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

**2009 MTWCC 37**

**WCC No. 2008-2046**

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**KATHY BENTON**

**Petitioner**

**vs.**

**UNINSURED EMPLOYERS' FUND**

**Respondent**

**and**

**UNINSURED EMPLOYERS' FUND**

**Third-Party Petitioner**

**vs.**

**ROBERT HARRYMAN and SUSAN HARRYMAN**

**Third-Party Respondents.**

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ORDER GRANTING UNINSURED EMPLOYERS' FUND'S MOTION TO DISMISS

**SUMMARY:** The Uninsured Employers' Fund moved to dismiss Petitioner's petition because it was filed more than 60 days after the date the mediator's report was mailed to the parties and was therefore untimely pursuant to § 39-71-520(2), MCA. Petitioner argued that § 39-71-520(2), MCA, is unconstitutional in that it violates her right to equal protection and is unconstitutionally void for vagueness.

**HELD:** The Uninsured Employers' Fund's motion to dismiss is granted. A prerequisite to any equal protection challenge is demonstrating that a classification has been adopted that affects two or more similarly situated classes in an unequal way. The Court identified the two classes involved in this case as (I) injured workers employed by uninsured employers seeking benefits from the UEF, and (II) injured workers employed by insured employers

seeking benefits from the employer's insurer. The process for seeking redress for an uninsured worker is distinct in myriad ways from that which an insured worker follows. The distinct process legislatively mandated for insured workers versus uninsured workers leads the Court to conclude that the classes of injured employees at issue in this case are not similarly situated. In *Weidow v. Uninsured Employers' Fund,* this Court determined that § 39-71-520(2), MCA, was unconstitutional by its vagueness. Unlike the claimant in *Weidow*, however, it was not necessary for Petitioner to guess at the meaning of the "determination by the department" referenced in the statute since she had rejected both the mediator's recommendation and the UEF's determination. Therefore, her required conduct – i.e., petitioning the Workers' Compensation Court within 60 days – was sufficiently defined. Section 39-71-520(2), MCA, is not unconstitutionally vague as applied to this case.

**TOPICS:**

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-520.** For purposes of the Petitioner's equal protection challenge to § 39-71-520(2)(b), MCA, the Court defined the classes involved as (I) injured workers employed by uninsured employers seeking benefits from the UEF, and (II) injured workers employed by insured employers seeking benefits from the employer's insurer.

**Constitutional Law: Equal Protection.** For purposes of the Petitioner's equal protection challenge to § 39-71-520(2)(b), MCA, the Court defined the classes involved as (I) injured workers employed by uninsured employers seeking benefits from the UEF, and (II) injured workers employed by insured employers seeking benefits from the employer's insurer.

**Remedies: Concurrent Remedies.** From the moment a worker is injured in the course and scope of employment, the remedies available to him and the path he follows in seeking redress is determined by whether his employer was properly insured. The distinct process legislatively mandated for insured workers versus uninsured workers leads the Court to conclude that the classes of injured employees at issue in this case are not similarly situated.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-520.** From the moment a worker is injured in the course and scope of employment, the remedies available to him and the path he follows in seeking redress is determined by whether his employer was properly insured. The distinct process legislatively mandated for insured workers versus uninsured workers leads the Court to conclude that the classes of injured employees at issue in this case are not similarly situated.

**Constitutional Law: Equal Protection.** From the moment a worker is injured in the course and scope of employment, the remedies available to him and the path he follows in seeking redress is determined by whether his employer was properly insured. The distinct process legislatively mandated for insured workers versus uninsured workers leads the Court to conclude that the classes of injured employees at issue in this case are not similarly situated.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-520.** Where the Petitioner need not have guessed at the meaning of the "determination of the department" referenced in the statute since she had rejected both the mediator's recommendation and the UEF's determination, her required conduct – petitioning the Workers' Compensation Court within 60 days – was sufficiently defined and therefore, § 39-71-520(2), MCA, is not unconstitutionally vague as applied to her case.

