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APRIL 25, 2011
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Toni Weeks,	)	**Supreme Court Case No. 20110024**
	)	
Appellant,	)	
	)	
vs.	)	
	)	
North Dakota Workforce Safety and Insurance Fund,	)	
	)	
Appellee,	)	
	)	
and	)	
	)	
Dakota Gasification Co.,	)	
	)	
Respondent.	)	
	)	

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BRIEF OF APPELLEE NORTH DAKOTA WORKFORCE SAFETY AND INSURANCE

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APPEAL FROM DISTRICT COURT ORDER DATED DECEMBER 8, 2010, ORDER FOR JUDGMENT DATED DECEMBER 10, 2010, AND JUDGMENT DATED DECEMBER 13, 2010
MERCER COUNTY DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE BRUCE A. ROMANICK

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STATEMENT OF THE ISSUE

[1] Whether the classifications found in N.D.C.C. § 65-05-09.3, 65-05-09.4 and 65-05-09.5 are rationally related to legitimate government interests.

STATEMENT OF THE CASE

[2] On June 16, 1993, Toni G. Weeks ("Weeks") sustained a work injury after being exposed to anhydrous ammonia while employed by Dakota Gasification Company, Beulah, North Dakota. (App. 20) Weeks submitted a claim for benefits from WSI, which was accepted. (App. 20; C.R. 3)

[3] On October 2, 2009, WSI issued a Notice of Intention to Discontinue/Reduce Benefits, wherein Weeks was informed that because she became eligible for social security retirement benefits on November 1, 2009, her permanent total disability benefits would end on October 31, 2009, and beginning November 1, 2009, she would receive additional benefit payable. (App. 47) Weeks requested reconsideration. (App. 48) On November 18, 2009, WSI issued an Order denying further disability benefits after October 31, 2009, and awarding additional benefit payable beginning November 1, 2009, under N.D.C.C. § 65-05-09.4. (App. 50-51) Weeks requested rehearing. (App. 53) However, on January 7, 2010, WSI issued a Notice of Decision Reversing Previous Order, informing Weeks that WSI had erroneously calculated the additional benefit payable under N.D.C.C. § 65-05-09.4 and determining that the alternative calculation under N.D.C.C. § 65-05-09.5 applied to Weeks' claim. (App. 52) WSI then issued an Order awarding benefits pursuant to N.D.C.C. § 65-05-09.5. (App. 54-67) Weeks again requested rehearing and a hearing was held on May 7, 2010. (App. 57, 67) Post-hearing briefs were submitted to the administrative law judge. (C.R. 96-100; 101-239)

[4] On May 25, 2010, ALJ Janet Seaworth issued Findings of Fact, Conclusions of Law and Order, affirming WSI's February 9, 2010, Order. (App. 60-66) On June 11, 2010, Weeks appealed ALJ Seaworth's Findings of Fact, Conclusions of Law and Order to the District Court. (App. 15-10) On December 8, 2010, District Court Judge Bruce Romanick concluded the classification within N.D.C.C. § 65-05-09.3 did not violate equal protection because the classification was rationally related to a legitimate government interest. (App. 83-97) This appeal followed.

STATEMENT OF FACTS

[5] On June 16, 1993, Weeks sustained a work injury after being exposed to anhydrous ammonia while employed by Dakota Gasification Company, Beulah, North Dakota. (App. 20; C.R. 4) Weeks submitted a claim for benefits to WSI, which was accepted. (App. 20; C.R. 3) At the time of her injury, Weeks was 49 years old. (App. 20) Weeks received an initial period of total disability benefits until July 19, 1993. (WSI App. 2)

[6] Weeks began receiving temporary total disability benefits from WSI in May of 1999, and benefits continued until January of 2003. (WSIApp. 2-3) She also received a vocational rehabilitation allowance for the period January 14, 2003 through May 24, 2004. (WSIApp. 3) Weeks then received temporary total disability benefits again beginning May 25, 2004, through September 7, 2004. (WSIApp. 3-4) As of September 8, 2004, Weeks was found to be permanently and totally disabled and began receiving permanent total disability benefits. (C.R. 55-56; 91)

[7] Effective November of 1999, Weeks was found eligible for social security disability benefits. (C.R. 9) Weeks received $1,305.50 per month in these benefits.

(App. 21) WSI applied the social security offset provisions of N.D.C.C. § 65-05-09.1 to Weeks disability benefits, which resulted in a weekly benefit rate of $266.42 (App. 22), or $1,065.68 every 28 days. (App. 22; WSIApp. 2) When Weeks' benefits converted to permanent total disability benefits, she continued to receive $1,065.68 every 28 days. (WSIApp. 4-8; App. 74) These benefits were in addition to her social security disability benefits.

[8] In September of 2009, WSI received confirmation that effective November of 2009, Weeks' social security disability benefits would convert to social security retirement benefits. (WSIApp. 1) At that time, Weeks would receive $1,791.40 in social security retirement benefits. (Id.) On October 2, 2009, Weeks was notified that her permanent total disability benefits would be discontinued effective November 1, 2009, and thereafter she would begin receiving additional benefit payable (ABP) of $104.25 per week. (App. 47) Weeks requested reconsideration from that decision asserting it was "age discrimination." (App. 48) WSI issued its formal Order on November 18, 2009, discontinuing Weeks' permanent total disability benefits and awarding additional benefit payable under N.D.C.C. § 65-05-09.3. (App. 79-70) On January 7, 2010, WSI issued a Notice of Decision Reversing Previous Order, concluding that the alternative calculation of additional benefits payable under N.D.C.C. § 65-05-09.5 applied to Weeks' claim. (App. 52) Under that calculation, Weeks was to receive $166.80 per week payable through March 10, 2026. (Id.) Weeks, through counsel, requested reconsideration and a formal hearing. (App. 53) WSI issued a formal order on February 9, 2010. (App. 54-56) Weeks requested reconsideration asserting that WSI's reduction in benefits amounted to age discrimination. (App. 57)

[9] Brief testimony was taken from Weeks at a hearing held May 7, 2010. (App. 67-75) Following submission of post-hearing briefs (C.R. 96-100; 101-239), ALJ Seaworth issued Findings of Fact, Conclusions of Law and Order affirming WSI's February 9, 2010, Order. (App. 60-66) Specifically, ALJ Seaworth concluded as follows:

> 5. A party making a constitutional claim must do more than submit bare assertions to adequately raise a constitutional issue. *Olson v Workforce Safety and Insurance*, 2008 ND 59, 747 N.W.2d 71. Ms. Weeks maintains that the retirement presumption is discriminatory and unfair and asserts that there are two schools of thought as to whether it is proper to terminate or reduce a disabled worker's wage loss benefits upon reaching Social Security retirement age. She provides a list of cases illustrating the two schools of thought; one, upholding statutes offsetting social security retirement benefits and one striking down such statutes as invalid. Both schools of thought rely on a variety of legal theories to uphold or strike down the statutes, including challenges based on equal protection provisions of federal and state constitutions, procedural due process challenges, violations of vested rights clauses of state constitutions, unfair operation of laws under state constitutions, and challenges pursuant to federal age discrimination statutes. The problem is that while Ms. Weeks urges this ALJ to declare section 65-05-09.3(2) invalid, she does not articulate any particular legal theory upon which Ms. Weeks seeks relief. *Overboe v. Farm Credit Services of Fargo*, 2001 ND 58, 623 N.W.2d 372 (courts cannot be expected to search through the record and applicable case law to discern deprivations of a constitutional magnitude when the party attempting to claim a constitutional violation hasn't bothered to do so). As one court has said, "Judges are not like pigs, hunting for truffles buried in briefs." *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)(skeletal "argument" that is really nothing more than assertion does not preserve claim for appeal, especially when brief presents passel of other arguments). Ms. Weeks' bare assertion that the termination of her disability benefits is discriminatory and unfair, without articulation of the specific provisions violated and without persuasive authority and reasoning, is insufficient to raise an issue regarding the validity of section 65-05-09.3.

