IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 8

WCC No. 2005-1467

HORIZON CUSTOM HOMES, INCORPORATED

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

IN RE: THE CLAIM OF ROBERT FLINK

Claimant.

ORDER GRANTING MOTION TO DISMISS

Summary: Respondent moved for an order to dismiss Petitioner's action on the grounds that Petitioner did not request mediation of Respondent's determination within 90 days as required by § 39-71-520(1), MCA. Petitioner argues that § 39-71-520, MCA, is unconstitutional because it violates Petitioner's right to equal protection under the law. Petitioner further argues that it should be entitled to review the medical records of the claimant because Petitioner believes Respondent may have improperly paid all or part of the claim.

Held: Section 39-71-520, MCA, is not unconstitutional because the classes at issue are not similarly situated. Petitioner is not entitled to review the claimant's medical records because Petitioner failed to appeal Respondent's determination to mediation within 90 days. Therefore, this Court is without jurisdiction to review Respondent's determination.

Topics:

> **Employers: Uninsured Employers.** Statutorily-defined uninsured employers and employers who do not fall into this category are not similarly situated because one class of employers has met its statutory obligation to provide workers' compensation coverage while the other has not. By not

obtaining coverage, uninsured employers place themselves in a separate class, and their injured workers are compensated by the "safety net" of the UEF.

Constitutional Law: Equal Protection. The first prerequisite in any equal protection analysis is a showing that the classes at issue are similarly situated. If they are not, the Court need look no further. Since the Court determined that statutorily-defined uninsured employers and employers who do not fall into this category are not similarly situated, Petitioner's equal protection challenge to § 39-71-520, MCA, must fail.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-520. The first prerequisite in any equal protection analysis is a showing that the classes at issue are similarly situated. If they are not, the Court need look no further. Since the Court determined that statutorily-defined uninsured employers and employers who do not fall into this category are not similarly situated, Petitioner's equal protection challenge to § 39-71-520, MCA, must fail.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-604. While § 39-71-604(2), MCA, authorizes the release of a claimant's relevant health care information to the workers' compensation insurer, in this case, the records were released to the UEF, which accepted liability, and the uninsured employer failed to appeal this determination within 90 days, as required by § 39-71-520, MCA. The employer would therefore be without recourse if its suspicions about the injured worker's medical claims proved correct, because the time to challenge the UEF's determination has lapsed.

Jurisdiction: Mediation. On its face, § 39-71-520, MCA, precludes mediation unless requested within the 90-day time limit. Since the uninsured employer failed to do so and since mediation is in turn a jurisdictional prerequisite to this Court's jurisdiction, *James v. UEF*, 2002 MTWCC 51, ¶ 4, failure to request mediation within 90 days prevents this Court from reviewing a UEF determination.

Jurisdiction: Workers' Compensation Court. On its face, § 39-71-520, MCA, precludes mediation unless requested within the 90-day time limit. Since the uninsured employer failed to do so and since mediation is in turn a jurisdictional prerequisite to this Court's jurisdiction, *James v. UEF*, 2002 MTWCC 51, ¶ 4, failure to request mediation within 90 days prevents this Court from reviewing a UEF determination.

Mediation: Department Jurisdiction. On its face, § 39-71-520, MCA, precludes mediation unless requested within the 90-day time limit. Since the uninsured employer failed to do so and since mediation is in turn a jurisdictional prerequisite to this Court's jurisdiction, *James v. UEF*, 2002 MTWCC 51, ¶ 4, failure to request mediation within 90 days prevents the Workers' Compensation Court from reviewing a UEF determination.

Uninsured Employers' Fund: Appeal of UEF Benefits Determination. Where an uninsured employer failed to request mediation within 90 days of the UEF's unconditional acceptance of an injured employee's claim, as required by § 39-71-520, MCA, the uninsured employer is without recourse.

