

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 56

WCC No. 2007-1863

SHELLY WEIDOW

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent,

and

BRADLEY HOWARD/HOWARD FAMILY 1995 TRUST

Respondent/Employer.

ORDER DEEMING RESPONDENT'S MOTION TO DISMISS TO BE A MOTION FOR SUMMARY JUDGMENT, DENYING THE MOTION FOR SUMMARY JUDGMENT, AND DECLARING § 39-71-520(2), MCA, TO BE UNCONSTITUTIONAL

Summary: Respondent Uninsured Employers' Fund moved for dismissal because it contends Petitioner did not timely file his petition with this Court. The UEF argues § 39-71-520(2), MCA, requires a petitioner to file a petition before this Court within 60 days of the mailing of the mediator's report or the UEF's determination becomes final. The mediator's report and recommendation was mailed on January 31, 2007. UEF notified the mediator and Petitioner that it would not accept the mediator's recommendation on February 21, 2007. Petitioner petitioned this Court on April 10, 2007, 69 days after the mediator's report was mailed. Petitioner argues that a reasonable interpretation of § 39-71-520(2), MCA, is that it is the mediator's report, and not the UEF's determination, that becomes final if no party petitions the Court within 60 days. Petitioner argues that another reasonable interpretation of the statute would allow 85 days to petition the Court. Petitioner argues that the statute is discretionary and not jurisdictional. Finally, Petitioner raises multiple constitutional challenges arguing that § 39-71-520(2), MCA, is void for vagueness, violates his constitutional right to equal protection under the law, and is an impermissible exercise of sovereign immunity.

Held: Although Petitioner's contention that the department mediator's report becomes final absent a petition filed in this Court within 60 days is a reasonable interpretation, so is UEF's interpretation that the UEF's determination becomes final if no petition is filed. The time limit provided for in § 39-71-520(2), MCA, is not tolled during the 25-day period which the parties have to notify the mediator whether they accept the mediator's recommendation. The time limits imposed in § 39-71-520, MCA, are jurisdictional and bar this Court from waiving them upon equitable grounds. However, § 39-71-520(2), MCA, can reasonably be interpreted to mean that either the UEF's determination or the department mediator's report becomes final if a petition is not filed in this Court within 60 days. Therefore, the statute is unconstitutionally vague because it requires those of ordinary intelligence to guess as to its meaning.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-520. Section 39-71-520, MCA, cannot clearly be interpreted to mean that it is the mediator's report which becomes final if settlement is not reached and a petition is not filed within 60 days of the mailing of the mediator's report. It can also reasonably be interpreted to mean that the UEF's determination becomes final if a petition is not filed within 60 days.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-520. Section 39-71-520, MCA, is not tolled during the 25-day period which the parties have to notify the mediator as to whether they accept the mediator's recommendation.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-520. The time limit imposed in § 39-71-520(2), MCA, is jurisdictional in nature and this Court is without authority to waive it.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-520. Section 39-71-520(2), MCA, is unconstitutional because it is so ambiguous that it is void for vagueness. It can reasonably be interpreted to mean that either the Uninsured Employer's Fund'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.

Constitutional Law: Vagueness. Section 39-71-520(2), MCA, is unconstitutional because it is so ambiguous that it is void for vagueness. It can reasonably be interpreted to mean that either the Uninsured Employer's Fund'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.

Standard of Review

¶ 1 A motion to dismiss may be granted when, in considering the motion, the petition is construed in the light most favorable to the nonmoving party, all allegations of fact contained therein are taken as true, and the court can conclude that the nonmoving party would not be entitled to relief based on any set of facts.¹ In the present case, the parties each submitted exhibits in support of their arguments. Thus, the motion is better characterized as a motion for summary judgment. A motion for summary judgment will be granted if the pleadings, discovery, and documents submitted by the parties show there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law.²

¶ 2 Parties are ordinarily entitled to notice when the Court intends to convert a motion to dismiss to a motion for summary judgment. However, in this case, the motion has largely been decided upon legal grounds and no material facts in dispute affect this motion. If either party believes the lack of notice is prejudicial, that party should notify the Court within ten days of this Order and the Court will consider reopening this matter.