In addition, ALJ Seaworth concluded that she had no authority to decide upon the constitutionality of the statute but noted that the cases referenced by Weeks' concerned equal protection challenges and stated:

> To the extent Ms. Weeks' allegation of age discrimination can be construed to include such a challenge, this ALJ is without authority to decide whether § 65-05-09.3 and the related sections 65-05-09.4 and 65-05-09.5 are unconstitutional. Accordingly, and without any clear indication from claimant as to the legal theory upon which she relies for the proposition that the social security retirement offset is discriminatory, this ALJ must assume the claimant intends a challenge to the statute on constitutional grounds. Under *Johnson and Conrad*, this ALJ "must assume the law to be valid until judicial determination to the contrary has been made" and refrain from addressing the constitutional issues. *Conrad*, 350 N.W.2d at 585.

(App. 65-66)

[10] Weeks appealed ALJ Seaworth's to the District Court decision asserting that Finding of Fact 11 and Conclusions of Law 2, 4, 5 and 6 were in error and that the termination of Weeks' disability benefits violated "N.D.C.C. Ch. 14-02.4 and that the equal protection provisions of both the North Dakota and U. S. Constitutions." (App. 15) She also alleged that she was denied sure and certain relief under N.D.C.C. § 65-01-01 and due process. (App. 15-16) Although Weeks raised numerous errors in her Specification of Error, her brief only addressed a claim of violation of equal protection.

[11] On December 8, 2010, the District Court Judge Bruce Romanick concluded the classifications in N.D.C.C. § 65-05-09.3 did not violate equal protection because the classifications were rationally related to a legitimate government interest. (App. 83-97) The District Court also held that this Court had applied rational basis review to classifications in workers' compensation statutes and found Weeks' challenge was not entitled to heightened scrutiny. (App. 88-89)

LAW AND ARGUMENT

I. BECAUSE WEEKS FAILED TO BRING OUT THE "HEAVY ARTILLERY" NECESSARY TO RAISE A CONSTITUTIONAL CHALLENGE, THE COURT SHOULD DISMISS HIS APPEAL.

[12] Weeks challenges the application of N.D.C.C. § 65-05-09.3(2) to her claim which statute provides:

> An injured employee who begins receiving social security retirement benefits or other retirement benefits in lieu of social security retirement benefit sunless the employee proves the employee is not eligible to receive social security retirement benefits or other benefits in lieu of social security retirement benefits is considered retired. The organization may not pay any disability benefits, rehabilitation benefits or supplementary benefits to an employee who is considered retired; however, the employee remains eligible for medical benefits, permanent partial impairment benefits, and the additional benefit payable under N.D.C.C. § 65-05-09.4

N.D.C.C. § 65-05-09.4 provides as follows:

> If an injured employee's benefits cease under subsection 2 of section 65-05-09.3, the organization shall pay to that employee every twenty-eight days a benefit based on the length of time the injured employee received disability benefits during the term of that claim. The organization shall pay the injured employee's additional benefits until the employee's death or for a period of time not to exceed the total length of time the employee received disability benefits under sections 65-05-08, 65-05-08.1, 65-05-09, and 65-05-10, and a vocational rehabilitation allowance under chapter 65-05.1, for that claim, whichever occurs first. The benefit is based on the injured employee's compensation rate before any applicable social security offset. . . .

In Weeks case, however, because her injury occurred before August 1, 1995, the additional benefit payable under N.D.C.C. § 65-05-09.5 applied. That statute states as follows:

> An injured employee who meets the requirements of subsection 1 is entitled to an alternative calculation of additional benefits payable instead of the calculation provided for under section 65-05-09.4. For the limited purpose of this alternative calculation, the organization shall use the calculation established under N.D.C.C. 65-05-09.4 and shall consider that the injured employee's pre-August 1, 1995, date of injury is also the injured employee's date of first disability.

N.D.C.C. § 65-05-09.5(2). Therefore, Weeks would be deemed to have been disabled since June 16, 1993, (i.e., not counting the break in disability benefits until payments

resumed in 1991) at the time of her conversion to social security retirement benefits, for at least 15 and less than 17 years, thus entitling her to 40% of her weekly benefit.

[13] In her brief, Weeks provided no significant analysis or argument on the standard of review to be applied, nor did she fully articulate the basis of her challenge. Instead, she simply cited several cases which have considered various constitutional challenges to different statutes which reduced or discontinued different forms of workers compensation benefits upon eligibility for social security retirement benefits. However, as this Court stated in Haney v. North Dakota Workers Compensation Bureau, 518 N.W.2d 195, 197 (N.D. 1994):

> "[A]n Act of the legislature is presumed to be correct and valid, and any doubt as to its constitutionality must, where possible, be resolved in favor of its validity." Southern Valley Grain Dealers Ass'n v. Board of County Comm'rs, 257 N.W.2d 425, 434 (N.D. 1977). "A statute enjoys a conclusive presumption of constitutionality unless it is clearly shown that it contravenes the state or federal constitution." Richter v. Jones, 378 N.W.2d 209, 211 (N.D. 1985). "'The justice, wisdom, necessity, utility and expediency of legislation are questions for the legislative, and not for judicial determination.'" Manikowske v. North Dakota Workmen's Compensation Bureau, 338 N.W.2d 823, 825 (N.D. 1983), quoting Ashbury Hospital v. Cass County, 72 N.D. 359, 7 N.W.2d 438, 442 Syllabus 11 (1943).

Furthermore, in Fenske v. Fenske, 542 N.W.2d 98, 100 (N.D. 1996), this Court stated:

> The first step in raising a constitutional claim is articulation of the specific constitutional provisions violated. City of Bismarck v. Uhden, 513 N.W.2d 373 (N.D. 1994). Persuasive authority and reasoning must support constitutional claims. Wisdom v. State ex rel. N.D. Real Estate Com'n, 403 N.W.2d 19 (N.D. 1987). A party raising a constitutional challenge "should bring up his heavy artillery or forego the attack entirely." So. Valley Grain Dealers v. Bd. Of Cty. Com'rs, 257 N.W.2d 425, 434 (N.D. 1977); See Eklund v. Eklund, 538 N.W.2d 182 (N.D. 1995).