**Constitutional Law: Vagueness.** Where the Petitioner need not have guessed at the meaning of the "determination of the department" referenced in the statute since she had rejected both the mediator's recommendation and the UEF's determination, her required conduct – petitioning the Workers' Compensation Court within 60 days – was sufficiently defined and therefore, § 39-71-520(2), MCA, is not unconstitutionally vague as applied to her case.

¶ 1 Mickey Benton was killed in a motor vehicle crash near Superior, Montana, on July 3, 2006. He was survived by his wife, Petitioner Kathy Benton (Benton).[1] Benton filed a Petition for Hearing in this Court on February 27, 2008, seeking workers' compensation death benefits related to Mickey's accident.[2]

¶ 2 Respondent Uninsured Employers' Fund (UEF) moves to dismiss the Petition for Hearing brought by Benton. The basis for the UEF's motion is that Benton filed her claim with this Court more than 60 days after the date the mediator's report was mailed to the parties and is therefore untimely pursuant to § 39-71-520, MCA (2005).[3,4] Benton does not

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[1] Uninsured Employers' Fund['s] Motion to Dismiss and Brief in Support (UEF's Motion to Dismiss) at 2, Docket Item No. 7.

[2] Petition for Hearing, Docket Item No. 1.

[3] UEF's Motion to Dismiss at 2.

[4] This case is governed by the 2005 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the clamant's industrial accident. *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

dispute the untimeliness of her petition. However, Benton argues that § 39-71-520, MCA, is unconstitutional because it does not provide equal protection to similarly situated injured workers.[5] After the UEF's motion was submitted, this Court held in *Weidow v. Uninsured Employers' Fund*[6] that the 60-day time limit found in § 39-71-520, MCA, was unconstitutionally vague. In light of this determination, I ordered the parties to submit supplemental briefs as to whether *Weidow* was dispositive of the UEF's motion to dismiss. The parties briefed the potential application of *Weidow* to the present motion and each issue will be addressed in turn.

**Issue One: Whether the 60-day time limit in § 39-71-520, MCA, violates equal protection.**

¶ 3 When an injured worker has a claim against the UEF, § 39-71-520(2)(b), MCA, controls the time limit for the worker to petition the Workers' Compensation Court. This statute provides, in pertinent part: "A party's petition must be filed within 60 days of the mailing of the mediator's report provided for in 39-71-2411 unless the parties stipulate in writing to a longer time period for filing the petition." Conversely, when an injured worker has a claim against his or her employer's workers' compensation insurer, § 39-71-2905(2), MCA, controls the time limit for the worker to petition the Workers' Compensation Court. This statute provides, in pertinent part: "A petition for hearing before the workers' compensation judge must be filed within 2 years after benefits are denied." Benton claims the disparity between these two time limits violates her right to equal protection.

¶ 4 A party challenging the constitutionality of a statute bears the heavy burden of proving the statute unconstitutional beyond a reasonable doubt.[7] A prerequisite to any equal protection challenge is demonstrating that a classification has been adopted that affects two or more similarly situated groups in an unequal way. The first step therefore is to identify the classes involved and then determine if they are similarly situated.[8] "The equal protection clause does not preclude different treatment of different groups or classes of people so long as all persons within a group or class are treated the same."[9] If the

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[5] Petitioner's Response in Opposition to Respondent's Motion to Dismiss (Petitioner's Response) at 1, Docket Item No. 13.

[6] *Weidow v. Uninsured Employers' Fund*, 2008 MTWCC 56.

[7] *Powell v. State Compen. Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877.

[8] *Bustell v. AIG Claims Service, Inc.,* 2004 MT 362, ¶ 20, 324 Mont. 478, 105 P.3d 286.