Factual Background

¶ 3 The facts pertinent to disposition of this matter are as follows:³

¶ 3a Petitioner Shelly Weidow was injured on June 13, 2006, while installing trim in Respondent/Employer's residence. Petitioner timely notified his employer of the injury and filed a claim for benefits in October 2006. The Uninsured Employers' Fund (UEF) denied liability. The matter went before a Department of Labor and Industry (department) mediator on January 4, 2007.

¹ *Plouffe v. State*, 2003 MT 62, ¶ 8, 314 Mont. 413, 66 P.3d 316.

² ARM 24.5.329(2).

³ Petitioner's Answer Brief in Opposition to Uninsured Employer's Fund's Motion to Dismiss ("Petitioner's Answer Brief") at 1-3.

The mediator mailed her report and recommendation to the parties on January 31, 2007.

- ¶ 3b On February 21, 2007, Petitioner's counsel sent a letter to the mediator notifying her that Petitioner accepted her recommendation and was willing to negotiate a settlement based on the recommendation. In that letter, Petitioner's counsel also requested the mediator issue her "decision" as soon as possible.
- ¶ 3c The UEF also sent the mediator a letter on February 21, 2007. The UEF's letter stated that no additional information provided during the mediation reversed its earlier decision denying benefits. The UEF also stated that since it had not received any information that the claim was settled per the mediator's recommendation, it would continue to deny liability for the claim.
- ¶ 3d The parties apparently undertook settlement discussions, but did not reach a settlement. Petitioner filed his claim in this Court on April 10, 2007.

Discussion

¶ 4 The UEF argues its motion to dismiss should be granted because Petitioner failed to petition this Court within the time period provided by statute. The statute at issue is § 39-71-520(2), MCA, which states:

(1) A dispute concerning uninsured employers' fund benefits must be appealed to mediation within 90 days from the date of the determination or the date that the determination is considered final.

(2) (a) If the parties fail to reach a settlement through the mediation process, any party may file a petition before the workers' compensation court.

(b) 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.

(c) If a settlement is not reached through mediation and a petition is not filed within 60 days of the mailing of the mediator's report, the determination by the department is final.

¶ 5 As discussed further below, Petitioner contends that § 39-71-520(2), MCA, is capable of multiple interpretations, some of which would consider his petition to be timely filed. Specifically, Petitioner argues the "determination by the department" that becomes final as provided in § 39-71-520(2)(c), MCA, is the determination or final report issued by the department mediator. Petitioner also contends that the statute is unconstitutional in

that it violates a claimant's equal protection rights or is void for vagueness. Petitioner's arguments are addressed in turn.

A. Section 39-71-520, MCA, cannot clearly be interpreted to mean that it is the mediator's report which becomes final if a settlement is not reached and a petition is not filed within 60 days of the mailing of the mediator's report.

¶ 6 Petitioner argues that § 39-71-520, MCA, may be construed to mean that when a settlement is not reached and a petition is not filed within 60 days of the mailing of the mediator's report, the mediator's report becomes final.⁴ Petitioner argues that § 39-71-520(2)(b)-(c), MCA, refers to mediation conducted by the mediation unit of the department, and it is therefore reasonable to conclude that the "determination of the department" which becomes final if a petition is not filed within 60 days, is the department mediator's decision.⁵ Petitioner argues that the cross-reference to § 39-71-2411, MCA, found at § 39-71-520(2)(b), MCA, supports this interpretation because § 39-71-2411(7), MCA, states in part, "If **either party** does not accept the mediator's recommendation, the party may petition the workers' compensation court for resolution of the dispute."⁶ Petitioner argues that since the UEF was the party who would not accept the mediator's report, it is the UEF who should have petitioned the Workers' Compensation Court (WCC) for resolution of the dispute.⁷

¶ 7 UEF argues the plain language of the statute indicates that the resolution suggested by the mediator is not a binding "decision" or "determination," but only a recommendation incapable of becoming final.⁸ Further, UEF contends no ambiguity exists as to what "determination" is referred to in the statute, and the only reasonable interpretation is that the UEF's determination becomes final if no resolution is reached in mediation and the claimant fails to file a petition within 60 days of the mailing of the mediator's report.⁹ Although UEF argues the statute is clear on its face, it also argues the legislative minutes indicate the legislature intended the statute to have the effect UEF proposes.

⁴ *Id.* at 2-3.

⁵ *Id.*

⁶ *Id.* (Emphasis added.)

⁷ Petitioner's Answer Brief at 3.