"This Court will only decide those issues which have been thoroughly briefed and argued, . . . and a party waives an issue by not providing adequate supporting arguments." Olson v. Workforce Safety and Insurance, 2008 ND 59 ¶ 26, 747 N.W.2d 79.

[14] ALJ Seaworth recognized that Weeks did not adequately raise her constitutional issue, and simply presented "two schools of thought" regarding offsets for social security retirement statutes. As she pointed out: "Judges are not like pigs, hunting for truffles buried in briefs." U.S. v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991). Although Weeks identified in her District Court appeal that she was proceeding on an equal protection theory, she still did not cite any additional legal authority in support of her claim. On appeal to this Court, she presented the identical arguments.

[15] ALJ Seaworth could not rule on the challenge, but if she could have, she would have simply dismissed the appeal for failure to adequately raise a constitutional challenge. This Court has the power to and should do so. See Effertz v. North Dakota Workers Compensation Bureau, 481 N.W.2d 218, 223 (N.D. 1992); Overboe v. Farm Credit Services of Fargo, 2001 ND 58 ¶ 13, 623 N.W.2d 372 (stating "[c]ourts cannot be expected to search through the record and applicable case law to discover deprivations of a constitutional magnitude when the party attempting to claim a constitutional violation has not bothered to do so.") "All regularly enacted statutes carry a strong presumption of constitutionality, which is conclusive unless the party challenging the statute clearly demonstrates that it contravenes the state or federal constitution." Grand Forks Professional Baseball, Inc. v. North Dakota Workers Compensation Bureau, 2002 ND 204 ¶ 17, 654 N.W.2d 426. A party "must do more than merely assert that a statute is [unconstitutional] to appropriately raise a constitutional issue." Swenson v. Northern

Crop Ins., Inc., 498 N.W.2d 174, 178 (N.D. 1993) (citation omitted). Because Weeks has not met this standard, the Court should refuse to consider the same and dismiss her appeal. See Owens v. State, 2001 ND 15 ¶ 31, 621 N.W.2d 566 (stating the Court "will not consider issues where there is a failure to cite supporting authority and briefing is inadequate"); State v. Witzke, 2009 ND 169 ¶ 6, 776 N.W.2d 232 (rejecting consideration of constitutional claim where only bare assertions submitted and lack of legal authority and case law to support claim).

II. STANDARD OF REVIEW OF CONSTITUTIONAL CHALLENGE.

[16] If this Court reaches the issue of Weeks' equal protection challenge, Article I § 21, of the North Dakota Constitution as the state constitutional guarantee of equal protection. Matter of Adoption of K.A.S., 499 N.W.2d 558, 563 (N.D. 1993). However, it must be remembered that "not all legislative classifications are unlawful." Haney, 518 N.W.2d at 197. "Perfection in making the necessary classifications is neither possible nor necessary." Hamich, Inc. v. State, ex rel. Clayburgh, 1997 ND 110 ¶ 31, 564 N.W.2d 640 quoting Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 314 (1976).

[17] The standard used to review a legislative classification depends on the challenged classification and the right allegedly infringed. Id. The various reviews of legislative classifications was set out by this Court in Gange v. Clerk of Burleigh County District Court, 429 N.W.2d 429, 433 (N.D. 1988), as follows:

> We apply strict scrutiny to an inherently suspect classification or infringement of a fundamental right and strike down the challenged statutory classification "unless it is shown that the statute promotes a compelling governmental interest and that the distinctions drawn by the law are necessary to further its purpose." State ex rel. Olson v. Maxwell, 259 N.W.2d 621, 627 (N.D. 1977). When an "important substantive right" is involved, we apply an intermediate standard of review which requires a "close correspondence between statutory classification and

> legislative goals." Hanson v. Williams County, 389 N.W.2d 319, 323, 325 (N.D. 1986) [quoting Arneson v. Olson, 270 N.W.2d 125, 133 (N.D. 1978)]. When no suspect class, fundamental right, or important substantive right is involved, we apply a rational basis standard and sustain the legislative classification unless it is patently arbitrary and bears no rational relationship to a legitimate governmental purpose. See State v. Knoefler, 279 N.W.2d 658, 662 (N.D. 1979).

This Court has noted that "like unemployment compensation benefits" workers compensation benefits "fall within 'the field of social welfare and economics.'" Haney, 518 N.W.2d at 199, quoting Lee v. Job Service North Dakota, 440 N.W.2d 518, 519 (N.D. 1989) and Idaho Department of Employment v. Smith, 434 U.S. 100, 101 (1977). Therefore, this Court has "'consistently deferred to legislative determinations concerning the desirability of statutory classifications affecting the regulation of economic activity and the distribution of economic benefits'" and concluded that the appropriate standard of review was the rational basis test. Id. at 199-200, quoting Lee, 440 N.W.2d at 519. This standard has been applied to challenges to workers' compensation statutory classifications. Baldock v. North Dakota Workers Compensation Bureau, 554 N.W.2d 441 (N.D. 1996)(equal protection challenge); Eagle v. North Dakota Workers Compensation Bureau, 1998 ND 54, 583 N.W.2d 97 (equal protection challenge). Accordingly, this Court should apply the rational basis test to Weeks' equal protection challenge.

> The rational basis test is a relaxed standard of review. As we summarized in Lee v. Job Service North Dakota, 440 N.W.2d at 519-20:
>
> > Under the rational basis standard of review, a legislative classification will be sustained unless it is patently arbitrary and bears no rational relationship to a legitimate government interest. Hanson v. Williams County, supra, 389 N.W.2d at 323. "A classification does not deny equal protection "if any state of facts reasonably can be conceived that would sustain it.'" Grand Forks-Traill

> Water Users, Inc. v. Hjelle, 413 N.W.2d 344, 348 (N.D. 1987) [quoting Signal Oil & Gas Co. v. Williams County, 206 N.W.2d 75, 83 (N.D. 1973)]. 'Through the precise points in a field of many competing pressures a legislature might most suitably have drawn its lines is not a question for judicial re-examination." Syllabus 6, State v. Gamble Skogmo, Inc., supra. A classification with a reasonable basis does not violate the equal protection clause merely 'because in practice it results in some inequality.' Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 491, 97 S.Ct. 1898, 1909, 52 L.Ed.2d 513, 528 (1977) [quoting Lindsley v. National Carbonic Gas Co.l, 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.3d 369, 377 (1911)].
>
> Reform may take one step at a time. Snyder's Drug Stores, Inc. v. North Dakota State Bd. Of Pharmacy, 219 N.W.2d 140, 148 (N.D. 1974); State v. Gamble Skogmo, Inc., 144 N.W.2d 749, 760 (N.D. 1966). "[A] court need not know the special reasons, motives, or policies of a State legislature in adopting a particular classification, so long as the policy is one within the power of the legislature to pursue, and so long as the classification bears a reasonable relation to those reasons, motives, or policies." Signal Oil & Gas Co. v. Williams County, 206 N.W.2d 75, 83 (N.D. 1973). "[T]he Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification." Nordlinger v. Hahn, ____ U.S. ___, ___, 112 S.Ct. 2326, 2334, 120 L.Ed.2d 1, 15-16 (1992).

