of the Act were unavailable to Deputy Stratemeyer for his mental anguish.[92] As a result, he brought a tort action claim against Lincoln County, his former employer, for "failure to train, counsel, and debrief him following the incident."[93] Lincoln County attempted to quash the lawsuit on the grounds that the Act was the exclusive remedy for work-related injuries in Montana, a remedy that was unavailable to Stratemeyer in his first cause of action.[94] Indeed, the right to sue an employer for injury in Montana does not exist if the employer "provides immediate coverage under the Workmen's Compensation laws."[95] However, as discussed in Part II, the exclusive remedy provision of the Act is an essential component of the *quid pro quo* that is its foundation.[96] That *quid pro quo* includes a guaranteed benefit to the worker.[97] Without that *quid pro quo*, the Court in *Stratemeyer II* held there is no exclusive remedy, "and the employer is thus exposed to potential tort liability."[98]

The holding in *Stratemeyer II* directly applies to Hensley's situation. While unrelated to the plurality's holding in *Hensley*, perhaps the most noteworthy outcome of the statutory revision is the erosion to workers' compensation's exclusive remedy. Justice Sandefur's dissent cautions that excluding one class of injured parties must be considered against the promise of the *quid pro quo*.[99] In this sense, the promise fails because one part of the *quid pro quo* is to guarantee payment for all physical injuries, including

87. *Id.* at 507–08.

88. *Id.* at 508.

89. *Id.*

90. Stratemeyer v. Lincoln County, 915 P.2d 175, 176–77 (Mont. 1996) (*Stratemeyer II*); *Stratemeyer I*, 855 P.2d at 508.

91. MONT. CODE ANN. § 39-71-119 (2019).

92. *Stratemeyer I*, 855 P.2d at 509.

93. *Stratemeyer II*, 915 P.2d at 176–77.

94. *Id.* at 179–80; *Stratemeyer I*, 855 P.2d at 509.

95. MONT. CONST. art. II, § 16.

96. *See supra* Part II.

97. *Stratemeyer II*, 915 P.2d at 179.

98. *Id.* at 180.

99. Hensley v. Mont. State Fund, 477 P.3d 1065, 1097 (Mont. 2020) (Sandefur, J., dissenting).

those that would fall under impairment Class One.[100] Hensley, however, did not raise this issue on appeal.[101] As Justice Shea quips in his special concurrence, "[t]he only one to make that argument in this case is Justice Sandefur."[102] The Court will not "consider new arguments or legal theories . . . on appeal."[103] Therefore, the Court could not consider the argument.[104] In *Stratemeyer II*, the Court held that because workers with mental injuries were outside the boundaries of the Act, a tort action remedy was available against the employer.[105] As a consequence of the *Hensley* plurality affirming § 39-71-703(2) and its placement of impairment Class One workers outside the boundaries of the Act, it follows that tort action claims are now available to them for the functional loss suffered due to their workplace injuries. Should the courts deny employees their right to an employer tort suit for impairment Class One injuries, a conflict arises where citizens are both barred a remedy within the Act and simultaneously barred from tort actions against employers who provide coverage under the Act.[106] The slippery slope suggested here is that each time the legislature removes a benefit for cost-containment purposes, the due process for workplace injury becomes more piecemeal and less exclusive until the purpose of workers' compensation insurance becomes moot. Justice Shea's special concurrence, likely in recognition of these consequences of the statute, appeared to invite the *quid pro quo* argument to the Court, and virtually vouched for its success.[107]

For now, injured employees will absorb the costs of Class One impairment awards. The injustice decried in Justice Sandefur's dissent,[108] Justice Gustafson's dissent,[109] and the appellant's brief[110] is that cost-savings are being recognized at the expense of those in impairment Class One. Justice Gustafson noted the prediction that the impairment award eligibility change

100. *Id.* at 1100.

101. Appellant's Brief, *supra* note 45, at 3, 5, 26–27. **R**

102. *Hensley*, 477 P.3d at 1079 (Shea, J., specially concurring).

