

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA
WCC No. 9506-7562

RUTH WIEGLEND

Appellant

vs.

STATE COMPENSATION INSURANCE FUND

Respondent.

DECISION AND JUDGMENT

Summary: Although couched as an appeal of an administrative order, claimant's filing in the WCC is an attempt to invoke the Court's original jurisdiction to challenge the constitutionality of statutory and regulatory provisions permitting an insurer to deny coverage for "maintenance care" following an industrial injury. The Court addresses the constitutionality of sections 39-71-116 (13) and (16), MCA (1993), section 39-71-704 (f), MCA (1993), and ARM 24.29.2004.

Held: Equal protection provisions are not applicable where the statutes and regulation at issue make distinctions in subject matter of benefits and do not distinguish between or among classes of persons. All persons covered by the WCA are subject to the exclusion regarding maintenance and palliative care. Under a substantive due process analysis, the provisions are lawful where enacted for a legitimate purpose. (Note: WCC was affirmed by the Supreme Court in an unpublished, nonciteable opinion, *Wiegler v. State Compensation Insurance Fund/Department of Labor and Industry*, No. 97-045 (1997).)

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-704(1)(f), MCA (1993). Section 39-71-704(1)(f), MCA (1993), and other statutory and regulatory provisions, do not deny equal protection or due process by providing that an insurer is not required to furnish maintenance care. (Note: WCC was affirmed by the Supreme Court in an unpublished, nonciteable opinion, *Wiegler v. State Compensation Insurance Fund/Department of Labor and Industry*, No. 97-045 (1997).)

Benefits: Medical Benefits: Maintenance Care. Section 39-71-704(1), MCA (1993), and other statutory and regulatory provisions, do not deny equal protection or due process by providing that an insurer is not required to furnish maintenance care. (Note: WCC was affirmed by the Supreme Court in an unpublished, nonciteable opinion, *Wiegler v. State Compensation Insurance Fund/Department of Labor and Industry*, No. 97-045 (1997).)

Constitutional Law: Due Process: Substantive Due Process. Section 39-71-704(1), MCA (1993), and other statutory and regulatory provisions, do not deny equal protection or due process by providing that an insurer is not required to furnish maintenance care. (Note: WCC was affirmed by the Supreme Court in an unpublished, nonciteable opinion, *Wieglanda v. State Compensation Insurance Fund/Department of Labor and Industry*, No. 97-045 (1997).)

Constitutional Law: Equal Protection. Section 39-71-704(1), MCA (1993), and other statutory and regulatory provisions, do not deny equal protection or due process by providing that an insurer is not required to furnish maintenance care. (Note: WCC was affirmed by the Supreme Court in an unpublished, nonciteable opinion, *Wieglanda v. State Compensation Insurance Fund/Department of Labor and Industry*, No. 97-045 (1997).)

Physicians: Chiropractors. Section 39-71-704(1), MCA (1993), and other statutory and regulatory provisions, do not deny equal protection or due process by providing that an insurer is not required to furnish maintenance care. (Note: WCC was affirmed by the Supreme Court in an unpublished, nonciteable opinion, *Wieglanda v. State Compensation Insurance Fund/Department of Labor and Industry*, No. 97-045 (1997).)

Introduction

This is a so-called appeal from a decision of the Department of Labor and Industry (Department).

The appellant herein, Ruth Wieglanda (claimant), petitioned the Department on April 11, 1996. The petition was in the form of a letter from claimant's attorney, Don Edgar Burris (Burris), accompanied by various exhibits. In relevant part, claimant, through Burris, alleged that the exclusion of maintenance and palliative medical care from covered medical expenses, § 39-71-704(1)(f), MCA (1993), is unconstitutional. The petition further alleged that the Department lacked jurisdiction over the constitutional challenge and requested that the Department dismiss the petition so claimant could appeal the constitutional issues to this Court. On May 20, 1996, a hearing officer of the Department obliged, finding that the Department indeed lacked jurisdiction over constitutional issues. (Findings of Fact; Conclusions of Law; and Final Order.⁽¹⁾) On June 19, 1996, claimant filed a Notice of Appeal with this Court, asking it to declare the exclusion unconstitutional.

It is tempting to dismiss the present appeal out-of-hand. The Department granted the relief requested by claimant. While judicial review is available to examine the correctness of the decision below, or the sufficiency of the process below, § 2-4-704, MCA, claimant does not challenge the Department's decision or the manner in which it was reached. Judicial review is available to persons "aggrieved" by a final agency decision. § 2-4-702(1)(a), MCA. Claimant does not satisfy that prerequisite. Thus, if this matter is treated as an appeal, the Court must affirm the Department's decision, which claimant concedes is correct, and go no further. § 2-4-704(2), MCA.

