IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 25

WCC No. 9707-7778R1

DWIGHT E. DAHL, d/b/a

BIG SKY CONCRETE

Appellants

vs.

UNINSURED EMPLOYERS' FUND

Respondent.

ORDER AND JUDGMENT INCORPORATING STIPULATION FOR APPORTIONMENT OF PENALTY AND DISMISSING CONSTITUTIONAL CHALLENGE

Summary: In Dahl v. Uninsured Employers' Fund, 1998 MTWCC 39, the Supreme Court reversed the decision of the WCC and held that section 39-71-401(1), MCA, required employers themselves to insure workers. The Supreme Court remanded to the WCC to address the employer's contention that the statutory definition of "temporary worker" is unconstitutionally vague.

Held: Section 39-71-116(29), MCA (1993) is not unconstitutionally vague. On its face, the statute distinguishes between temporary and permanent employees and limits the use of temporary leave employees to emergency situations or to fill in for permanent employees on leave. This definition is comprehensive and applies to employees at issue.

Topics:

> **Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-116(29), MCA (1993).** On remand from the Supreme Court, which held that companies receiving workers from temporary employment agencies must maintain their own WC coverage and cannot rely on their temporary agency to provide coverage, the WCC held that section 39-71-116(29), MCA (1993), which defines "temporary worker," was not unconstitutionally vague. On its face, the statute distinguishes between temporary and permanent employees and limits the use of temporary employees to emergency situations or to fill in for permanent employees on leave. This definition is comprehensible as applied to employees at issue.

Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-401, MCA (1993). On remand from the Supreme Court, which held that companies receiving workers from temporary employment agencies must maintain their own WC coverage and cannot rely on their temporary agency to provide coverage, the WCC held that section 39-71-116(29), MCA (1993), which defines "temporary worker," was not unconstitutionally vague. On its face, the statute distinguishes between temporary and permanent employees and limits the use of temporary employees to emergency situations or to fill in for permanent employees on leave. This definition is comprehensible as applied to employees at issue.

Employers: Insurance. On remand from the Supreme Court, which held that companies receiving workers from temporary employment agencies must maintain their own WC coverage and cannot rely on their temporary agency to provide coverage, the WCC held that section 39-71-116(29), MCA (1993), which defines "temporary worker," was not unconstitutionally vague. On its face, the statute distinguishes between temporary and permanent employees and limits the use of temporary employees to emergency situations or to fill in for permanent employees on leave. This definition is comprehensible as applied to employees at issue.

Employment: Temporary Employees. On remand from the Supreme Court, which held that companies receiving workers from temporary employment agencies must maintain their own WC coverage and cannot rely on their temporary agency to provide coverage, the WCC held that section 39-71-116(29), MCA (1993), which defines "temporary worker," was not unconstitutionally vague. On its face, the statute distinguishes between temporary and permanent employees and limits the use of temporary employees to emergency situations or to fill in for permanent employees on leave. This definition is comprehensible as applied to employees at issue.

Penalties: Uninsured Employers. On remand from the Supreme Court, which held that companies receiving workers from temporary employment agencies must maintain their own WC coverage and cannot rely on their temporary agency to provide coverage, the WCC held that section 39-71-116(29), MCA (1993), which defines "temporary worker," was not unconstitutionally vague. On its face, the statute distinguishes between temporary and permanent employees and limits the use of temporary employees to emergency situations or to fill in for permanent employees on leave. This definition is comprehensible as applied to employees at issue.

I. Background

¶1 This matter is on judicial review from a Department of Labor and Industry (Department) Order finding that appellants, Dwight E. Dahl and Big Sky Concrete, were uninsured

employers. In a prior decision of this Court, I held that respondents were not uninsured since the temporary employment agency which furnished them with workers maintained insurance coverage for those workers. *Dahl v. Uninsured Employers' Fund,* 1998 MTWCC 39. The Supreme Court reversed, holding that section 39-71-401(1), MCA, on its face, required Dahl and Big Sky Concrete to insure their employees. The Court said, "[C]ontrary to the Workers' Compensation Court's interpretation, § 39-71-401(1), MCA (1993), precludes a separate entity from providing workers' compensation insurance for an employer's employees." (*Id.* at 6-7.)

