IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 14

WCC No. 9312-6964

DONALD SIMPSON

Petitioner

vs.

LEWIS AND CLARK COUNTY

Respondent/Insurer/Employer.

DECISION AND ORDER GRANTING SUMMARY JUDGMENT

Summary: Individual performing community service work as part of a deferred criminal sentence hurt his back when a light bulb fixture fell and knocked him down. He challenged the limitation of benefits under section 39-71-118(f), MCA (1991) as denying equal protection, full legal redress, or substantive due process, or as constituting cruel and unusual punishment.

Held: Section 39-71-118(f), MCA (1991), which limits workers' compensation benefits available to an individual performing community service work under court order, is constitutional. The legislature's decision to provide a more limited benefits package to workers injured while performing court-ordered community service was rationally calculated to encourage public agencies and non-profit organizations to participate in community service programs while still affording some protection to the workers (medical benefits and impairment award).

Topics:

> **Constitutions, Statutes, Regulations and Rules:** Montana Code Annotated: section 39-71-118(f), MCA (1991). Section 39-71-118(f), MCA (1991), which limits workers' compensation benefits available to an individual performing community service work under court order, does not violate constitutional provisions requiring equal protection, full legal redress, or substantive due process, nor does it inflict cruel and unusual punishment. The legislature's decision to provide a more limited benefits package to

workers injured while performing court-ordered community service was rationally calculated to encourage public agencies and non-profit organizations to participate in community service programs while still affording some protection to the workers (medical benefits and impairment award).

Constitutional Law: Constitutional Challenges: Full Redress. Section 39-71-118(f), MCA (1991), which limits workers' compensation benefits available to an individual performing community service work under court order, does not violate constitutional provisions requiring equal protection, full legal redress, or substantive due process, nor does it inflict cruel and unusual punishment. The legislature's decision to provide a more limited benefits package to workers injured while performing court-ordered community service was rationally calculated to encourage public agencies and non-profit organizations to participate in community service programs while still affording some protection to the workers (medical benefits and impairment award).

Constitutional Law: Cruel and Unusual Punishment. Section 39-71-118(f), MCA (1991), which limits workers' compensation benefits available to an individual performing community service work under court order, does not violate constitutional provisions requiring equal protection, full legal redress, or substantive due process, nor does it inflict cruel and unusual punishment. The legislature's decision to provide a more limited benefits package to workers injured while performing court-ordered community service was rationally calculated to encourage public agencies and non-profit organizations to participate in community service programs while still affording some protection to the workers (medical benefits and impairment award).

Constitutional Law: Due Process: Substantive Due Process. Section 39-71-118(f), MCA (1991), which limits workers' compensation benefits available to an individual performing community service work under court order, does not violate constitutional provisions requiring equal protection, full legal redress, or substantive due process, nor does it inflict cruel and unusual punishment. The legislature's decision to provide a more limited benefits package to workers injured while performing court-ordered community service was rationally calculated to encourage public agencies and non-profit organizations to participate in community service programs while still affording some protection to the workers (medical benefits and impairment award).

Constitutional Law: Equal Protection. Section 39-71-118(f), MCA (1991), which limits workers' compensation benefits available to an individual performing community service work under court order, does not violate constitutional provisions requiring equal protection, full legal redress, or substantive due process, nor does it inflict cruel and unusual punishment. The legislature's decision to provide a more limited benefits package to workers injured while performing court-ordered community service was rationally calculated to encourage public agencies and non-profit organizations to participate in community service programs while still affording some protection to the workers (medical benefits and impairment award).

Employment: Community Service. Section 39-71-118(f), MCA (1991), which limits workers' compensation benefits available to an individual performing community service work under court order, does not violate constitutional provisions requiring equal protection, full legal redress, or substantive due process, nor does it inflict cruel and unusual punishment. The legislature's decision to provide a more limited benefits package to workers injured while performing court-ordered community service was rationally calculated to encourage public agencies and non-profit organizations to participate in community service programs while still affording some protection to the workers (medical benefits and impairment award).