It is apparent, however, that the claimant seeks to invoke this Court's original jurisdiction to decide constitutional issues. Administrative agencies, including the Department of Labor and Industry, are powerless to declare a statute or administrative regulation

unconstitutional. "A judicial body, not an administrative body, is the proper forum to decide constitutional questions" *Schneeman v. Department of Labor and Industry*, 257 Mont. 254, 259, 848 P.2d 504, 507 (1993) (citing *Jarussi v. Board of Trustees*, 204 Mont. 131, 135-36, 664 P.2d 316, 318 (1983)). The original jurisdiction of the Workers' Compensation Court is not limited to determining specific benefits; it extends to other matters which may affect benefits and encompasses requests for declaratory rulings in such matters. *State ex rel. Uninsured Employers' Fund v. Hunt*, 191 Mont. 514, 625 P.2d 539 (1981). Since claimant's constitutional attack on section 39-71-704(1)(f), MCA, ultimately affects her entitlement to medical benefits, this Court has original jurisdiction over her challenge and will treat her appeal as a petition for declaratory judgment. Respondent will not be affected by this treatment since it has responded to claimant's constitutional contentions and has assumed that those issues are properly before the Court.

Constitutional Issues Raised by Claimant

In her Notice of Appeal the claimant alleges:

The statutes (39-71-116(13) to (16), 39-71-704 and Med. Service Rule 24.29.2004 are unconstitutional on the grounds they deny due process and, equal protection of the law and, constitute cruel and unusual punishment. [Sic.]

The Statutes and Rule at Issue

The laws in effect at the time of the claimant's injury govern her right to benefits. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). Both parties agree that claimant's injury occurred in 1994 and that the 1993 version of the Workers' Compensation Act (WCA) applies in this case.

The 1993 statutes and administrative rule challenged by the claimant are as follows:

39-71-116 (13) "Maintenance care" means treatment designed to provide the optimum state of health while minimizing recurrence of the clinical status.

39-71-116 (16) "Palliative care" means treatment designed to reduce or ease symptoms without curing the underlying cause of the symptoms.

39-71-704. Payment of medical, hospital, and related services-fee schedules and hospital rates - fee limitation. (1) In addition to the compensation provided under this chapter and as an additional benefit separate and apart from compensation benefits actually provided, the following must be furnished:

(a) After the happening of a compensable injury and subject to other provisions of this chapter, the insurer shall furnish reasonable primary medical services for conditions resulting from the injury for those periods as the nature of the injury or the process of recovery requires.

(b) The insurer shall furnish secondary medical services only upon a clear demonstration of cost-effectiveness of the services in returning the injured worker to actual employment.

(c) The insurer shall replace or repair prescription eyeglasses, prescription contact lenses, prescription hearing aids, and dentures that are damaged or lost as a result of an injury, as defined in 39-71-119, arising out of and in the course of employment.

(d) The insurer shall reimburse a worker for reasonable travel expenses incurred in travel to a medical provider for treatment of an injury only if the travel is incurred at the request of the insurer. Reimbursement must be at the rates allowed for reimbursement of travel by state employees.

(e) Except for the repair or replacement of a prosthesis furnished as a result of an industrial injury, the benefits provided for in this section terminate when they are not used for a period of 60 consecutive months.

(f) Notwithstanding subsection (1)(a), the insurer may not be required to furnish, after the worker has achieved medical stability, palliative or maintenance care except:

(i) when provided to a worker who has been determined to be permanently totally disabled and for whom it is medically necessary to monitor administration of prescription medication to maintain the worker in a medically stationary condition; or

(ii) when necessary to monitor the status of a prosthetic device.

(g) If the worker's treating physician believes that palliative or maintenance care that would otherwise not be compensable under subsection (1)(f) is appropriate to enable the worker to continue current employment or that there is a clear probability of returning the worker to employment, the treating physician shall first request approval from the insurer for the treatment. If approval is not granted, the treating physician may request approval from the department for the treatment. The department shall appoint a panel of physicians, including at least one treating physician from the area of specialty in which the injured worker is being treated, pursuant to rules that the department may adopt, to review the proposed treatment and determine its appropriateness.