¶ 1 Respondent moved this Court to dismiss Petitioner's action on the grounds that Petitioner did not request mediation within 90 days of Respondent's unconditional acceptance of the claim, as required by § 39-71-520(1), MCA. The Court, having read the parties' briefs and hearing oral argument on this issue, GRANTS Respondent's motion to dismiss for the reasons set forth below.

¶ 2 Petitioner petitioned this Court to order Respondent to provide Petitioner with the medical records of Robert Flink (Flink). Petitioner prayed for relief from any obligation to indemnify Respondent for any benefits improperly paid or payable on this claim, and further prayed for relief in full from any obligation to indemnify Respondent on the grounds that the statutory provisions for contesting an Uninsured Employers' Fund (UEF) determination violates due process and equal protection and are therefore unconstitutional.

¶ 3 Respondent responded that, absent a release from Flink, it is prohibited from releasing Flink's medical records pursuant to §§ 39-71-224, -525, MCA. Respondent adds that the medical records which Petitioner seeks are unrelated to the claim for which Respondent is paying benefits, and the release of such records to Petitioner by Respondent would violate Flink's rights under Mont. Const., Art. II, §§ 10 and 17.

¶ 4 Respondent explains that on October 30, 2003, it decided to pay benefits relative to Flink's claim under a full reservation of rights, and provided written notification of this determination to Petitioner that same day. The notification letter stated that Respondent's decision to pay benefits would become final if not appealed to mediation within 90 days, pursuant to § 39-71-520(1), MCA. Petitioner did not appeal this determination until August 19, 2005. Respondent states that Petitioner's 90-day appeal limit expired on January 28, 2004, and when Petitioner did not appeal by that date, Respondent's decision became final.

¶ 5 Petitioner argues that Respondent's motion to dismiss should fail because § 39-71-520, MCA, is unconstitutional. Petitioner argues that this statute denies equal protection to parties adversely affected by a determination of the UEF. Petitioner states that all other parties with a dispute concerning benefits under the Workers' Compensation Act have two

years in which to bring a matter to mediation, and ultimately to the Court, pursuant to § 39-71-2905, MCA. Petitioner asserts that no rational basis exists for the disparate statutory time lines which provide for a two-year statute of limitations for all but uninsured employers, who have only 90 days in which to bring a matter to mediation.[1]

¶ 6 Respondent replies that § 39-71-520, MCA, is constitutional and that a rational basis exists for treating uninsured employers differently under the Workers' Compensation Act. Respondent cites *Auto Parts of Bozeman v. Uninsured Employers' Fund*[2] and *Zempel v. Uninsured Employers' Fund*[3] in support of these contentions.

¶ 7 During oral argument, Respondent clarified the issues to be determined as whether § 39-71-520, MCA, is constitutional and, if it is, whether Petitioner nonetheless retains the right to challenge the reasonableness of the payments Respondent made to Flink. The Court addresses each issue in turn:

I. Does § 39-71-520, MCA, violate Mont. Const., Art. II, § 4, by treating uninsured employers differently than insured employers under the Workers' Compensation Act?

¶ 8 Petitioner argues § 39-71-520, MCA denies it equal protection of the law because, under this statute, uninsured employers are treated differently than other individuals or classes of individuals who are adversely affected by the determinations of an insurer or other person under the Workers' Compensation Act. Petitioner claims the 90-day limitation period which § 39-71-520, MCA, allows for the appeal to mediation of a dispute with the UEF, is unfair in light of the two-year limitations period provided for all other disputes under § 39-71-2905, MCA, for bringing a matter through mediation and to this Court. Petitioner argues that no rational basis exists for treating those affected by UEF determinations differently from others involved in the workers' compensation system.

¶ 9 Petitioner further points out that a claimant who works for an uninsured employer may be similarly situated to a claimant who works for an insured employer, yet the claimant would be subject to the shorter time limitation of § 39-71-520, MCA, by virtue of working for an uninsured employer.