The present case requires the Court to determine whether the different treatment accorded under the Montana Workers' Compensation Act to workers performing court-ordered community service is constitutional. At issue is a 1991 amendment to section 39-71-118(f), MCA. As amended, the section provides:

> **Employee, worker, workman and volunteer firefighter defined.** (1) The terms "employee", "workman", or "worker" means:
>
> . ..
>
> (f) a person, other than a juvenile as defined in subsection (1)(b), performing community service for a nonprofit organization or association or for a federal, state, or local government entity under a court order, or an order from a hearings officer as a result of a probation or parole violation, whether or not under appointment or contract of hire with an employer as defined in this chapter and whether or not receiving payment from a third party. For a person covered by the definition in this subsection (f):
>
> (i) compensation benefits must be limited to medical expenses pursuant to 39-71-704 and an impairment award

> pursuant to 39-71-703 that is based upon the minimum wage established under Title 39, chapter 3, part 4, for a full-time employee at the time of the injury; . . .

See 1991 Montana Laws, ch. 813, § 2. Petitioner, who was injured while performing court-ordered community service, challenges the law on various constitutional grounds.

The facts underlying the petitioner's constitutional challenge are not in dispute and the parties have presented the matter for final decision by way of respondent's Motion for Summary Judgment. The motion requests the Court to find the statute constitutional. In resisting the motion, the petitioner requests the Court to find the statute unconstitutional.

Factual Background

The summary judgment motion is based on the pleadings, a Stipulation of Facts, medical records of the petitioner, and legislative history of section 39-71-118(f), MCA. The legislative history is attached to respondent's Motion for Summary Judgment.

The petitioner, Donald Simpson, pled guilty to a criminal charge and was sentenced to perform forty (40) hours of community service as part of a deferred sentence arrangement. He was discharging his community service sentence by performing work at the City/County Building in Helena when on March 11, 1992, he was struck by a falling fluorescent light fixture. He fell and hit his tailbone, injuring his back. Since then he has suffered low-back pain. He has been treated by various physicians, ultimately by Dr. Allen Weinert, who specializes in physical medicine and rehabilitation. Dr. Weinert diagnosed petitioner as suffering from "spondylolysis at the L5-S1 level with grade I spondylolisthesis." He has limited petitioner "to work at the light medium physical demand level." As of June 21, 1993, petitioner had reached maximum healing.

At the time of his accident, the petitioner was a full-time student at Helena Vocational Technical School. He had completed one-year of a two-year course in auto mechanics. He was also employed for sixteen (16) hours a week as a janitor at Shodair Hospital in Helena, earning $5.60 per hour. He claims that as a result of his back injury he is unable to continue with his schooling in auto mechanics and is unable to perform his job at Shodair Hospital.

The County has paid the petitioner's medical bills and an impairment award. Based on section 39-71-118(f), MCA, it has denied liability for any further benefits.

STANDARD OF REVIEW

The issues presented in this case are legal ones. The stipulated facts demonstrate petitioner's standing to challenge the statute in question and both parties agree that summary judgment is appropriate. They disagree only as to which party is entitled to judgment. Therefore, the Court will omit any discussion of summary judgment rules and procedures.

DISCUSSION

Jurisdiction and Nature of Constitutional Review

The Workers' Compensation Court has jurisdiction to decide constitutional questions. ***State ex rel. Uninsured Employers' Fund v. Hunt****, 191 Mont. 514, 625 P.2d 539 (1980);* ***McClanathan v. Smith,*** *186 Mont. 56, 606 P.2d 507 (1980).* Thus, the petitioner's constitutional challenges are properly before the Court.

The petitioner challenges section 39-71-118(f), MCA, on equal protection and substantive due process grounds. He also argues that limitations on benefits as set forth in the section amount to impermissible cruel and unusual punishment.

In mounting his constitutional challenges, the petitioner bears a heavy burden. Statutes are presumed to be constitutional. ***Ingraham v. Champion International****, 243 Mont. 42, 46-47, 793 P.2d 769 (1990).* Unconstitutionality must be proven beyond a reasonable doubt, and doubt must be resolved in favor of constitutionality. ***Harper v. Greely****, 234 Mont. 259, 269, 763 P.2d 650 (1988).*

Equal Protection Analysis

Petitioner alleges that the statute violates his right to equal protection as guaranteed by Article II, Section 4 of the Montana Constitution and the Fourteenth Amendment of the United States Constitution. The Montana Supreme Court has held that equal protection analysis under the Montana Constitution may be more strict than that under the Fourteenth Amendment. In ***Butte Community Union v. Lewis,*** *219 Mont. 426, 433, 712 P.2d 1309 (1986),* the Court stated:

> We will not be bound by decisions of the United States Supreme Court where independent state grounds exist for developing heightened and expanded rights under our state constitution.