⁸ UEF's Reply to Petitioner's Answer Brief in Opposition to UEF's Motion to Dismiss ("UEF's Reply Brief") at 2.

⁹ *Id.*

¶ 8 When construing a statute, the court looks first to the “plain meaning of the words used.”¹⁰ If the statute cannot be interpreted through a plain reading of the language, only then may the court look to other means to determine legislative intent.¹¹ The statute at issue, § 39-71-520 (2)(a) -(c), MCA, states in pertinent part:

(2) (a) If the parties fail to reach a settlement through the mediation process, any party may file a petition before the workers' compensation court.

(b) 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.

(c) If a settlement is not reached through mediation and a petition is not filed within 60 days of the mailing of the mediator's report, the determination by the department is final.

I have concluded that this statute is not clear on its face and it is therefore appropriate to look to other means to determine legislative intent.

¶ 9 Section 39-71-520(2)(b), MCA, requires a petition to be filed within 60 days of the mailing of the mediator's report as provided for in § 39-71-2411, MCA. In § 39-71-2411(1), MCA, “department” refers to the mediation unit of the department which supports Petitioner's interpretation. Notwithstanding this cross-reference, however, it is not clear that “the department” referred to in § 39-71-520, MCA, is the mediation unit of the department and that the **mediator's report** becomes final absent the filing of a petition within 60 days. Although that may be a reasonable interpretation of the statute, UEF's interpretation that the “department” determination which becomes final refers to the UEF – which is also a division of the department – is also reasonable.

¶ 10 The statute's legislative history does not support Petitioner's proposed interpretation. Petitioner concedes the legislative history provides little insight into the intent of the legislature, but actually adds further confusion and ambiguity to the statute's meaning.¹² UEF argues the legislative history is not ambiguous because written testimony submitted by department personnel states in reference to § 39-71-520, MCA, that the proposed amendments were meant to impose a time limit for filing a petition in the WCC and that

¹⁰ *Mont. Ass'n of Underwriters v. State*, 172 Mont. 211, 215, 563 P.2d 577, 579-80 (1977).

¹¹ *Id.*

¹² Petitioner's Answer Brief at 5-6.

those amendments were “important to move the case to a legally binding determination that the employer is liable for the debt so the [d]epartment can seek to collect it.”¹³

¶ 11 Although the legislative history clearly shows that the legislature intended to impose a time limit for petitioning the WCC for UEF benefits, nothing in the history sheds any light on whether the UEF’s determination or the mediator’s report becomes final if a petition is not filed in the WCC within 60 days. In reviewing the legislative history submitted by the parties, I find nothing indicating the legislature intended to change a claimant’s right and time frame to file a claim against the UEF. Similarly, nothing in the legislative history indicates the legislature intended to allow UEF’s denial of benefits to become final if a claimant did not file a petition within 60 days of the mailing of the mediator’s report. I conclude that neither Petitioner’s nor the UEF’s interpretation of § 39-71-520(2)(a)-(c), MCA, is supported by either the plain language of the statute or the legislative history.

B. The statute is not tolled during the 25-day period which the parties have to notify the mediator as to whether they accept the mediator’s recommendation.

¶ 12 Petitioner next argues that the 60-day time limit to file a petition in this Court is tolled during the 25-day period each party has to notify the mediator regarding whether it accepts the mediator’s recommendation.¹⁴ I disagree.

¶ 13 I have previously addressed the series of requirements imposed by § 39-71-520(2), MCA, and § 39-71-2411(7), MCA.¹⁵ In *Auchenbach v. UEF*, I stated:

Applying the plain language of both §§ 39-71-520 and 39-71-2411, MCA, evinces a concurrent running of two statutory time limitations beginning with the mailing of the mediator’s report and recommendation. Moreover, both statutes require that at least one of the parties to the dispute must reject the mediator’s recommendation before a petition may be filed with this Court. Therefore, if all parties to the dispute comply with the twenty-five-day response requirement, then the parties will have a minimum of thirty-five days to file a petition with the Court after determining that the mediator’s

¹³ UEF’s Reply Brief at 3.

¹⁴ Petitioner’s Answer Brief at 3.