Haney, 518 N.W.2d at 201. In addition, "[u]narticulated legislative purposes may be considered in an equal protection analysis of a statutory classification." Id. at 202. Therefore, if a court can conceive of a reason justifying the choice made by the legislature in service of a legitimate end, the statute does not violate the equal protection clause. Best Products Co., Inc. v. Spaeth, 461 N.W.2d 91, 97 (N.D. 1990).

III. LEGISLATIVE HISTORY BEHIND ENACTMENT OF N.D.C.C. § 65-05-09.3(2), N.D.C.C. § 65-05-09.4 AND N.D.C.C. § 65-05-09.5.

[18] In 1989, the North Dakota Legislature enacted N.D.C.C. § 65-05-09.2 that required "an offset of social security retirement benefits against workers' compensation

disability benefits for workers who retired on or after July 1, 1989." Gregory v. North Dakota Workers Compensation Bureau, 1998 ND 94 ¶ 18, 578 N.W.2d 101. In 1995, the Legislature enacted a statutory presumption (N.D.C.C. § 65-05-09.3(2) (1995)) which provided that an individual that becomes eligible for social security retirement benefits was considered retired and no longer eligible for workers' compensation disability benefits. Id. ¶ 19. In 1997, the Legislature replaced N.D.C.C. § 65-05-09.3(2)(1995) and enacted N.D.C.C. § 65-05-09.4 which created an additional benefit payable for workers whose benefits were cancelled by application of N.D.C.C. § 65-05-09.3(2). Id. ¶ 20. The statute as enacted in 1997 provided as follows:

> An injured employee who begins receiving social security retirement benefits or other retirement benefits in lieu of social security retirement benefits, or who attains retirement age for social security retirement benefits unless the employee proves the employee is not eligible to receive social security retirement benefits or other benefits in lieu of social security retirement benefits is considered retired. The bureau may not pay any disability benefits, rehabilitation benefits, or supplementary benefits to an employee who is considered retired; however, the employee remains eligible for medical benefits, permanent partial impairment benefits, and the additional benefit payable under section 65-05-09.4.

N.D.C.C. § 65-05-09.3(2).[1] The additional benefit payable under N.D.C.C. § 65-05-09.4 provides for payment of the benefits based on a percentage of the former disability benefit being paid and the length of time the individual had previously received disability benefits. Gregory, 1998 ND 94 ¶ 20, 578 N.W.2d 101.

[19] The legislative history of the 1997 amendments reflect the purpose of the retirement presumption and the additional benefit payable as follows:

[1] An amendment in 2003 changed the language of "bureau" to "organization." 2003 N.D. Laws ch. 561 § 3. There have been no substantive changes to the statute since 1997.

This Bill, if enacted, will create a new benefit for injured workers who have been unable to work for longer periods of time because of their work injuries, and will amend the law that provides that workers compensation wage loss payments end at retirement.

The Bill follows up on a law enacted by the 1995 Legislative Assembly as part of the package of workers compensation reform legislation. The 1995 legislation amended section 65-05-09.3 of the Century Code. Before 1995, section 65-05-09.3 provided that after an injured worker had retired, the worker was no longer eligible to begin receiving workers compensation wage loss benefits. This is because after a person has retired from the workforce, even if that person later becomes medically disabled, that person does not miss work or lose wages, and therefore should not receive wage loss payments.

This law had a loophole. It did not apply to injured workers who were already receiving wage loss payments at the time they reached retirement. Therefore, although a worker who retired and then later became medically disabled received no wage loss payments, a worker who became disabled shortly before retirement might receive wage loss payments for life. The 1995 legislation made the law more consistent by providing that wage loss payments for all injured workers and when they begin receiving Social Security Retirement benefits, or when they reach age 65, and are eligible to receive Social Security Retirement benefits. The same is true for workers who are outside the Social Security Retirement system because they are in a job that has a special alternative retirement system.

. . .

The 1995 legislation took effect on August 1, 1995. During the next year, 56 individuals who were receiving wage loss benefits reached the age of 65. Of these, three had suffered catastrophic work injuries and two were not eligible for Social Security Retirement benefits. These five injured workers were therefore exempt from the law and continued to receive wage loss benefits. The remaining 51 claimants were eligible for full Social Security Retirement benefits when they reached age 65, and therefore their Workers Compensation wage loss benefits ended.

The median age at which these 51 workers had been injured was age 57. In other words, the typical worker from this group had been injured about eight years before becoming eligible for full Social Security Retirement. Attached to this testimony is a graph titled “Age at Date of Injury for Claimants Recently Subject to Retirement Law.” This graph demonstrates that two-thirds of these workers were over age 55 when they were injured.

> Another graph, titled "Income Replacement Study," also attached, shows the results of a recent study of individuals receiving disability payments from both Workers Compensation and Social Security, as almost all of the 51 workers were. The study revealed that in 72% of the cases studied, the individuals were receiving as much or more in disability payments than they had been earning in take home income when they were working.
>
> Putting these together, we can see that most of the individuals whose wage loss benefits ended at retirement had been off work for relatively short periods of time, and that most of them had received as much or more in disability payments as they would likely have earned in take home income. In other words, when they reached retirement most were financially not much worse off, and may have even been better off, than they would have been if they had continued working. When these individuals' wage loss benefits ended, they were in approximately the same financial situation as would be a similar group of workers who had not been injured and had continued working and earning wages until retirement.
>
> This shows that for most workers, the 1995 retirement legislation worked as intended. The workers received wage loss payments during their working years when they were unable to work, and for most of them their lost wages were matched or even exceeded. When those workers reached retirement, the wage loss payments ended, just as the wages of working people end, and their retirement benefits began. Since most of them had been receiving Social Security disability payments with annual cost of living adjustments, when those disability payments were converted into retirement benefits, at age 65, their retirement benefits were at an appropriate level.
>
> However, a smaller number of the 51 workers had been injured earlier, when they were in their thirties or forties, and some had been unable to work for twenty or thirty years or more. They had not had the opportunity to develop their careers. A concern arose that the law may be having a disproportionate impact on these relatively small number of injured workers who had been unable to work for long periods of time because of their work injuries.