(h) Notwithstanding any other provisions of this chapter, the department, by rule and upon the advice of the professional licensing boards of practitioners affected by the rule, may exclude from compensability any medical treatment that the department finds to be unscientific, unproved, outmoded, or experimental.
[Emphasis added.]

24.29.2004 WORKERS' COMPENSATION DOES NOT PAY (1) For maintenance -- a regime designed to provide the optimum state of health while minimizing recurrence of the clinical status.

(2) Prevent treatment -- procedures necessary to prevent the development of clinical status.

Factual Background

The constitutional challenge in this case is a legal one. No facts were developed below and claimant does not attempt to lay any factual predicate here. Nonetheless, it is helpful to understand the context in which this case arises. That context is provided in the petition⁽²⁾ and exhibits filed with the Department.

It appears that claimant was injured on May 25, 1994. (Ex. A at 1.) She thereafter received chiropractic treatments from Richard Vande Veegaete, D.C. (Exs. A and C.)

On December 19, 1995, the State Fund wrote to Dr. Vande Veegaete advising him that its chiropractic consultant had determined that "the treatments currently being provided to" claimant are "maintenance in nature." (Ex. A. at 1.) The letter then notified Dr. Vande Veegaete that the State Fund would not pay for future maintenance treatments. (*Id.*)

Claimant, either before or after the State Fund letter, retained Burris. On January 7, 1996, Burris wrote Dr. Vande Veegaete asking if he agreed his treatments were maintenance in nature. (Ex. B.) The doctor replied in the affirmative and confirmed that claimant had reached maximum medical improvement. (Ex. C.) However, he went on to indicate that chiropractic treatment was appropriate for claimant's continuing pain, that pain medication was inappropriate because of claimant's prior drug addiction to them, and that exercise was inappropriate because claimant was unable to tolerate traditional exercise programs. (*Id.*)

It is apparent from the foregoing facts, and the present litigation, that claimant wishes to continue chiropractic maintenance treatments. She does not challenge the characterization of further treatment as "maintenance" or "palliative" within the meaning of sections 39-71-704(1)(f) and -116(16) and (20), MCA, but seeks to establish her entitlement to reimbursement for such care.

Discussion

In Appellants' Opening Brief at page 1, the claimant restates the issue in rather colorful terms, as follows:

Whether the Legislature, in an effort to grant largesse and political pork to insurance companies, denies injured workers' due process and equal protection of the law under the Montana Constitution and/or the United States Constitution by requiring an injured employee to either (1) suffer from chronic and intractable pain or (2) become addicted to pain medication in order to mask the pain and (3) be financially responsible for maintenance care as to the pain in all cases? (39-71-116, MCA; 39-71-704, MCA; Med. Service Rule 24.29.2004.)

Initially, the Court need not consider the challenge to ARM 24.29.2004. That regulation merely repeats what is already set forth in the statutes, §§ 39-71-116(13) and (16), 39-

71-704(1)(f), MCA, and is superfluous. If the statutes are constitutional, then the regulation is too.

1. Claimant's Burden

The standard for reviewing a constitutional challenge is well established. "The constitutionality of a legislative enactment is *prima facie* presumed, and every intendment in its favor will be made unless its unconstitutionality appears beyond a reasonable doubt." *Ingraham v. Champion International*, 243 Mont. 42, 47, 793 P.2d 769, 772 (1990). The party challenging the constitutionality of a statute "has a heavy burden of proving a violation of fundamental law." *Harper v. Greely*, 234 Mont. 259, 269, 763 P.2d 650, 657 (1988).

2. Equal Protection and Due Process

Initially, in passing upon claimant's equal protection and due process arguments, the Court is hampered by her counsel's failure to set forth basic legal principles and cite legal authority. Appellant's Opening Brief at 5-6 contains one citation, which is to *Medora v. Colautti*, 602 F.2d 1149 (1979). He cites that case for the proposition that "[w]here there is disparate treatment involving 'denial of all aid, the courts will more closely examine the rationality of the underlying classification.'" 602 F.2d at 1154. Even the single citation to *Medora* is inappropriate since this case does not involve a "denial of all aid."

Burris' briefs are unacceptable. If the issues raised by counsel are serious enough to warrant the Court's consideration, then they are serious enough to require counsel to thoroughly research and present them. In future cases, briefs which fail to apprise the Court of applicable legal standards and which fail to supply citations to basic authority will be returned to counsel and further briefing will be required.