¹⁵ *Auchenbach v. UEF*, 2006 MTWCC 13, ¶ 6.

recommendation has been rejected and, therefore, there has been a failure to reach settlement through the mediation process.¹⁶

¶ 14 Although in *Auchenbach* I did not specifically address the tolling issue that Petitioner raises here, I analyzed the interaction between the respective time limits imposed by § 39-71-520(2), MCA, and § 39-71-2411(7), MCA, and found that the time limits run concurrently. Nothing in the plain language of either § 39-71-520(2), MCA, or § 39-71-2411(7), MCA, suggests any other interpretation and nothing supports Petitioner's tolling argument.

C. The time limits imposed in § 39-71-520, MCA, are jurisdictional.

¶ 15 Petitioner next argues that the time limits set forth in § 39-71-520, MCA, are not statutes of limitations and therefore failing to meet the time limits does not raise a jurisdictional bar to a claim in this Court.¹⁷ Petitioner argues, without citation to any authority, that a legal claim is governed by only one "statute of limitations." However, in *Colmore v. UEF*,¹⁸ the Court held a claimant's request to have the WCC recalculate her benefits more than a year after the UEF determined the benefits should have been denied because it was made past the time allowed in § 39-71-520(1), MCA.¹⁹ Further, the *Colmore* court specifically referred to the time limits in § 39-71-520, MCA, as "statutes of limitations" and held that the WCC was without jurisdiction to hear the claimant's motion to amend benefits when the claimant did not meet the time limits.²⁰

¶ 16 Shortly after the *Colmore* decision, the courts again addressed the subject of workers' compensation time limits. In *Flynn v. UEF*,²¹ the claimant did not request mediation until 93 days after UEF denied his benefits.²² This Court later denied the claimant's petition on grounds that his failure to meet the statutory time limits of § 39-71-

¹⁶ *Id.*

¹⁷ Petitioner's Answer Brief at 7.

¹⁸ *Colmore v. UEF*, 2005 MT 239, 328 Mont. 441, 121 P.3d 1007.

¹⁹ *Id.*, ¶¶ 41-42.

²⁰ *Id.*, ¶ 42.

²¹ *Flynn v. UEF*, 2005 MT 269, 329 Mont. 122, 122 P.3d 1216.

²² *Id.*, ¶ 7.

520(1), MCA, deprived the Court of jurisdiction to hear the case.²³ On appeal, the Montana Supreme Court affirmed and explained that Flynn's claim was "time barred" and "neither the Mediation Unit nor the Workers' Compensation Court could hear the matter," because he did not request mediation within 90 days of the UEF's denial of benefits.²⁴

¶ 17 Although the statute at issue here is § 39-71-520(2), MCA, I find no basis to hold that its time limit does not constitute a statutory time limit when the Supreme Court has held that the time limit set forth in the preceding subsection of the same statute is a statutory time limit which deprives the Court of jurisdiction when not met. I therefore hold that the time limit imposed by § 39-71-520(2), MCA, is jurisdictional in nature and this Court is without authority to waive it.

D. Section 39-71-520(2), MCA, is unconstitutional because it is so ambiguous that it is void for vagueness.

¶ 18 Finally, Petitioner argues § 39-71-520(2), MCA, is void because it is unconstitutionally vague.

¶ 19 Generally, a court assumes all statutes are constitutional and attempts to construe them in a manner that avoids unconstitutional interpretation.²⁵ A party challenging a statute must prove beyond a reasonable doubt that the statute is unconstitutional.²⁶

¶ 20 "Both the United States Constitution and the Montana Constitution protect against vague statutes which infringe upon a citizen's right to due process."²⁷ The void-for-vagueness doctrine requires that the statute "give a person of ordinary intelligence fair notice that the statute does not permit his contemplated conduct."²⁸ The Supreme Court has held, "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."²⁹

²³ *Id.*, ¶ 9.

²⁴ *Id.*, ¶ 18.

²⁵ *Oberson v. U.S. Forest Service*, 2007 MT 293, ¶ 14, 339 Mont. 519, 171 P.3d 715.

²⁶ *Id.*

²⁷ *State v. Knudson*, 2007 MT 324, ¶ 18, 340 Mont. 167, 174 P.3d 469.

²⁸ *Yurczyk v. Yellowstone County*, 2004 MT 3, ¶ 33, 319 Mont. 169, 83 P.3d 266.

²⁹ *Rierson v. State*, 188 Mont. 522, 526, 614 P.2d 1020, 1023 (1980).