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[1] Petitioner further argued that Respondent should be estopped from invoking § 39-71-520, MCA, and that it exercised due diligence in attempting to comply with § 39-71-520, MCA. However, during oral argument before this Court, it withdrew these arguments and they are thus not considered here. (*See* Minute Book Hearing No. 3720.)

[2] *Auto Parts of Bozeman v. Uninsured Employers' Fund*, 2001 MT 72, 305 Mont. 40, 23 P.3d 193.

[3] *Zempel v. Uninsured Employers' Fund*, 282 Mont. 424, 938, P.2d 658 (1997).

¶ 10 "A party challenging the constitutionality of a statute bears the burden of proving the statute unconstitutional beyond a reasonable doubt."[4] "Any doubts regarding constitutionality must be resolved in favor of the statute."[5]

¶ 11 Both the Fourteenth Amendment to the United States Constitution and Mont. Const. Art. II, § 4, provide that no person shall be denied equal protection of laws. "The principal purpose of Montana's Equal Protection Clause is to ensure that Montana's citizens are not subject to arbitrary and discriminatory state action."[6]

¶ 12 "Proper equal protection analysis involves identifying the classes involved, determining whether they are similarly situated and then using the appropriate level of scrutiny to determine if the statute is constitutional."[7] When analyzing workers' compensation statutes, the rational basis test is used because the right to receive workers' compensation benefits is not a fundamental right, nor does the Act infringe upon the rights of a suspect class.[8] "Under the rational basis test, the question becomes whether a legitimate governmental objective bears some identifiable rational relationship to a discriminatory classification."[9]

¶ 13 A prerequisite in any equal protection claim is demonstrating that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. The Montana Supreme Court has held that, when addressing an equal protection challenge, it first identifies the classes involved and determines if they are similarly situated.[10]

¶ 14 In the present case, Respondent points out that the two classes at issue – statutorily-defined uninsured employers and employers who do not fall into this category – have already been identified in *Zempel*. This Court must, therefore, determine whether

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[4] *Bustell v. AIG Claims Service, Inc.*, 2004 MT 362, ¶ 8, 324 Mont. 478, 105 P.3d 286 (citing *Henry v. State Compensation Ins. Fund*, 1999 MT 126, ¶ 11, 294 Mont. 449, 982 P.2d 456).

[5] *Bustell*, ¶ 8 (citing *Powell v. State Compensation Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877).

[6] *Bustell*, ¶ 19 (citing *Powell*, ¶ 16).

[7] *Bustell*, ¶ 20 (citing *Henry*, ¶¶ 7-29).

[8] *Bustell*, ¶ 19 (citing *Henry*, ¶ 29).

[9] *Bustell*, ¶ 19 (citing *Powell*, ¶ 21).

[10] *Bustell*, ¶ 20 (citing *Powell*, ¶ 22).

these classes are similarly situated. Equal protection does not require that all persons be treated alike regardless of whether their circumstances are the same. It requires only that all persons be treated alike under like circumstances.[11]

¶ 15 "Statutorily-defined uninsured employers have failed to comply with an Act to which they are subject, but they remain subject to the state's authority to enforce funding for the UEF through reimbursement and penalties."[12] In *Auto Parts of Bozeman*, the Montana Supreme Court explained,

> Because not all employers comply with the statutory requirement to carry insurance on their employees, the UEF was created to provide an injured employee of an uninsured employer with the same benefits which the employee would have received had the employer been properly enrolled in a workers' compensation plan. The UEF is a legislatively created fund, the payments from which are intended to minimize the hardships imposed when an injured worker is unable to get workers' compensation benefits as a result of the employer's failure to provide coverage. The UEF is not an insurer, but merely a safety net.[13]

¶ 16 Respondent argues that the above-cited cases illustrate that uninsured employers are treated differently because they have created the social problem of injured employees who do not have workers' compensation insurance and the law is designed to provide benefits quickly to those employees who find themselves in such a situation. Therefore, Respondent concludes, Montana case law further demonstrates that the courts have recognized the existence of a rational basis for disparate treatment of statutorily-defined uninsured employers versus other employers under the law. Respondent's arguments are well-taken.