¶2 The Supreme Court remanded this case for further proceedings to individually apportion the penalty which has been assessed jointly against Dahl and Big Sky Concrete. It also directed this Court to address the appellants' contention that section 39-71-116(23), MCA, is void because it is unconstitutionally vague. The Supreme Court's citation to section 39-71-116(23), MCA, is a typographical error. The citation should have been to section 39-71-116(29), MCA (1993), which defined temporary worker during the time appellants were uninsured.[(1)]

¶3 Following remand the parties stipulated that "a penalty of $18,175.09 applies to Mr. Dahl individually and as a sole proprietorship" and "that a separate sum of $22,429.19 applies to Big Sky Concrete, Inc." (Stipulation of Parties Regarding Penalty Allocation and Briefing Schedule (received October 1, 1999) at 1.) Therefore, the only remaining issue before the Court is appellants' constitutional challenge.

II. Timeliness of Challenge

¶4 The Uninsured Employers' Fund (UEF) argues that appellants' constitutional challenge is untimely because it was not raised until the opening statement made by appellants' counsel at the Department hearing. The argument is without merit. This Court is bound by the decision of the Supreme Court, which remanded the case with specific instructions that it consider the void-for-vagueness challenge. Moreover, as the UEF acknowledges, constitutional issues cannot be considered by administrative agencies. *Jarussi v. Board of Trustees of School Dist. No. 28, Lake County,* 204 Mont. 131, 135-36, 664 P.2d 316, 318 (1983). Raising the issue at the agency level is a useless and unnecessary act. Moreover, appellants could have bypassed the Department altogether and petitioned for declaratory judgment. *See Brisendine v. Montana Department of Commerce, Board of Dentistry,* 253 Mont. 361, 366, 833 P.2d 1019, 1021 (1992). They cannot be penalized because they first exhausted their administrative remedies before bringing the issue before this Court.

III. Scope of Challenge

¶5 UEF further argues that appellants' constitutional challenge should be limited to the temporary worker definition in section 39-71-116(29), MCA (1993), and that the Court should not consider their arguments concerning section 39-71-401(1), MCA (1993). Section

39-71-401(1), MCA, which sets forth the requirement that employers maintain workers' compensation insurance coverage.

¶6 The Supreme Court remanded for consideration of the challenge to section 39-71-116(23) [sic], MCA; there is no mention of any challenge to section 39-71-401, MCA. However, in mentioning section 39-71-401, MCA, appellants are not raising a new or separate issue. They simply point out that section 39-71-116(29), MCA, and 39-71-401(1), MCA, are "inextricably intertwined" because the temporary worker definition "is controlling" as to whether Dahl is in violation of section 39-71-401(1), MCA (1993). (Brief Regarding Vagueness Issue at 4-5.) No separate consideration need be given section 39-71-401(1), MCA.

IV. Temporary Worker Provisions

¶7 As a general matter, the Montana Workers' Compensation Act requires employers to maintain workers' compensation insurance coverage for all their employees. § 39-17-401(1), MCA. There are a number of exceptions to the requirement, including an exception with respect to temporary workers.

¶8 There are four provisions pertaining to temporary workers. The first two are substantive provisions governing coverage. Section 39-71-117(3), MCA (1993), concerns the employer's responsibility for insuring workers furnished by others. It provides in relevant part:

> (3) An employer defined in subsection (1)[(2)] who utilizes the services of a worker furnished by another person, association, contractor, firm, or corporation, **other than a temporary service contractor**, is presumed to be the employer for workers' compensation premium and loss experience purposes for work performed by the worker. [Emphasis added.]

Subsection (2) of section 39-71-117, MCA (1993), makes the temporary service contractor responsible for furnishing workers' compensation coverage for temporary employees, providing: "(2) A temporary service contractor is the employer of a **temporary worker** for premium and loss experience purposes." (Emphasis added.) Together, these two subsections place the burden of insuring temporary workers upon the agency providing the temporary workers.

¶9 The second two provisions are definitional. Section 39-71-116(27), MCA (1993), defines "temporary service contractor" as any person, firm, association, or corporation conducting business that employs individuals directly for the purpose of furnishing the services of those individuals on a part-time or temporary basis to others.

Section 39-71-116(29), MCA (1993), defines "temporary worker" as

> a worker whose services are furnished to another on a part-time or temporary basis to substitute for a permanent employee on leave or to meet an emergency or short-term workload.

It is this latter definition that appellants argue is unconstitutionally vague.

V. Constitutionality

¶10 In attacking the constitutionality of a statute, appellants bear a heavy burden. The statute is presumed to be constitutional. *State v. Stanko,* 1998 MT 321, ¶4, 292 Mont. 192, 974 P.2d. 1132-3 (1998). The appellants' burden is to convince the Court *beyond a reasonable doubt* that it is unconstitutional. *Id.* at ¶ 16.