The Court then applied a "middle-tier test" to a statute restricting welfare benefits to able-bodied persons without dependent children. However, other than applying a different degree of scrutiny than would the United States Supreme Court, the Montana Supreme

Court has applied federal equal protection principles in its equal protection analysis under Article II, Section 4 of the Montana Constitution.

The Montana Supreme Court has already determined that laws concerning workers' compensation benefits are not subject to heightened scrutiny; rather, they are subjection the rational relationship test. ***Cottrill v. Cottrill Sodding Service,*** *229 Mont. 40, 42-43, 744 P.2d 895 (1987)*; ***Eastman v. Atlantic Richfield Co.****, 237 Mont. 332, 337-338, 777 P.2d 862 (1989);* ***Stratemeyer v. MACO Workers' Compensation Trust,*** *259 Mont. 147, 855 P.2d 506 (1993).* In ***Eastman*** the Court said:

> We have held that the right to receive Workers' Compensation benefits is not a fundamental right. . . . The classification does not affect the rights of a suspect class, which would include race, nationality, alienage and wealth. We conclude that the Act is not subject to strict scrutiny. As a result [Defendant] need not show a compelling state interest. We conclude that the Act should be analyzed under the rational basis test. That test requires a legitimate governmental objective which bears some identifiable rational relationship to the classification in question.

Eastman at *337-338 (citations omitted).* In ***Stratemeyer*** the Court reaffirmed that holding, *259 Mont. at 151,* and this Court is bound by it. Petitioner's argument for invoking a higher level of scrutiny should be addressed to the Montana Supreme Court.

Under the rational relationship test the Court must determine whether the distinction or classification drawn by the statute in question is rationally related to a legitimate governmental purpose. ***Cottrill v. Cottrill Sodding Service,*** *supra,* ***Eastman v. Atlantic Richfield Co.,*** *supra.* In ***Montana Stockgrowers v. Dept. of Revenue****, 238 Mont. 113, 777 P.2d 285 (1989*), the Court described the rational basis inquiry in the following terms.

> [T]o survive scrutiny under the rational basis test, classifications must be reasonable, not arbitrary, and they must bear a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. ***Eisenstadt v. Baird*** (1972), 405 U.S. 438, 447, 92 S.Ct. 1029, 1035, 31 L.Ed. 2d 349, 359. In applying this test the Court in ***Eisenstadt*** framed the inquiry as: "Whether there is some ground of difference that rationally explains the different treatment . . . ."

Montana Stockgrowers *at 117-118.* Thus, we must first examine the purpose of the distinction found in section 39-71-118(f), MCA. Assuming a legitimate governmental purpose is identified, we must next determine whether the distinction is rationally related to that purpose.

In ascertaining the purpose of a statutory classification, the Court is bound only by its own reasonable imagination and that of counsel:

> The purpose of the legislation does not have to appear on the face of the legislation or in the legislative history, but may be any possible purpose of which the court can conceive. In this case, the Workers' Compensation Court expected the legislature to provide the purpose. This, however, is not required of legislation being examined relative to equal protection.

Stratemeyer, *259 Mont. at 152.* While the legislature did not enact a statement of purpose or preamble when it amended section 39-71-118(f), MCA, *see 1991 Montana Laws, ch. 813, § 2,* the purpose of the amended section is readily ascertainable from legislative history. The Court needs to go no further than that history.

The amendment was introduced in the Senate as Senate Bill 473 and sponsored by Senator Paul Svrcek. In introducing the bill to the Senate Committee on Labor & Employment Relations,

> Senator Svrcek told the Committee that Senate Bill 473 addresses a current problem with community service in Montana. He explained a Judge can sentence an individual to perform community service but because of problems with workers' compensation the program has been shutdown.