Equal protection of the laws is guaranteed under both the United States and the Montana constitutions. U.S. Const., amend IV, § 1; Mont. Const., art. II, § 4. In a general sense the equal protection clauses of the two constitutions protect persons against arbitrary and discriminatory state action. *McKamey v. State*, 268 Mont. 137, 145, 885 P.2d 515, 521 (1994). Equal protection does not preclude the classification and different treatment of persons but does require, at minimum, that a classification have a rational basis. *State v. Sanders*, 208 Mont. 283, 289, 676 P.2d 1312, 1315 (1984).

The right to workers' compensation benefits is not a fundamental right, thus the minimal "rational relationship test" of equal protection applies in analyzing the legislative classification at issue in this case. *Cottrill v. Cottrill Sodding Service*, 229 Mont. 40, 43, 744 P.2d 895, 897 (1987); *accord Eastman v. Atlantic Richfield Co.*, 237 Mont. 332, 338, 777 P.2d 862, 865 (1989); *Stratemeyer v. Lincoln County*, 259 Mont. 147, 151, 855 P.2d 506, 509 (1993). That test requires the Court to determine whether the classification at issue is rationally related to a legitimate or proper government purpose. *Cottrill*, 229 Mont. at 43, 744 P.2d at 897; *Eastman*, 237 Mont. at 338, 777 P.2d at 865.

However, equal protection, as the words suggest, applies to legislation which results in different treatment of similarly situated persons. *State ex rel. Zander v. District Court*, 180 Mont. 548, 556-57, 591 P.2d 656, 661 (1979). Subject matter distinctions, as distinguished from class distinctions, are not subject to equal protection scrutiny. *Id.* In *Zander* the Montana Supreme Court, put it this way:

Determination or classification of the subjects of legislation does not deny equal protection. If all persons in the same class are treated alike, there is no violation of equal protection. Here there is but one class and all persons within that class are treated equally satisfying constitutional equal protection requirements.

Id. (citations omitted). *Zander* involved an equal protection challenge to a statute criminalizing marijuana cultivation. The defendant argued that tobacco is as harmful as marijuana and that the legislature's failure to criminalize tobacco cultivation therefore amounted to discrimination in violation of the Equal Protection Clause. But the criminal statute applied equally to all people, hence there was but one class of persons, all of whom were treated equally, and there was no violation of the Equal Protection Clause.

The statutes involved in this case are similar to the statute in *Zander* in that they are based on distinctions in subject matter and do not distinguish between or among classes of persons. All persons covered by the WCA are subject to the exclusion regarding maintenance and palliative care. Persons not covered by the WCA are not entitled to any benefits whatsoever, thus are equally denied maintenance and palliative care benefits. Thus, there is but one class of persons, all of whom are treated equally. The statutes do not violate the equal protection clauses.

Although evading review under equal protection, the statutes at issue herein are subject to the rational relationship test under the due process clauses of the United States and Montana constitutions. U.S. Const., amend. XIV, § 1; Mont. Const., art. II, § 17. In one writer's words,

[T]he standards for validity under the due process and equal protection clauses are identical.

The difference in the method of analysis under the due process and equal protection guarantees relates only to whether or not the governmental act classifies persons. . . . When the governmental action relates only to matters of economics or general social welfare, the law need only rationally relate to a legitimate governmental purpose. If the law does not classify individuals, it will be subjected to the due process guarantee. However, if the means the law employs to achieve its end is the classification of persons for differing benefits or burdens, it will be tested under the equal protection guarantee.

R. Rotunda & J. Nowak, *Treatise on Constitutional Law: Equal Protection*, § 18.1 at 5-6 (2d ed. 1992).

Due process, in its substantive form, "bars arbitrary governmental actions regardless of the procedures used to implement them, and serves as a check on oppressive governmental action." *Newville v. Department of Family Services*, 267 Mont. 237, 249,

883 P.2d 793, 800 (1994). "[I]n order to satisfy guarantees of substantive due process, a statute enacted by the legislature must be reasonably related to a permissible legislative objective." *Id.* at 250, 883 P.2d at 801 (citing *Raisler v. Burlington Northern Ry. Co.*, 219 Mont. 254, 263, 717 P.2d 535, 541 (1985)).

In determining the purpose or object of a statute, the Court is not limited to those articulated by the legislature, either in the statute itself or in legislative history, but may consider any rational purpose which may have motivated the legislature to enact the legislation. *Stratemeyer*, 259 Mont. at 152, 855 P.2d at 509. In this case, we need not look beyond the legislative history of the statutes in question to find a legitimate, rational purpose for the limitation on medical benefits.