¶11 Statutes which impose either criminal or civil penalties must be clear and explicit. If they are vague and uncertain, then the penal provisions are void. *Missoula High School Legal Defense Assoc. v. Superintendent of Public Instruction,* 196 Mont. 106, 112, 637 P.2d 1188, 1192 (1981). While the provisions governing the use of temporary employees are not themselves penal, the failure to comply with the provisions renders the business subject to civil penalties for failure to insure the employees. § 39-71-504, MCA (1993).

¶12 A statute may be unconstitutionally vague on its face or as applied to a particular situation. *Stanko, ¶ 7.* A statute is void if, on its face or as applied, "it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *Smith v. Montana Driver's Improvement Bureau*, 1998 MT 94, 288 Mont. 383, 958 P.2d 677, ¶12. But, as with many rules, the devil is in the application of the rule. Appellants' claim that the temporary employee provisions failed to provide fair notice of workers' compensation requirements as applicable to his circumstances. The UEF counters, "Not so."[(3)]

¶13 Respondent Dahl "believed he had fully complied with all workers' compensation requirements" and was assured by Olsten's, which was the temporary service agency, that the workers furnished by Olsten's were covered by insurance. (Brief Regarding Vagueness Issue at 4.) The test, however, is not what Dahl or some other individual may have believed or understood, or what assurances may have been provided by Olsten's. The standard is what a "reasonable person" would understand. *State v. Martel,* 273 Mont. 143, 150, 902 P.2d 14, 18-19 (1995).

¶14 In *State v. Stanko,* 1998 MT 321, 292 Mont. 192, 974 P.2d 1132 (1998), the Montana Supreme Court struck down for vagueness a traffic statute making it a violation to operate a motor vehicle at a speed

> *greater than is reasonable and proper under the conditions existing at the point of operation*, taking into consideration the amount and character of traffic, condition of brakes, weight of vehicle, grade and width of highway, condition of surface, and freedom of obstruction to the view ahead.

Id. ¶ 19 (italics in original). The difficulty in ascertaining what was proscribed by the statute was evident in responses of the Attorney General, who could not state at what speed driving became unreasonable at the point and time of claimant's citation, and who acknowledged that a determination of what speed is excessive rests in each individual police officer's discretion. *Id*. ¶¶ 26-28. The Supreme Court further noted that the statute failed to specify how the various factors enumerated by it were to be weighted or applied. *Id*. ¶ 28.

¶15 The statute under consideration here does not suffer from the same problems. In *C. Loney Concrete Construction, Inc. v. Uninsured Employers' Fund,* WCC No. 9305-6788, Decision and Order on Appeal (December 28, 1993), I methodically went through the criteria for determining whether a worker is a temporary worker. My analysis was based on the plain, commonly understood meaning of the words in the definition:

> In construing a statute, the primary tool for ascertaining the legislature's intent is the plain meaning of the words used. *Dorn v. Bd. of Trust. of Billings Sch. Dist.,* 203 Mont. 136, 144, 661 P.2d 426, 430 (1983). When the language of the statute is plain, unambiguous, direct and certain, the statute speaks for itself and no further interpretation is required. *Blake v. State,* 226 Mont. 193, 198, 735 P.2d 262, 265 (1987). On its face, the definition of temporary worker requires that two conditions be met. First, the worker must be furnished on a "part-time or temporary basis." Second, the worker must be a "substitute for a permanent employee on leave" or filling in "to meet an emergency or short-term workload." The conditions are conjunctive.

The first condition is satisfied by either services furnished on a "part-time basis" or on a "temporary basis." The condition is worded disjunctively, so either will satisfy the first condition.

"Full-time" work is commonly understood to be work which is performed full-time (typically 40 hours) on a regular basis. "Part-time" work is thus work which is not full-time work. Regular work for less than 40 hours, for example for 20 hours a week, or irregular work which only infrequently reaches 40 hours in any week, may be considered part-time.