[9] *Powell, ¶ 22.*

classes are not similarly situated, then the Court need not continue its equal protection analysis.[10]

¶ 5 In this case, Benton does not specifically set forth the classes involved in her equal protection challenge. Rather, Benton states that she "is a similarly situated injured worker (or rather, beneficiary) who, because of an arbitrary rule, receives a significantly less hearing opportunity than those injured or killed workers who are fortunate enough to have employment with insured employers."[11] The UEF identifies the classes involved as, "cases involving the UEF and cases not involving the UEF."[12]

¶ 6 For purposes of this equal protection analysis, I determine the classes to be:

I. Injured workers employed by uninsured employers seeking benefits from the UEF. (For ease of reference, hereafter referred to as "uninsured workers.")

II. Injured workers employed by insured employers seeking benefits from the employer's insurer. (For ease of reference, hereafter referred to as "insured workers.")

¶ 7 Having identified the classes involved, I must next determine whether these classes are similarly situated. In that regard, Benton offers virtually no analysis for the Court's consideration but instead focuses her argument on the obvious disparity in the time periods the respective classes have for petitioning the Court. Before considering Benton's argument regarding the disparate treatment of these two classes, however, I must determine whether they are similarly situated. For the reasons discussed immediately below, I find that they are not.

¶ 8 In *Thayer v. Uninsured Employers' Fund,*[13] the Montana Supreme Court recognized that "the statutory scheme of the Uninsured Employers' Fund requires that we treat the Fund differently than an insurer."[14] The process for seeking redress for an uninsured worker is distinct in myriad ways from that which an insured worker follows. These distinctions are not limited to the time limit for petitioning the Workers' Compensation Court

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[10] *Id.*

[11] Petitioner's Response at 3.

[12] Uninsured Employers' Fund's Reply Brief on Motion to Dismiss at 6, Docket Item No. 14.

[13] *Thayer*, 1999 MT 304, 297 Mont 179, 991 P.2d 447.

[14] *Id*., ¶ 22.

– the basis for Benton's equal protection challenge. For example, except in cases of an "intentional injury,"[15] an insured worker's exclusive remedy for an on-the-job injury is found within the provisions of the Workers' Compensation Act.[16] Conversely, an uninsured worker may pursue multiple remedies concurrently, including but not limited to:

> (a) a claim for benefits from the uninsured employers' fund;
> (b) a damage action against the employer in accordance with 39-71-509;
> (c) an independent action against an employer as provided in 39-71-515; or
> (d) any other civil remedy provided by law.[17]

¶ 9 With these multiple remedies come multiple time limitations, all of which are distinct depending on whether the worker's employer was insured or uninsured. Regarding the time limits for petitioning the Workers' Compensation Court, even the event which commences the time limit is different depending upon whether the employer was insured or uninsured. When an uninsured worker seeks benefits from the UEF, the 60-day time limit for petitioning the Workers' Compensation Court commences with the mailing of the mediator's report. When an insured worker seeks benefits from the employer's insurer, the 2-year time limit for petitioning the Workers' Compensation Court commences with the insurer's denial of benefits. If an uninsured worker brings an independent cause of action against his employer in district court – an option not available to an insured worker – the claim must be brought within 3 years of the date of injury.[18]

¶ 10 In short, from the moment a worker is injured in the course and scope of employment, the remedies available to him and the path he follows in seeking redress, is determined by whether his employer was properly insured. The distinct process legislatively mandated for insured workers versus uninsured workers leads me to conclude that the classes of injured employees at issue in the present case are not similarly situated. Since the classes are not similarly situated, the Court's equal protection analysis need go no further.

**Issue Two: Whether § 39-71-520(2)(b), MCA, is unconstitutionally void for vagueness.**

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[15] *See*, § 39-71-413, MCA.

[16] § 39-71-411, MCA.

[17] § 39-71-508, MCA.

[18] *Barthule v. Karman*, 268 Mont 477,485, 886 P.2d 971, 976 (1994).