1997 North Dakota Legislative Assembly, Testimony on Senate Bill No. 2125, Reagan R. Pufall, January 13, 1997, Senate Industry, Business and Labor Committee. (WSIApp. 26-28) Thus, the legislative history reflects that the discontinuance of disability benefits upon receipt of social security retirement benefits was predicated on the belief that it

would be inconsistent to pay disability benefits, which are to replace lost wages, when an individual is retired and would not be receiving wages. The legislative history also reflects that studies conducted found that the 1995 legislation which discontinued disability benefits upon becoming eligible for social security retirement benefits "worked as intended" and the workers receiving social security retirement benefits without disability benefits their social security retirement benefits were at an appropriate level. Id. (WSIApp. 28)

[20] However, the legislative history from the 1997 amendments which modified the discontinuance of disability benefits and provided an additional benefit payable thereafter, reflects the goals/purposes of that legislation were as follows: (1) to provide an appropriate benefit to those who need it. The additional benefit payable pays a higher benefit to those individuals that have been unable to work for longer periods of time because of their work injuries. (2) Avoid negative incentives, or, in other words, balance the need to provide an appropriate benefit to those in need against the danger of providing a high enough benefit to create an incentive for individuals to leave work and stay off work. (3) Avoid unnecessary premium costs. The fiscal analysis showed that the additional benefit payable would have a 1% upward impact on premium and require additional reserves. (4) Avoid litigation. The additional benefit payable avoids litigation in two ways – simple to use and calculate the amount of benefits payable and avoiding "notches" or large differences in benefits available as the size and term of the benefit increases smoothly in small incremental steps. (5) Provide even handed treatment of claimants. Although this does not mean "equal or identical treatment" the legislation provides some benefit to almost all workers whose wage loss benefits end at retirement,

but targets more assistance towards those who have been unable to work for longer periods of time. (6) Simplicity of use. The additional benefit payable is simple to calculate and gives the ability to pay the benefit in an efficient, businesslike manner. It is with these goals/purposes of the legislation that the analysis of whether there is a rational basis for the same must be analyzed, in addition to any unarticulated purpose of the legislation that could withstand challenge. See id. WSIApp. 29-40.

[21] In 2007, the Legislature enacted N.D.C.C. § 65-05-09.5, an alternative calculation of the additional benefit payable under N.D.C.C. § 65-05-09.4. The legislation came out of the Workers' Compensation Review Committee, established pursuant to N.D.C.C. § 54-35-22. The legislative history reflects that the purpose of the amendment was as follows:

> This amendment establishes an alternative benefit calculation for those individuals who incurred a compensable injury prior to August 1, 1995, yet realized a date of disability after August 1, 1995.
>
> This change seeks to address inequities which arose in this population as compared to those individuals who received a continuous stream of benefits beginning prior to August 1, 1995. The effect of this amendment is to provide an alternative Additional Benefit Payable (ABP) calculation upon eligibility for designated permanent total disability recipients. This amendment would allow the recipient to receive an ABP calculation based on the date of injury rather than the date of disability.
>
> The individuals who are eligible to receive this alternative calculation are injured employees incurring a compensable injury prior to August 1, 1995, yet have a date of disability or a successful reapplication for disability after July 31, 1995. The injured employee must also be determined permanently and totally disabled prior to August 1, 2007. The beginning date for calculation of their ABP will be presumed to be the date of injury.
>
> Briefly, let me illustrate a situation showing the effect of the amendment and the reasons the Organization supports it. In 1995 and 1997 the Legislature instituted a retirement presumption and corresponding eligibility for ABP (Attachment A). This legislation was intended to terminate wage replacement benefits when an injured employee retired,

> yet still provide a transitional benefit called "Additional Benefits Payable" based on the length of time and amount of wage replacement benefits received.
>
> The North Dakota Supreme Court subsequently determined the retirement presumption could not terminate benefits of an injured employee who was already receiving ongoing benefits prior to July 31, 1995. As a result, an injured employee on uninterrupted wage replacement benefits as of July 31, 1995, would receive the same level of benefits for life and not be affected by the ABP law.
>
> Alternatively, an injured employee who experienced a break in benefits after July 31, 1995, would – at their time of retirement – convert to ABP. In other words, the ABP retirement presumption would apply to anyone with a date of injury before July 31, 1995, but who then subsequently had a break in benefits after that date because they attempted to return to work.

2007 House Bill No. 1038, Testimony of Tim Wahlin, Staff Counsel, before the House Industry, Business and Labor Committee, January 10, 2007. (WSIApp.96-100).

IV. N.D.C.C. § 65-05-09.3(2), N.D.C.C. § 65-05-09.4 AND N.D.C.C. § 65-05-09.5 ARE RATIONALLY RELATED TO LEGITIMATE GOVERNMENT PURPOSES.

[22] Under North Dakota's statutory scheme, disability benefits are to compensate for a loss of earning capacity. Gronfur v. North Dakota Workers Compensation Bureau, 2003 ND 42 ¶ 14, 658 N.W.2d 337. In Weeks' case, she was receiving permanent total disability benefits and social security disability benefits until her social security disability benefits converted to social security retirement benefits after November 1, 2009. WSI applied N.D.C.C. § 65-05-09.3(2) to discontinue Weeks' permanent total disability benefits and start payment of additional benefit payable under N.D.C.C. §§ 65-05-09.4 and 65-05-09.5.

[23] Weeks offers up a variety of cases which provide differing analyses on the purpose of workers' compensation benefits. However, a closer analysis of those cases also reveals differences in the type of benefits discontinued, offset or reduced upon

receipt of social security retirement benefits, and the stated purpose of the legislative enactments discontinuing those benefits. Those cases upholding the constitutionality of discontinuance of disability benefits upon receipt of social security retirement benefits more closely parallel the rationale of the North Dakota statutory enactment and therefore the constitutionality of N.D.C.C. §§ 65-05-09.3, 65-05-09.4 and 65-05-09.5 should be upheld.

[24] In In Re Tobin's Case, 675 N.E.2d 781 (Mass. 1997), the challenged statute terminated total or partial disability benefits if an employee had been out of the labor market for at least two years and was eligible for social security benefits or benefits from a public or private pension paid for in part or entirely by an employer. Id. at 783. The statute was challenged on equal protection grounds, and the court applied a rational basis standard of review. Id. at 784. The court noted that the workers' compensation law was designed to provide wage-loss protection to employees who were injured on the job and incurred "a loss of earning capacity from the injury." Id. In analyzing the enactment, the court stated:

> Workers' compensation restores to the injured employee a portion of the wages made unavailable because of lost earning capacity. Social security and public or private pension programs are also designed to provide wage-loss protection, but do so on account of advanced age. Like workers' compensation, benefits from these sources provide an employee with a percentage of preretirement income. Without a benefit coordination provision, the combined payments from "double-dipping" through the receipt of both workers' compensation benefits and social security and pension payments could exceed the employee's preinjury average weekly wage. In furtherance of a legitimate State interest, the Legislature could rationally have enacted [the statute] to coordinate benefits and thereby prevent the stacking of benefits derived from statutory and other schemes designed to serve a common purpose.
>
> The Legislature could also have enacted the statute to reduce the cost of workers' compensation premiums for employers who are paying into

> multiple benefits systems such as workers' compensation, social security, and pensions. Because [the statute] makes it more difficult for employees eligible for social security or pensions also to collect workers' compensation benefits, the burden on employers is alleviated. This also provides a rational basis for the statute. For these reasons, there is a universal agreement that statutes . . . promote legitimate governmental goals and do not violate rights of equal protection.

In Re Tobin's Case, 675 N.E.2d at 784-85 (citations omitted). Thus, like the North Dakota provision, the purpose of the discontinued benefits was to provide wage loss protection for loss of earning capacity and to prevent the stacking of benefits.