If the worker is not working part-time, the worker's services must be furnished on a "temporary basis." While "temporary" is not specifically defined, it is generally understood that "[a] temporary position is for a limited time in contrast to a permanent one which is for an indefinite time." *State ex rel. Christian v. St. Clair,* 166 S.E.2d 785, 789 (W.Va. 1969). The fact that the employment is not year around does not render it temporary. School teachers, for example, are permanent employees although they may work only 40 weeks a year. *Durgin v. Director of Civil Service,* 44 N.E.2d 781 (Mass. 1942). Employment at will for an indefinite time is not ordinarily temporary employment. *Boone v. United States,* 482 F.2d 417, 419 (5th Cir. 1973). Employment for an indefinite time may nonetheless be temporary,

if the time of contemplated employment is short and the employment is for the completion of a specific task:

> [A] temporary employee is a worker hired for a limited time only, frequently to meet a peak demand or a special rush job. Such an employee is hired with the understanding that his employment will end with completion of the particular task for which he was hired.

Iowa Association of School Boards v. Iowa P. E. R. B., 400 N.W.2d 571, 575 (Iowa 1987) *(quoting Robert's Dictionary of Industrial Relations, rev. ed. 1971)*.

> The second condition also permits two alternative situations. The first is where the worker's services are furnished to "substitute for a permanent employee on leave." Since Loney claims to have no permanent employees, this alternative is inapplicable in the present case. The second alternative is that the worker's services are furnished "to meet an emergency or short-term workload." "Emergency" contemplates something unforeseen and unexpected, requiring immediate action. In the context of the statute, "short term" contemplates a workload which is greater than the normal workload and exists for a matter of weeks or at most a few months.
>
> . . . .

Id. at 12-13. This analysis was followed and applied on appeal. *Loney Concrete Construction v. Employment Relations Division,* 1998 MT 230, ¶23, 291 Mont. 41, 964 P.2d 777 (1998).

¶16 In *Loney* I went on to reject a void for vagueness challenge:

> The specific statute attacked as vague and overly broad is the one defining temporary worker. The statute has been analyzed and interpreted in the previous section of this opinion. It should be manifest from that discussion that the statute has a common sense meaning which should be apparent to "persons of ordinary intelligence." Accordingly, the statute does not fail for vagueness.

Loney at 14. A review of other Montana Supreme Court cases satisfies me that my determination in Loney was correct and that the temporary employee provisions are sufficiently specific to pass muster.

¶17 In *State v. Martel*, the Court considered a challenge to a statute making "stalking" a criminal offense. The statute in question defined the offense as follows:

> 1) A person commits the offense of stalking if the person purposely or knowingly causes another person substantial emotional distress or reasonable apprehension of bodily injury or death by repeatedly:
>
> (a) following the stalked person; or

(b) harassing, threatening, or intimidating the stalked person, in person or by phone, by mail, or by other action, device, or method.

273 Mont. at 148, 902 P.2d at 18. The appellant, who had been convicted of the offense, attacked the statute as vague because it did not define "repeatedly," "harassing," "intimidating," "reasonable apprehension," or "substantial emotional distress." The Court rejected his argument that the terms were in need of further definition:

> The legislature is not required to define every term it employs when constructing a statute. If a term is one of common usage, readily understood, it will be presumed that a reasonable person of average intelligence comprehends it.

273 Mont. at 150, 902 P.2d at 18-19. The Court found that persons of average intelligence would understand the terms:

> Words such as "repeatedly," "harassing," and "intimidating" have commonly understood meanings. "Repeatedly" means "more than once." "Intimidate" means "to make timid; to frighten." "Harass" means "to annoy repeatedly." Webster's Collegiate Dictionary, (10th Ed.1993). A person of average intelligence would recognize and understand these terms without recourse to legislative definitions.
>
> Appellant argues that the terms "reasonable apprehension" and "substantial emotional distress" are too vague because they employ a subjective standard, placing upon the defendant the burden of guessing how much distress is substantial or how much apprehension reasonable. We disagree. The standard to be employed when construing the statute is that of the "reasonable person." When faced with the conduct complained of, would a reasonable person feel apprehension or substantial emotional distress? A reasonable person standard is an objective one.
>
> Further, the term "substantial emotional distress" has been examined by this Court within the context of the tort of intentional infliction of emotional distress. First Bank-Billings v. Clark (1989), 236 Mont. 195, 771 P.2d 84. We found that the reasonable person standard was the most appropriate way of quantifying an abstract concept such as emotional distress. Such a standard is equally applicable here, and may be inferred from the language of the stalking statute.

Id.