¶ 11 In *Weidow v. Uninsured Employers' Fund*,[19] the claimant (Weidow) accepted the mediator's report and recommendation[20] and believed that the mediator's report, and not the UEF's determination, would become final if he did not file a petition with this Court within 60 days after the mediator mailed her report.[21] The UEF moved to dismiss Weidow's petition because it was untimely. I determined that § 39-71-520(2), MCA, was unconstitutional by its vagueness and denied the UEF's motion. Specifically, I noted that:

> Section 39-71-520(2), MCA, can reasonably be interpreted to mean that either the UEF's determination or the mediator's report become final if a petition is not filed within 60 days, and individuals of ordinary intelligence must necessarily guess at this section's meaning. A claimant who disagreed with the UEF's determination but accepted the mediator's report may well be confused as to whether he must petition the WCC for resolution or whether he can just wait 60 days for the mediator's report to become final. Section 39-71-520(2), MCA, therefore violates due process by its vagueness.[22]

¶ 12 Benton argues that this Court held in *Weidow* that § 39-71-520, MCA, is facially unconstitutional in all circumstances and therefore is dispositive of the UEF's motion to dismiss in this case. The UEF argues that the *Weidow* holding was fact-specific and should not be applied to the present case because the basis for the Court's determination of unconstitutionality in *Weidow* does not apply here. The UEF notes that, unlike the claimant in *Weidow*, Benton rejected the mediator's report.[23] Therefore, the UEF argues that irrespective of whether the "determination by the department" referred to in § 39-71-520(2), MCA, was the UEF's determination or the mediator's recommendation, Benton did not agree with either "determination of the department." Thus, the ambiguity that formed the basis for this Court's finding of unconstitutionality in *Weidow* is not present in this case.

¶ 13 In *Monroe v. State*,[24] the Montana Supreme Court addressed the issue of whether a residency statute was unconstitutionally vague on its face. Citing the United States

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[19] *Weidow*, 2008 MTWCC 56.

[20] *Id.*, ¶ 3b.

[21] *Id.*, ¶ 23.

[22] *Id.*, ¶ 25.

[23] Exhibit 1 to Uninsured Employers' Fund's Opening Brief on the Applicability of the Decision in *Weidow v. UEF*, 2008 MTWCC 56, to the Instant Case, Docket Item No. 88.

[24] *Monroe*, 265 Mont. 1, 873 P.2d 230 (1994).

Supreme Court case of *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*,[25] the Montana Supreme Court noted that "a law challenged as unduly vague on its face must be demonstrated to be impermissibly vague in *all* of its applications."[26] Section 39-71-520(2), MCA, is not vague in its application to the present case. As the UEF correctly points out, irrespective of whether Benton believed the "determination by the department" which would become final within 60 days of the mailing of the mediator's report was the mediator's recommendation or the UEF's denial of Benton's claim, Benton was on notice that she had to petition the Workers' Compensation Court within that time or one of those determinations would become final. "A statute violates due process for vagueness when the language used does not sufficiently define the required conduct and men of common intelligence must necessarily guess at its meaning."[27] In Benton's case, she need not have guessed at the meaning of the "determination by the department" referenced in the statute since she had rejected both the mediator's recommendation and the UEF's determination. Therefore, her required conduct – petitioning the Workers' Compensation Court within 60 days – was sufficiently defined. Section 39-71-520(2), MCA, is not unconstitutionally vague as applied to the present case.

ORDER

¶ 14 The UEF's motion to dismiss is **GRANTED**.

¶ 15 Benton's Petition for Hearing is dismissed without prejudice.

¶ 16 Pursuant to ARM 24.5.348(2), this Order is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 3rd day of December, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: James P. O'Brien
Mark Cadwallader
Charles G. Adams
Submitted: April 1, 2009

[25] *Village of Hoffman Estates*, 455 U.S. 489 (1982).

[26] *Monroe,* 265 Mont. at 5, 873 P.2d at 232 (citing *Hoffman*, 455 U.S. at 497). (Emphasis in original.)

[27] *Rierson v. State*, 188 Mont. 522, 526, 614 P.2d 1020, 1023 (1980).