¶ 17 The two classes of employers, as defined in *Zempel*, are not similarly situated. By not obtaining workers' compensation insurance coverage, uninsured employers place themselves in a separate class, and their injured workers are compensated by the "safety net" of the UEF. Petitioner attempts to persuade this Court to look not at the two classes of employers but, rather, consider whether there is a rational basis for distinguishing between hypothetical ***claimants***. These are not the facts of this case and Petitioner lacks the standing to avail itself of a hypothetical equal protection challenge on behalf of a hypothetical claimant. The classes of employers are not similarly situated because one

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[11] *Zempel*, 282 Mont. at 432, 938 P.2d at 663 (citations omitted).

[12] *Zempel*, 282 Mont. at 432, 938 P.2d at 663.

[13] *Auto Parts of Bozeman*, ¶ 22 (citations omitted).

class of employers has met its statutory obligation to provide workers' compensation coverage for its employees, while the other has not.

¶ 18 The first prerequisite in any equal protection analysis is a showing that the classes at issue are similarly situated. If the classes are not similarly situated, then the first criteria for proving an equal protection violation is not met and the Court need look no further.[14] Having determined that the classes at issue are not similarly situated, the Court's equal protection analysis need go no further.

¶ 19 Petitioner has not met its burden of proving beyond a reasonable doubt that § 39-71-520, MCA, is unconstitutional.

II. Can this Court order Respondent to produce Flink's medical records to Petitioner?

¶ 20 Petitioner argues that although it has indemnified Respondent for benefits paid to Flink, Petitioner suspects that some or all of those benefits may have been inappropriately paid. Petitioner asks this Court to order Respondent to produce Flink's medical records for Petitioner's inspection so that Petitioner may make this determination.

¶ 21 The Montana Supreme Court has held that medical records are private and "deserve the utmost constitutional protection."[15] While § 39-71-604(2), MCA, authorizes the release of a claimant's relevant health care information to the workers' compensation insurer, in this case, the records were released to the UEF, which accepted liability, and Petitioner failed to appeal this determination within 90 days, as required by § 39-71-520, MCA. Even if Petitioner's suspicions proved correct, Petitioner would be without recourse as the time to challenge the UEF's determination has lapsed.

¶ 22 Even if the Court were inclined to release Flink's medical records, it is without jurisdiction to do so. Pursuant to § 39-71-520(1), MCA, a dispute concerning UEF benefits must be appealed to mediation within 90 days from the date of the determination. In *James v. Uninsured Employers' Fund*,[16] this Court recognized that on its face, § 39-71-520, MCA,

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[14] *Powell v. State Compensation Ins. Fund*, 2000 MT 321, ¶ 22, 302 Mont. 518, 15 P.3d 877 (citations omitted).

[15] *Henricksen v. State of Montana*, 2004 MT 20, ¶ 36, 319 Mont. 307, 84 P.3d 38 (citing *State v. Nelson,* 283 Mont. 231, 242, 941 P.2d 441, 448 (1997)).

[16] *James v. Uninsured Employers' Fund*, 2002 MTWCC 51, ¶ 4.

precludes mediation unless requested within the 90-day time limit, and since mediation is in turn a jurisdictional prerequisite to this Court's jurisdiction,[17] failure to request mediation within 90 days prevents this Court from reviewing a UEF determination. Petitioner concedes that it did not request mediation with 90 days of the UEF's determination. Therefore, this Court is without jurisdiction to review the UEF's determination.

ORDER

¶ 23 Respondent's motion to dismiss is **GRANTED**.

¶ 24 This Order is certified as final for purposes of appeal.

SO ORDERED.

DATED in Helena, Montana, this 14th day of February, 2007.

(SEAL)

/s/ James Jeremiah Shea
JUDGE

c: Charles G. Adams
Brian J. Hopkins
Submitted: August 7, 2006

[17] §§ 39-71-2401(1), -2408(1), -2905, MCA.