[25] In Vogel v. Wells Fargo Guard Services, 937 S.W.2d 856 (Tenn. 1996), there was a challenge to a statute enacted as part of workers' compensation reform that limited permanent total disability benefits payable until age 65. Id. at 858. However, workers who are injured after age 60, were paid 260 weeks of benefits. Id. The Court applied a rational basis test in reviewing the statutory enactment. Id. After reviewing the various approaches by other jurisdictions, the Tennessee Court stated:

> The Kansas and Washington approach views workers' compensation benefits as part of an overall "wage-loss program" which includes unemployment, disability, and retirement benefits. When viewed as a part of an overall program, it is argued that "[t]he crucial operative fact is the wage loss, the cause of the wage loss merely dictates the category of legislation applicable." 4 A. Larson, *Workmen's Compensation* § 97.10 (1990)
>
> > [I]f a work[er] undergoes a period of all three conditions, it does not follow that [the worker] should receive three sets of benefits…. [The worker] is experiencing only one wage loss and, in any logical system, should receive only one wage-loss benefit.
>
> Id. Thus, a statute that includes termination of disability benefits upon commencement of old-age benefits, those courts conclude, is a rationally based statute.
>
> Our statute is not identical to the Colorado statute deemed unconstitutional in Romero. Our statute terminates benefits for permanently, totally

> disabled workers at age sixty-five, but it provides 260 weeks of benefits for any worker who becomes permanently and totally disabled after age sixty regardless of the age. Unlike the Colorado statute, it does not deprive individuals like Vogel, seventy-three when injured, of benefits.
>
> We conclude that our legislature intended to tie workers' compensation benefits for workers who are permanently and totally disabled to the commencement of Social Security benefits. The distinctions drawn between ages sixty and sixty-five, in an effort to accomplish that end, are not unconstitutional. Further the 260 week award for claimants injured after age sixty is rationally related to the goal of assuring that employees have an adequate recovery. While we acknowledge the numerous distinction between old-age and disability benefits, we conclude that the legislature was attempting to serve legitimate state interest in awarding compensation benefits for the permanently, totally disabled employee until old-age Social Security benefits commenced. The scheme employed, differentiating on the basis of age, bears a rational relationship to the accomplishment of that state interest. We are persuaded, based on our reading of our statute and the excellent analyses of other states reviewed in this opinion, that [the statute] insofar as it relates to termination of permanent total disability benefits for workers age sixty and over, does not violate equal protection.

Id. at 860-61. Like the North Dakota provision, the Tennessee provision reflected an intent to compensate for wage loss only until retirement. At that point, the wage loss ends and retirement begins and it is a legitimate state interest to allow payment of only one type of wage loss benefit, regardless of what caused the wage loss.

[26] Next, Brown v. Goodyear Tire & Rubber Co., 599 P.2d 1031 (Kan. 1979), involved review of a statute that terminated workers compensation permanent total, temporary total or partial disability benefits from and after the date an injured worker became entitled to social security retirement benefits. The claimant challenged application of the statute as unconstitutional based on due process and equal protection based on age. Id. at 1035. In rejecting the challenges that court stated as follows:

> "Classification necessarily involves discrimination. Yet it is only invidious discrimination with no rational basis for the statutory classification that offends the equal protection guarantee." The

> classification must bear a fair and substantial relation to the purpose of the legislation. Baker v. List and Clark Construction Co., 222 Kan. At 130, 563 P.2d at 434, relying upon Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971); Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491, rehearing denied 398 U.S. 914 (1970); Henry v. Bauder, 213 Kan. 751, 518 P.2d 362 (1974). Citing 4 A. Larson, The Law of Workmen's Compensation, § 97.00, 97.10 (1976) and the Report on Kansas Legislative Interim Studies to the 1974 Legislature 3-1-18, the court characterized the Workmen's Compensation Act as a system of wage-loss protection, and preventing the duplication of benefits that was viewed as a reasonable legislative objective. "It may be said that the classification created by statute has a rational basis, is not arbitrary, and affords like treatment to persons similarly situated." Baker, 222 Kan. At 132, 563 P.2d at 435.
>
> . . .
>
> The setoff provision challenged in this action withstands allegations of unconstitutionality on grounds similar to those described in Baker… By preventing a duplication of benefits under the Workmen's Compensation Act and the Social Security Act, the provision places the worker in the same position as fellow workers who have retired and are drawing old age social security benefits. At that point he is no longer subject to wage loss. It is only his disability benefits that are affected. After retirement the wage loss experienced by a worker is not caused by injury, but by retirement.

Id. at 1035-36.

[27] The rationale outlined above employed by the Kansas Court applies equally to the North Dakota provisions. One of the goals was to place injured workers in the same or similar position that individuals would be if they had not been injured and simply receiving social security retirement benefits. The 1997 amendments reflect an attempt to provide assistance to those that needed more assistance to get them to that end, as the studies indicated there were instances where the longer period of time individuals were on disability benefits, the discontinuance of those benefits after receiving retirement benefits disproportionately impacted them. In addition, the 2007 amendment grew out of a study by the Workers Compensation Review Committee that addressed a further

concern with the 1995 enactment, that being, if individuals had a break in disability benefits even though injured prior to 1995, the 1995 legislation was applicable to discontinue their benefits and award ABP benefits. The 2007 legislation increased the benefits payable to those injured workers by providing for calculation of additional benefit payable based on the date of injury, rather than date of disability after 1995. The minutes of the Workers' Compensation Review Committee that considered the amendments reflects that it was a "likely reality that from the date of injury forward an injured employee is earning less money and is less able to prepare for retirement" and thus the purpose of the additional amendment is to address these issues. North Dakota Legislative Council, Minutes of the Workers' Compensation Review Committee, September 21, 2006. (WSIApp. 110-118). By providing an additional benefit payable, although not "perfect" it certainly is rationally related to the legitimate purposes of the legislation. See, Hamich, Inc. 1997 ND 110 ¶ 31, 564 N.W.2d 640 (citation omitted).

[28] In Harris v. State Department of Labor and Industries, 843 P.2d 1056 (Wash. 1993), the challenged statute reduced workers compensation benefits pursuant to an offset with social security retirement benefits. The provision, therefore, is more akin to N.D.C.C. § 65-05-09.2 than N.D.C.C. § 65-05-09.3(2). Nonetheless, the provision withstood a challenge based on equal protection, based on the same analysis employed in Brown.

[29] In a very recent case, not cited by Weeks, the Supreme Court of Montana considered a challenge of constitutionality of termination of permanent total disability benefits at age 65 in Satterlee v. Lumberman's Mut. Cas. Co., 222 P.3d 566 (Mont. 2009). In Satterlee, three individuals who had suffered work-related injuries which

resulted in them receiving permanent total disability benefits challenged the constitutionality of a Montana statute that provided for termination of disability or rehabilitation benefits if a claimant receives or was eligible to receive social security retirement benefits or an alternative form of retirement benefits. Id. at 570. The statute in question is quite similar to N.D.C.C. § 65-05-09.3(2) in that disability[2] benefits are discontinued, but the claimant remains eligible for impairment awards and medical benefits. See id. However, the Montana statute does not provide for any additional benefits payable.