(Committee Minutes, April 16, 1991 at 4, attached to Brief in Support of Motion for Summary Judgment.) The remarks made by proponents of the bill show that the bill was intended to promote the use of community service as an alternative sentence to incarceration in criminal cases. A representative of probation and parole officers testified that "generally the probation and parole officers feel community service is a proper and effective means of rehabilitation and support legislation intended to make community service a viable option." (*Id.* at 5.) Dan Russell, Administrator of the Corrections Division, Department of Institutions, testified that limiting workers' compensation liability for persons sentenced to community service "will allow community service placements to become available with less difficulty." (*Id.* at 2.) The mayor, two judges, a public defender, an assistant city attorney, assistant chief of police, and other officials from Missoula, presented a statement indicating that Missoula's program for community sentencing was unable to

obtain insurance to cover offenders ordered to perform community service, and that lacking such insurance many non-profit and governmental agencies refused to participate in the program. (*Id.*)

While courts may sentence criminal offenders to community service, the actual service is performed for other public or non-profit organizations. For example, in this case the petitioner was painting at the City-County Building in Helena, thus benefiting both city and county governments. For community service programs to succeed, public and non-profit agencies must be willing to employ, albeit for no pay, offenders sentenced to community service.

The promotion of community service as an alternative to incarceration is a legitimate public purpose, especially for non-violent offenders and especially in light of our burgeoning prison population. Petitioner argues that "there is nothing in the legislation nor its history which provides a reason why offenders are less in need or deserving of compensation and rehabilitation benefits than other workers." (Brief in Opposition to Respondent/insurer's Motion for Summary Judgment at 5.) But equal protection principles do not require that all injured workers be treated identically, only that any distinctions among workers be rationally related to some legitimate public purpose. Distinctions may even be made because of historical factors rather than on any specific, current goal. *E.g.,* ***Eastman*** *(holding that historical, common-law distinctions made between industrial injuries and diseases were sufficient to justify lesser compensation under the Montana Occupational Disease Act).*

Petitioner brushes aside the articulated purpose of the 1991 amendments and argues that the real purpose of the statue is to reduce labor costs to the agencies and organizations which utilize community service workers. Assuming that to be so, the reduction of workers' compensation costs is a legitimate public purpose. ***Stratemeyer*** *at* 153. More importantly, however, even if that was one of the purposes of the amendments, it was not the only purpose. The Court cannot ignore the specific purpose articulated in the committee hearings. So long as the Court can conceive of any possible legitimate public purpose, the first test is satisfied. In this case, the legislature clearly had a legitimate public purpose in mind when it adopted SB 473, and the identification of that purpose ends the Court's first inquiry.

The second prong of equal protection analysis -- rational relationship -- is also satisfied since the amendments are reasonably calculated to encourage public agencies and non-profit organizations to participate in community service programs. Testimony presented to the Senate and House committees indicated that agencies and organizations were reluctant to participate in community service programs because of liability concerns. A group representing the community service program in Missoula presented written comments stating that community service participants were not subject to the Workers' Compensation Act since their service was involuntary. (Under the 1989 version of the Act

an employee was defined as someone "who is in the service of an employer . . . under any appointment or contract of hire . . . ." § 39-71-118(a), MCA (1989).) Dan Russell, Administrator of the Corrections Division, told the Senate committee that "the State Fund had no administrative method of extending workers' compensation coverage for community service placements." (Committee Minutes at 4-5.) He went on to state that "an obvious liability exists should the offender become injured while performing the community service obligation." (*Id.* at 5.) In the House committee hearing Representative Jerry Driscoll spoke in favor of the bill, stating, "Without this bill, there is no organization that will take the risk of unlimited court action in court for a work related injury." (*Id.* at 1.)

The 1991 amendments did two things. First, they expressly brought persons performing community service under the Workers' Compensation Act. Thus, persons performing community service under court sentence were assured that if injured while working they would receive medical benefits and, if warranted, an impairment award. At the same time the amendments assured agencies and organizations participating in community service programs that they would be insulated from tort liability as are other employers who are subject to the Act.

Second, the amendments provided agencies and non-profit organizations a financial incentive to participate in the community service program. In addition to limiting liability, the limitation on benefits could reasonably be expected to hold down premiums. A representative of the State Fund told the Senate committee that a separate class code would be established for community service workers. Premiums for specific classifications are based on loss experience. Thus, the limitation on benefits could reasonably be expected to hold down the premium rates for community service classifications.

In summary, legislative history makes it clear that the 1991 amendment was aimed at encouraging public agencies and non-profit organizations to participate in the program. The amendment was rationally calculated to provide the financial incentive for them to do so.

Petitioner argues, however, that "there is nothing in the legislation nor its history which provides a reason why offenders are less in need or deserving of compensation and rehabilitation benefits than other workers." Fairness, however, is not the touchstone of equal protection analysis. In ***Eastman*** *at 339,* the Supreme Court said, "We recognize the fairness of an argument for equal compensation for similar disabilities." Despite that recognition it went on reject an equal protection claim that benefits payable under both workers' compensation and the Occupational Disease Act should be the same.