¶ 21 As discussed above, § 39-71-520(2), MCA, has at least two reasonable interpretations. The phrase “any party may file a petition” in § 39-71-520(2)(a), MCA, implies that in some circumstances, the UEF may want to file a petition in the WCC. However, under UEF’s interpretation of the statute, the UEF would never file a petition with the WCC if it disagreed with the mediator’s report because the UEF’s determination would become final if no agreement was reached in mediation. By providing that if a settlement is not reached, “any party may file a petition before the workers’ compensation court,” the statute implies the UEF may at times have incentive to file a petition. However, the UEF would have incentive to petition the WCC only if the mediator’s report becomes final absent a petition being filed with the WCC.

¶ 22 Moreover, § 39-71-520(2)(c), MCA, provides, “If a settlement is not reached through mediation and a petition is not filed within 60 days . . . the determination by **the department** is final.”³⁰ Title 39, chapter 5 is devoted to the subject of uninsured employers; chapter 5 refers to the UEF in a variety of ways. In some statutes, the UEF is referred to as “the department.”³¹ In others, it is referred to as “the fund.”³² Further compounding the confusion, § 39-71-2411, MCA – which is cross-referenced in § 39-71-520(2), MCA – refers to the mediation unit of the Department of Labor and Industry as “the department.”³³ Therefore “the department,” as used in § 39-71-520(2), MCA, could reasonably be interpreted to mean either the mediation unit of the Department of Labor and Industry or the UEF.

¶ 23 The present case illustrates the confusion fostered by the general term “the department” in § 39-71-520(2)(c), MCA. Clearly, Petitioner’s attorney believed the mediator’s report, and not the UEF’s determination, would become final if Petitioner did not file a petition within 60 days after the mediator mailed her report. This is evidenced by his February 21, 2007, letter to the department mediator in which Petitioner’s attorney thanked the mediator for her “mediation report and recommendation” and noted his acceptance of

³⁰ Emphasis added.

³¹ See §§ 39-71-503(3)(a)-(b), 39-71-504(1)(a), (3), 39-71-519, MCA.

³² See §§ 39-71-503(4), 39-71-504(1)(b)-(c), MCA.

³³ § 39-71-2411(1), MCA.

her decision.³⁴ Petitioner's attorney also requested the mediator "issue [her] decision as soon as possible" so the matter could conclude.³⁵

¶ 24 The letter of Petitioner's counsel was sent just 20 days after the mediator's report was mailed and demonstrates counsel's understanding that the mediator's report would resolve the matter unless a party filed a petition in the WCC. Since Petitioner accepted the mediator's recommendation, he saw no reason to petition the Court. Conversely, the UEF interpreted the statute to mean that the UEF's determination would become final if no party filed a petition with the Court. If competent counsel on both sides are capable of reaching conflicting interpretations of this statute, certainly a pro sé claimant should not be expected to navigate § 39-71-520(2), MCA, without confusion. The statutory language does not advance the public policy of providing a system that is designed to minimize the reliance upon lawyers and the courts to obtain benefits and interpret liabilities.³⁶

¶ 25 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.

¶ 26 This holding is limited to the constitutionality of § 39-71-520(2), MCA. Although this Order analyzes and discusses §§ 39-71-520(1), -2411, MCA, and their interaction with the challenged statute, this Court makes no determination regarding the constitutionality of these statutes.

¶ 27 Because this motion is resolved on the grounds set forth above, the Court does not address Petitioner's arguments regarding equal protection and impermissible exercise of sovereign immunity.

³⁴ Ex. 1 to Petitioner's Answer Brief.

³⁵ *Id.*

³⁶ § 39-71-105(4), MCA.

ORDER

¶ 28 Respondent's motion to dismiss is deemed a motion for summary judgment.

¶ 29 Respondent's motion for summary judgment is **DENIED**.

¶ 30 Either party to this dispute may petition the Court for reconsideration of its decision to deem Respondent's motion a summary judgment motion within 10 days of the publication of this Order.

¶ 31 Section 39-71-520(2), MCA, is **UNCONSTITUTIONAL** by its vagueness.

DATED in Helena, Montana, this 31st day of December, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA

JUDGE

c: James G. Hunt
Jonathan McDonald
Arthur M. Gorov
G. Andy Adamek

Submitted: October 15, 2007