¶18 In *State v. Nye,* 283 Mont. 505, 943 P.2d 96 (1997), the Supreme Court considered a statute making it a criminal offense to maliciously intimidate or harass another person on account of the other person's race, creed, religion, color, national origin, or involvement in civil rights or human rights activities. The statute - section 45-5-221, MCA -- provided:

> **Malicious intimidation or harassment relating to civil or human rights--penalty.** (1) A person commits the offense of malicious intimidation or harassment when, because of another person's race, creed, religion, color, national origin, or involvement in civil rights or human rights activities, he purposely or knowingly, with the intent to terrify, intimidate, threaten, harass, annoy, or offend:
>
> (a) causes bodily injury to another;
>
> (b) causes reasonable apprehension of bodily injury in another; or
>
> (c) damages, destroys, or defaces any property of another or any public property.
>
> (2) For purposes of this section, "deface" includes but is not limited to cross burning or the placing of any word or symbol commonly associated with racial, religious, or ethnic identity or activities on the property of another person without his or her permission.

283 Mont. at 510, 943 P.2d 99. As in *Martel*, the Court found that words used in the statute had ordinary meanings which were reasonably understood by persons of ordinary intelligence.

> The terms "annoy" and "offend" have commonly understood meanings. "Annoy" means to bother, irritate or harass, particularly by repeated acts. The American Heritage Dictionary 112 (2d college ed.1985). "Offend" means to create or excite anger, resentment or annoyance or to cause displeasure. The American Heritage Dictionary 862 (2d college ed.1985). These are terms of common usage and are readily understood, thus we can presume that a reasonable person of average intelligence would comprehend their meaning.

283 Mont. at 513-14, 943 P.2d at 102.

¶19 In *Rierson v. State,* 188 Mont. 522, 614 P.2d 1020 (1980), the Court found that the word "prompt," as used in a statute requiring "prompt" service of a petition for judicial review, was sufficiently definite. The Court rejected a void-for-vagueness challenge and found that service of a petition 16 months after filing was not prompt.

¶20 This Court's prior *Loney* decision conducted an analysis very similar to the analysis conducted in each of the three cited Supreme Court cases. As this Court determined in *Loney,* the key terms used in the temporary employee statute have plain meanings which are understandable by persons of ordinary intelligence. As applied to the appellants' circumstances, the limitations of the statute are comprehensible. On its face, the definition of temporary worker distinguishes between temporary and permanent employees and limits the use of temporary employees to emergency situations or to fill in for permanent employees on leave. As in *Loney*, the appellants in this case claim to have no permanent employees even though they were engaged in a continuing business. Under

these circumstances, their workers could not have possibly been temporary employees since they were not substituting for permanent employees on leave. Similarly, there was no emergency requiring expansion of permanent work force since they claimed to have no permanent work force. To argue that there was an emergency need for an entire work-force defies logic.

¶21 The temporary worker statutes are **not** unconstitutionally vague either on their face or as applied to these appellants.

ORDER AND JUDGMENT

¶22 Based on the foregoing discussion, the Court FINDS AND ADJUDGES that the temporary worker provisions of the 1993 version of the Montana Workers' Compensation Act are not unconstitutionally vague. The appellants' constitutional challenge is **dismissed with prejudice**.

¶23 Any party to this dispute has 20 days in which to request an amendment or reconsideration of this decision.

DATED in Helena, Montana, this 2nd day of May, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Stephen A. Doherty
Mr. Daniel B. McGregor
Submitted: December 15, 1999

1. The definition has bounced around over the years as a result of amendments to section 39-71-116, MCA. "Temporary worker" is defined in section 39-71-116(29), MCA(1993); section 39-71-116(34), MCA (1995); section 39-71-116(35), MCA (1997). Under current law it is found in section 39-71-116(35) MCA (1999).

2. Subsection (1) of 39-71-117, MCA (1993), sets out an all-encompassing definition of employer, as follows:

> **39-71-117. Employer defined.** (1) "Employer" means:
>
> (a) the state and each county, city and county, city school district, irrigation district, all other districts established by law, and all public corporations and quasi-public corporations and public agencies therein and every person, every prime contractor, and every firm, voluntary association, and private corporation, including any public service corporation and including an independent contractor who has any person in service under any appointment or contract of hire, expressed or implied, oral or

written, and the legal representative of any deceased employer or the receiver or trustee thereof;

(b) any association, corporation, or organization that seeks permission and meets the requirements set by the department by rule for a group of individual employers to operate as self-insured under plan No. 1 of this chapter; and

(c) any nonprofit association or corporation or other entity funded in whole or in part by federal, state, or local government funds that places community service participants, as defined in 39-71-118(1)(f), with nonprofit organizations or associations or federal, state, or local government entities.

3. I have paraphrased.