The fairness argument is one which is more appropriately addressed to the legislature. ***See Eastman*** *at 339-340*. The equal protection clause does not require perfection:

> "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others."

Eastman *at 339* (*quoting from* ***Williamson v. Lee Optical Co.,*** *348 U.S. 483, 489 (1955)) (citations omitted*). In the present case the legislature had to balance the community service worker's needs against public need for a community service program. Its decision to provide a more limited benefits package to workers injured while performing court-ordered community service was rationally calculated to encourage public agencies and non-profit organizations to participate in the program while still affording some protection to the workers. Section 39-71-118(f), MCA, does not deny petitioner his right to equal protection of the laws.

Full Legal Redress

In his Petition for Trial the petitioner alleges that section 39-71-118(f), MCA, deprives him of his right to full legal redress under Article II, Section 16 of the Montana Constitution. However, in his brief he does not argue this point and the Court deems it abandoned.

Moreover, the assertion is without merit. Article II, Section 16 of the Montana Constitution provides:

> Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. 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. Right and justice shall be administered without sale, denial, or delay.

In ***Meech v. Hillhave West, Inc.,*** *238 Mont. 21, 776 P.2d 488 (1989)*, the Supreme Court held that Section 16 does not create any right to a *particular* cause of action, remedy or redress. While the second sentence of the section does guarantee an injured worker the same right of recovery against a third-party tortfeasor as is available to others, ***Francetich v. State Compensation Mutual Insurance Fund,*** *252 Mont. 215, 827 P.2d 1279 (1992)*, that is its sole purpose and protection, ***Meech,*** *238 Mont. at 38-41.* The second sentence

does not guarantee any particular level of workers' compensation benefits to workers in return for the loss of the opportunity to sue their employers or fellow workers.

Substantive Due Process

Petitioner argues that section 39-71-118(f)(i), MCA, violates the due process clauses of Article II, section 17, of the Montana Constitution and the Fourteenth Amendment to the United States Constitution. Petitioner cites ***Meech,*** *238 Mont. at 51,* and ***Duke Power Co. v. Carolina Environmental Study Group,*** *98 S.Ct. 2620, 2638 (1978),* as suggesting, though not determining, that the legislature must provide a *quid pro quo* or adequate substitute when eliminating a common- law cause of action or remedy.

In ***Duke*** the United States Supreme Court considered a congressional cap on damages arising out of nuclear accidents at nuclear power plants. The act in question -- the Price-Anderson Act -- imposed a 560 million dollar aggregate limit on liability. One of the arguments advanced by the group challenging the cap was that by failing to provide a "satisfactory *quid pro quo*" for the abrogation of common-law rights of recovery, the cap violated the Due Process Clause. The Court rejected the argument:

> Initially, it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy. However, we need not resolve this question here since the Price-Anderson Act does, in our view, provide a reasonably just substitute for the common-law or state tort law remedies it replaces.

Duke *at 2638 (footnote omitted).* Quoting the above passage from ***Duke,*** the Montana Supreme Court concluded in ***Meech*** that the Montana Wrongful Discharge Act provides benefits which are "not illusory" and "provides a reasonably just substitute for the common-law causes it abrogates." ***Meech*** *at 50.* However, as in ***Duke*** the Court declined to determine whether the Due Process Clause requires a *quid pro quo,* holding that the issue need not be addressed since there was a *quid pro quo* in any event.

In a footnote to the statement that "it is not at all clear that the Due Process Clause in fact requires that a legislative enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy," the Supreme Court wrote in ***Duke***:

> Our cases have clearly established that "[a] person has no property, no vested interest, in any rule of the common law." The "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object," despite the fact that "otherwise settled expectations" may be upset thereby.

> Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.

(Id.) *(footnote 32) (citations omitted).* The footnote, along with the text to which it is attached, suggests that it is doubtful that the *quid pro quo* argument will achieve constitutional status, and this Court declines to elevate the argument to constitutional status in this case.