103. *Id.*

104. *Id.*

105. 915 P.2d 175, 179–80 (Mont. 1996) (*Stratemeyer II*).

106. *See* MONT. CONST. art. II, § 16 (stating "No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable *except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state*.") (emphasis added).

107. *Hensley*, 477 P.3d at 1079 (Shea, J., specially concurring) ("Considering only the arguments as they were presented to the Workers Compensation Court and to this Court, I agree with the Court's ultimate conclusion that, in this particular case, Hensley has not met her burden of demonstrating that § 39-71-703(2), MCA, violates equal protection. I therefore concur in the result affirming the WCC.").

108. *Id.* at 1100 (Sandefur, J., dissenting).

109. *Id.* at 1087 (Gustafson, J., dissenting).

110. Appellant's Brief, *supra* note 45, at 31 (impairment class is a "cost–cutting carrot"). **R**

would realize a cost-savings of $8 million per annum.[111] The fiscal note for House Bill 334—the bill that added impairment Class of Two or greater to the eligibility criteria—noted that "approximately 1,600 of the 3,000 injured workers per year who receive an impairment rating less than Class Two but have no wage loss would no longer receive an impairment award."[112] Susan Hensley's predicted impairment award, but for the eligibility change, was $5,192.[113] Multiplying the estimated number of workers affected by the change (1,600) by Hensley's lost award ($5,000) arrives at the same cost-savings estimate the fiscal note anticipated: eight million dollars per annum. These savings do not exist in a vacuum. They come in the form of 1,600 people like Susan Hensley, who suffered a "glenoid labral tear of her left shoulder"[114] and a permanent, uncompensated loss of function in her body due to a workplace injury.[115] By recognizing the distinct loss associated with permanent whole person impairment but denying a remedy for such a loss, the Act shifts the cost of such injuries on to the very employees that are injured. Montana workers' compensation lawyers should note their clients' impairment class, as a potentially lucrative replacement source of compensation may now be available in the form of tort actions against employers.

The balance of cost-savings is accomplished by shifting costs of impairment awards from being applied evenly across all employers (in the form of insurance premiums) to the employers who have a litigious injured worker with an impairment Class One (in the form of settlement or damages). Deputy Stratemeyer brought a claim against Lincoln County when he was ineligible for workers' compensation for his mental injury.[116] The very existence of *Hensley* proves that some injured workers with no wage loss, and an impairment Class One, will bring a claim to exact their remedy. Employers with impairment Class One lawsuits will find themselves paying workers' compensation insurance premiums plus the very legal costs, settlements, and damages the Act is supposed to protect them from, while other employers benefit from the associated cost-savings. For this reason, a *quid pro quo* argument brought to the Court by an employer is just as likely.

111. *Hensley*, 477 P.3d at 1088 (Gustafson, J., dissenting).

112. Mont. State Fund, Generally Revise Workers' Compensation, H.R. Fiscal Note No. HB 334, at 4 (Mont. 2011).

113. *Hensley*, 477 P.3d at 1080 (Gustafson, J., dissenting).

114. *Id.* at 1069.

115. *Id.* at 1080 (Gustafson, J., dissenting).

116. Stratemeyer v. Lincoln County, 915 P.2d 175, 176–77 (Mont. 1996) (*Stratemeyer II*).

V. Conclusion

The plurality in *Hensley* found § 39-71-703(2) to pass rational basis muster, evidencing a shift to a more deferential Court than in 2012, when *Caldwell* was decided. Consequently, the statute remains in conflict with the fundamental promise to employers that the Act will shield them from litigation and to employees that the Act will compensate them for their loss.[117] The result is the shifting of class one impairment award costs from all employers to only those employers litigated against, and to employees who fail to seek or obtain a remedy in tort. The implication within Justice Shea's concurrence is that an argument exists to persuade the Court to hold this statute unconstitutional.[118] The contradiction between the new costing shift and the implied *quid pro quo* purpose of the Act suggests this area of law will remain unsettled until that argument arrives.

117. *Hensley*, 477 P.3d at 1100 (Sandefur, J., dissenting).
118. *Id.* at 1079 (Shea, J., specially concurring).