The provisions at issue herein were part of Senate Bill 347, enacted into law by the 1993 Legislature. The minutes of both the Senate Committee on Labor and Employment Relations and the House Select Committee on Workers' Compensation, which held hearings on February 16, 1993 and March 10, 1993, respectively, reflect that one of the purposes of S.B. 347 was to control medical costs.

The bill was sponsored by Senator Harp. In his opening statement before the Senate committee, the Senator stated that "SB 347 is built upon the principle of cost containment" (Senate Minutes of 2/16/93 at 3.) Rick Hill, representing the Governor's office, "stated that workers' compensation premiums are increasing at a rate the Montana economy cannot afford." *Id.* Pat Sweeney, then president of the State Compensation Insurance Fund, testified:

[T]he State Fund spent almost \$37 million on medical expenses in fiscal year 1992. He stated medical expenses account for over half of the 20% rate increase the State Fund experienced at the beginning of fiscal year 1993. Mr. Sweeney stated medical cost containment is essential to managing workers' comp.

Id. Similar testimony was given in the House committee hearings. (House Minutes, 3/10/93, at 2.)

In *Stratemeyer* the Supreme Court held that cost control over workers' compensation benefits is a legitimate governmental purpose. *Id.* at 153, 855 P.2d at 510. It specifically pointed out that in matters of economic regulation, social and health issues, which by implication includes workers' compensation, the legislature is in a much better position to make economic judgments than a court. *Id.*

The constitutions of the United States and the State of Montana do not mandate any specific level of benefits for injured workers. In car terminology, they do not mandate a Cadillac, or even a Chevy. In *McClanathan v. Smith*, 186 Mont. 56, 67-68, 606 P.2d 507, 513 (1980), the Montana Supreme Court said with regard to equal protection:⁽³⁾

Perfection in making classifications is neither possible nor necessary. Neither is mathematical nicety or perfect equality. Rather, where the goals of a classification are legitimate, and the classification is rationally related to the achievement of those goals, the statute should be constitutionally upheld.

The legislative purpose in this case -- cost control -- is a legitimate one. The provisions which claimant attacks are reasonably calculated to cut medical costs. They eliminate liability for certain medical services while preserving essential medical services which assure that the claimant will be treated until she reaches maximum medical improvement. The provisions do not violate claimant's right to due process.

3. Cruel and Unusual Punishment

The claimant alleges in her Notice of Appeal that the statutes at issue violate the prohibition against cruel and unusual punishment. That prohibition is found in the Eighth Amendment to the United States Constitution and Article II, Section 22 of the Montana Constitution. ⁽⁴⁾

In her brief the claimant devotes a one sentence paragraph to her cruel and unusual punishment allegation, as follows:

If criminal law concepts were operative here, one could say without hesitation that the rules/statutes relied on by Respondents and the options they provide for Ruth clearly constitute an infliction of cruel and unusual punishment for her temerity in getting injured on the job.

(Appellant's Opening Brief at 5, emphasis added.) The "if" in the sentence is dispositive of her argument. 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, 1063 (1958). The prohibition deals exclusively with criminal process and punishments and is not applicable in other contexts. *Ingraham v. Wright*, 430 U.S. 651, 664 (1977); *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187, 217 (Colo. 1984). It has no application in the present case.

JUDGMENT

For the reasons set forth in the foregoing discussion, IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. Sections 39-71-704(1)(f) and -116(13) and (16), MCA (1993), do not violate the claimant's rights to equal protection of the laws and due process of law, nor do they violate the constitutional prohibition against cruel and unusual punishment.
2. The Notice of Appeal in this matter is **dismissed with prejudice**.
3. This Judgment is certified as final for purposes of appeal.

DATED in Helena, Montana, this 23rd day of October, 1996.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Don Edgar Burris
Ms. Susan C. Witte
Submitted: September 10, 1996

1. While the hearing officer captioned his decision as Findings of Fact; Conclusions of Law; and Final Order, the decision did not address any factual matters and merely concluded that claimant was correct in her assertion that the Department lacked jurisdiction over her constitutional challenges.

2. Actually, Burris' letter filed on April 11, 1996.

3. As discussed previously, due process analysis is similar to equal protection analysis. Thus, statements made with regard to equal protection analysis may be applied in the due process context.

4. The Eighth Amendment, provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Montana provision is identical except it substitutes the word "or" for the word "nor". Mont. Const. art. II, § 22.