Moreover, the same considerations which led the United States Supreme Court in ***Duke*** and the Montana Supreme Court in ***Meech*** to conclude that the statutes at issue in those cases provided reasonable substitutes, are present in the present case. In ***Duke*** the Court pointed out that the Price-Anderson Act provided certainty of recovery up to the amount of the cap, noting that however large a verdict in a civil case there is no guarantee that a judgment will be collected. It also noted that the Act abolished defenses and assured an equitable distribution of benefits. In ***Meech*** the Court pointed to the additional protection afforded by the Wrongful Discharge Act to employees and the elimination of some common law defenses. In both cases, the benefits of the statutes were sufficient to offset the possibility of a larger verdict under common-law principles.

In this case, the loss of the common-law right of action is offset by the elimination of common-law defenses, the guarantee of medical expenses, and, where appropriate, an impairment award, all irrespective of fault. Those benefits are substantial. Approximately fourteen (14%) percent of our gross domestic product is spent on medical care. The cost of medical care for serious and chronic conditions can run into the hundreds of thousands of dollars. Along with those benefits, the Workers' Compensation Act provides an expedited court process to resolve disputes over benefits. The prospect of collection is also more certain and no longer dependent upon the depth of the employer's pocket. Thus, the benefits provided by the 1991 amendment are a "reasonably just substitute."

Cruel and Unusual Punishment

Petitioner next argues that by providing less than full benefits, the 1991 amendment violates constitutional prohibitions against cruel and unusual punishment. Montana Constitution Article II, Section 22; United States Constitution, Amendment 8.[1] He argues that the consequences of the amendment are "shocking and outrageous" because he has

> lost his ability to do heavy labor for the rest of his life, was deprived of any tort remedies for his damages, lost his concurrent employment and his chosen vocation for which he had trained for a year, and was provided only medical benefits,

[1]The Eighth Amendment prohibition against cruel and unusual punishment has been extended to the states through the Due Process Clause of the Fourteenth Amendment. ***State of Louisiana ex rel. Francis v. Resweber,*** 329 U.S. 459, 463 ((1947) *and see also* ***Furman v. Georgia,*** *408 U.S. 238, 241 (1972)* (Douglas, J., concurring) *and* ***Robinson v. State of California,*** *370 U.S. 660 (1962).*

> which he apparently would have had coming without workers' compensation coverage.

(Brief in Opposition to Respondent/insurer's Motion for Summary Judgment at 13-14.)

The prohibition against cruel and unusual punishment applies to sentences and penalties imposed with respect to crimes. ***State ex rel. Hardy v. State Board of Equalization***, *133 Mont. 43, 46, 319 P.2d 1061 (1958).* We assume for purposes of this decision that in view of the consequences in the 1991 amendment the prohibition applies.

The test for determining whether a criminal sentence or penalty is cruel and unusual is whether it "is so greatly disproportionate to the crime that it shocks the conscience and outrages the moral sense of the community or of justice . . . . " ***State v. Bruns,*** *213 Mont. 372, 377, 691 P.2d 817 (1984).* The Court finds that it does not.

Initially, the petitioner's injury was only incidental to the community service sentence imposed on petitioner. Had petitioner been sentenced to prison or jail, he could have been injured there. Had he been employed rather than performing community service he would have been exposed to the same risk. The fact that he was injured is regrettable but not a part of any criminal sentence.

By performing community service petitioner avoided a possible jail or prison sentence. His opportunity to avoid incarceration was enhanced by the 1991 amendment. In retrospect petitioner perhaps would have preferred incarceration, but it is doubtful that at the time of sentencing he would have rejected community service because of the limited benefits available to him if injured.

Moreover, the 1991 amendment affords petitioner valuable benefits. Those benefits are substantial and are guaranteed. While petitioner alleges that he would receive medical benefits anyway, his common-law right to medical expenses were conditioned on his proving negligence on the part of another. If he was injured through his own carelessness, he could very well have been entitled to nothing.

In light of the considerations outlined above, I cannot say that the consequences of the 1991 amendment "shocks the conscience and outrages the moral sense of the community or of justice." Petitioner has not been subjected to cruel and unusual punishment.

JUDGMENT

1. Petitioner has failed to persuade the Court that section 39-71-118(f), MCA, is unconstitutional. He is not entitled to rehabilitation, permanent partial disability benefits or temporary total disability benefits, and his petition is **dismissed with prejudice**.

2. The JUDGMENT in this case is certified as final for purposes of appeal pursuant to ARM 24.5.348.

3. Any party to this dispute may have twenty (20) days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

Dated in Helena, Montana, this 16th day of February, 1995.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Ms. Janice S. VanRiper
Mr. Norman H. Grosfield