[30] The Montana Court applied rational basis scrutiny to the equal protection challenge. Id. at 571-72. In rendering its decision, the Montana Court distinguished a prior case, Reesor v. Montana State Fund, 103 P.3d 1019 (Mont. 2004). As the Court in Satterlee pointed out, the benefit as issue in Ressor was permanent partial disability benefits. Id. at 572. Permanent partial disability benefits are intended to restore the claimant to a pre-accident wage level for a limited amount of time, while permanent total disability benefits are meant to assist the claimant for his or her work life. Under Montana's system, permanent partial disability payments are a wage supplement which restores the claimant to a pre-accident wage level if the claimant suffered a wage decrease after returning to work. Id. at 573. The Court found this distinction important as permanent total disability benefits were not meant to supplement a claimant's wages, and therefore declined to follow Ressor. Id. The Court then stated:

> In order to achieve the stated purpose of PTD benefits, which the legislature explained to be the provision of wage-loss benefits that bear a

[2] The benefits discontinued in Satterlee were permanent total disability benefits, but the statute provides for termination of any type of disability benefits, just as is the case with N.D.C.C. § 65-05-09.3(2).

> reasonable relationship to actual wages lost, it is sufficiently rational that such benefits would terminate when actual wages would normally terminate-upon retirement. The fact that retirement is statutorily defined at a given age for purposes of terminating PTD entitlements does not make the statute *per se* irrational.
>
> As the WCC pointed out, "in the absence of § 39-71-710's limitations, [PTD benefits] would become a lifetime benefit." Satterlee v. Lumberman's Mut. Cas. Co. et. Al., 2005 MTWCC 55. Indeed, without the statute, PTD benefits would run on until the claimant's death. Conversely, PPD benefits do terminate after a statutorily defined number of weeks. As such § 39-71-710, MCA, was irrational as it applied to PPD benefits because it disparately impacted similarly situated classes without serving any legitimate government interest. The termination of PTD based on SSRI eligibility on the other hand, is a sufficiently rational means of ensuring that PTD benefits do not become a lifetime benefit… With the statutory intent of § 39-71-710, MCA, in mind, it is rational for the workers' compensation system to terminate PTD benefits at a time when, statistically, most people's work-lives have ended. While this may not always seem fair, it is not unconstitutional. By acting to terminate benefits as it does, § 39-71-710, MCA, rationally advances the government purpose of providing wage-loss benefits that bear a reasonable relationship to actual wages lost.

Id. at 574. Thus, the type of benefits discontinued and the purpose behind the enactment considered in Satterlee are nearly identical to the North Dakota statutes, and, as demonstrated above, withstands an equal protection challenge under the rational basis test.

[31] With respect to the other cases cited by Weeks, one can see why courts struck them down under the rational basis test. For example, in Industrial Claims Appeals Office of the State of Coloraco v. Romero, 912 P.2d 62 (Colo. 1996), the challenged statute discontinued *only* permanent total disability benefits at age 65 upon receipt of social security retirement benefits, but allowed individuals age 65 and over to continue to collect temporary total and partial disability benefits. Id. at 69. The Court pointed out that the statutory classification singles out the most seriously injured person and excludes

them from compensation, but continues to compensate those who are less seriously injured. Id.

[32] Furthermore, contrary to Weeks' assertion, the rationale in all cases for the conclusion that the discontinuance of permanent total benefits was unconstitutional was because the court did not recognize that disability benefits were wage-replacement benefits is incorrect. In fact, in Culver v. Ace Electric, 971 P.2d 641 (Colo. 1999), the same court, in reviewing a social security retirement offset provision rejected the argument that Romero stood for the proposition that social security retirement benefits and permanent total disability benefits do not serve the same purpose, stating:

> In Romero, we discussed the contention that "withholding workers' compensation benefits from persons age sixty-five and older ... is not rationally related to the goal of preventing duplicate benefits because workers' compensation benefits do not serve the same purpose as retirement benefits." Romero, 912 F.2d at 68.
>
> However, because we held that section 8-42-11(5) impermissibly denied persons age sixty-five and older equal protection of the laws for mere administrative convenience, our discussion of the nature of social security benefits was tentative and not dispositive. *See id.* at 67-68. We recognized, nonetheless, that the legislature had provided an offset provision to address duplication of benefits, should social security retirement benefits be viewed as replacing wage loss resulting from advanced age:
>
> > Even if social security old age benefits are construed to be a replacement for wage loss resulting from advanced age, *then preventing double recovery of old age benefits and permanent total disability benefits is already achieved by § 8-42-103(1)(c)(II),* 3B C.R.S. (1995 Supp.), which deducts the value of the social security old age benefit from the award for workers' compensation benefits.
>
> *Id.* at 68 n. 4. (emphasis added).

Culver, 971 P.2d at 647. That court then went on to adopt the same rationale as other cases in upholding statutory enactments to constitutional challenges:

> We have previously recognized the validity of the General Assembly placing placed workers' compensation benefits, social security retirement benefits, and unemployment benefits into a general pool of wage loss compensation benefits for purposes of an offset provision. *See* Goode, 867 P.2d at 879-80.
>
> …
>
> Other state courts have recognized that workers' compensation benefits and social security retirement benefits share a common purpose. *See, e.g., Injured Workers of Kan. v. Franklin,* 262 Kan. 840, 942 P.2d 591, 613-14 (Kan.1997); *McClanathan v. Smith,* 186 Mont. 56, 66-67, 606 P.2d 507, 513- 14 (Mont.1980); *Vogel v. Wells Fargo Guard Servs.,* 937 S.W.2d 856, 860-61 (Tenn.1996); *Harris v. Department of Labor & Indus.,* 120 Wash.2d 461, 843 P.2d 1056, 1066 (Wash.1993). The Washington Supreme Court, for example, has held that workers' compensation and federal old age social security benefits "serve the same purpose: to restore earnings due to wage loss. The cause of wage loss--whether it be old age, disability, or unemployment--is irrelevant." *Harris, 843 P.2d at 1066.* The Washington court quoted another portion of Larson's treatise in support of its holding:
>
> > Wage-loss legislation is designed to restore to the worker a portion, such as one-half to two-thirds, of wages lost due to the three major causes of wage-loss: physical disability, economic unemployment, and old age. The crucial operative fact is that of wage loss; the cause of the wage loss merely dictates the category of legislation applicable. Now if a workman undergoes a period of wage loss due to all three conditions, it does not follow that he should receive three sets of benefits simultaneously and thereby recover more than his actual wage. He is experiencing only one wage loss and, in any logical system, should receive only one wage-loss benefit....
>
> *Harris,* 843 P.2d at 1066 (quoting 4 Arthur Larson, *Workmen's Compensation* § 97.10 (1990)).

Culver, 971 P.2d at 649-50. Accordingly, Romero does not support an argument that N.D.C.C. §§ 65-05-09.3(2), 65-05-09.4 or 65-05-09.5 violate equal protection of the laws. North Dakota's enactments do not simply discontinue permanent total disability upon eligibility for social security retirement benefits, but instead applies to all forms of

disability benefits. Therefore, the irrationality noted in Romero of that statutory system is not present in North Dakota's statutes. Furthermore, the statute at issue in Romero left the injured worker without any form of additional compensation upon receipt of retirement benefits, while North Dakota provides payment of additional benefits payable.

[33] Likewise, in Golden v. Westmark Community College, 969 S.W.2d 154 (Ark. 1998), the court reviewed a statutory provision against an equal protection challenge that reduced payment of permanent partial disability benefits to workers age sixty five or older in an amount equal to public or privately funded retirement or pension plans. Id. at 156-57. Under the Arkansas system, the award of 15% permanent partial disability, or loss-of-income rating, he was not eligible for this benefit. Id. This provision was separate from a provision which applied to permanent total disability benefits. Id. at 157. Therefore, the benefit at issue in Golden was not the same type of benefit at issue in this case, but more akin to the type of benefit at issue in Romero. Thus, the type of benefit considered in Golden is not a disability benefit, but rather an additional statutory benefit that compensates for loss of the ability to earn the same wage as earned prior to the injury combined with a loss of permanent physical disability rating. See id at 159. Therefore, this benefit is something that does not specifically exist under North Dakota's workers' compensation system but is more akin to permanent partial impairment awards under North Dakota's system. Accordingly, this case is distinguishable and does not provide support for Weeks' argument.

[34] Likewise, in State v. Richardson, 482 S.E.2d 162 (W. Va. 1996), while the court's decision did reflect its belief that workers' compensation benefits and social security retirement benefits were not merely wage replacement benefits, the court also found it

important that "the statute under discussion prescribes a reduction of benefits for those totally disabled persons receiving old age benefits who are *permanently and totally* disabled under workers' compensation and does not affect the benefits of persons receiving old age social security disability benefits who are *permanently, but partially*, disabled under workers' compensation." Id. at 170. The court noted that the statute at issue was more akin to that under consideration in Romero, and therefore relied in part on that fact in support of its determination that the classification was irrational. Id. Again, therefore, the statute at issue is quite different than the statutes which have been applied to Weeks, and the troubling elements in the above cited cases are not present here.

[35] Finally, in Merrill v. Utah Labor Commission, 223 P.3d 1089 (Utah 2009), the provision at issue appears to be more akin to N.D.C.C. § 65-05-09.2, than N.D.C.C. § 65-05-09.3(2). In fact, the Court noted that the statute under consideration was "similar to the one" at issue in Ressor. Id. at 1094. However, as outlined above, in Satterlee the Montana Supreme Court, in considering a statute substantially similar to the North Dakota statute, found no constitutional violation and in fact upheld the applicability of the same. Therefore, the Merrill case also does not support Weeks' arguments.

[36] Based on an analysis of the case law from various jurisdictions, the case most closely analyzing a statute such as N.D.C.C. § 65-05-09.3(2) is Satterlee. In Satterlee, the court examined a statute that does what the North Dakota statute does – terminates disability benefits upon receipt of social security retirement benefits or eligible to receive similar such benefits and upheld the constitutionality of that statute. Significantly, the Montana statute at issue completely eliminated the payment of additional disability benefits whereas N.D.C.C. § 65-05-09.3(2) provides for payment of additional benefit

payable under N.D.C.C. § 65-05-09.4.

[37] More importantly, N.D.C.C. §§ 65-05-09.2(3), 65-05-09.4 and 65-05-09.5 were enacted with significant forethought and analysis. The legislative history reflects that the enactments were the result of studies and analysis performed by WSI on the impact of discontinuance of disability benefits upon receipt of social security retirement benefits on workers that had been out of work for long and short periods of time, and how long injured workers had been out of work before becoming eligible for social security retirement benefits. Those studies reflected that the majority of injured workers were over age 55 when they were injured. Interestingly, Ms. Weeks was 49 at the time of her injury in 1993, but did not begin receiving a continuous stream of disability benefit until 1999, when she was 55 years old. In addition, the legislative history reflects that most of injured workers received as much or more in disability payments than they had been earning in take home pay while they were on disability benefits. (WSI App. 64)

[38] All of the goals/purposes of the enactment of N.D.C.C. §§ 65-05-09.3(2), 65-05-09.4 and 65-05-09.5 are rationally related to legitimate government interests, including, avoiding payment of additional wage loss benefits when an individual is retired and receiving retirement benefits, yet providing some additional benefit to compensate individuals who left the workforce early due to temporary or permanent disability, or were partially disabled for a period of time up until retirement and therefore unable to earn as much as they would have earned up to that time. The legislative history also reflects how the statutes were drafted in order to promote the goals/purposes of the act – to provide assistance to those that need it the most – those that have been injured and off work for longer periods of time, yet ensuring that the benefit does not create an incentive

to stay out of the workforce. In addition, the legislative history reflects an additional goal/purpose of the statutes was to provide some benefit to all workers whose wage loss benefits end at retirement, but in particular, a greater benefit to those who have been unable to work for a longer period of time.

[39] None of the legislation reviewed by the cases cited and discussed above either upheld or rejected the constitutional challenge put forth have what North Dakota has adopted – an additional benefit payable after an injured worker is considered retired and begins receiving retirement benefits. It certainly is rational to assume, as the Legislature did, that the longer the injured worker had been out of the workforce prior to retirement the greater the need for additional continued benefits to compensate for the period of time they were unable to earn as much as they could have earned in the workforce. Even so, the legislative history reflects that some individuals were receiving the same or greater amount of income than they would have received without having been injured. Accordingly, North Dakota's legislation bears a rational relationship to the reasons, motivations and policies of workers' compensation laws.

[40] Finally, Weeks proffers numerous allegations that she asserts make the statute "unconstitutional, discriminatory and unfair." However, she has not provided persuasive legal authority to support any of those statements, nor has she provided citation to legal authority that holds a substantially similar scheme unconstitutional. Thus, her arguments fall well short of the "heavy artillery" this Court has repeatedly stated is required to overcome the presumption of constitutionality of a legislative enactment. See Jarvis v. Jarvis, 1998 ND 163 ¶ 33, 584 N.W.2d 84 (stating "perfunctory constitutional argument is without merit" and fails to reach required level of "heavy artillery" for court to address

issue); Baldock, 554 N.W.2d at 447 (rejecting argument of violation of equal protection noting there was no citation to any "decision of any state or federal court holding any similar state workers compensation scheme . . . is an unconstitutional denial of equal protection). Therefore, the Court should reject Weeks' challenge to the legislation on equal protection grounds.

CONCLUSION

[41] For the foregoing reasons, WSI respectfully requests the Court affirm the District Court's decision of December 8, 2010.

DATED this 26th day of April, 2011.

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CERTIFICATE OF COMPLIANCE

The undersigned, as the attorney representing Appellant, Workforce Safety and Insurance, and the author of the Brief of Appellee Workforce Safety and Insurance hereby certifies that said brief complies with Rule 32(a)(7)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 9,965 from the portion of the brief entitled "Statement of the Issue" through the signature block. This word count was done with the assistance of the undersigned's computer system, which also counts abbreviations as words.

Dated this 26th day of April, 2011.

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