

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2022 MTWCC 12

WCC No. 2022-5957

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TANYA ANDREWS

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

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ORDER DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT  
AND  
ORDER DENYING RESPONDENT'S CROSS-MOTION FOR SUMMARY JUDGMENT

**Summary:** Petitioner moved for summary judgment, asserting that Respondent did not correctly calculate her average weekly wage for purposes of TPD benefits under § 39-71-712(2), MCA. Respondent cross-moved for summary judgment, asserting that it correctly calculated Petitioner's average weekly wage for purposes of TPD benefits.

**Held:** The Court denied both motions because neither party correctly calculated Petitioner's average weekly wage for purposes of TPD benefits.

¶ 1 Petitioner Tanya Andrews moved for summary judgment, asserting that Respondent Montana State Fund (State Fund) did not correctly calculate her average weekly wage for purposes of temporary partial disability (TPD) benefits under § 39-71-712(2), MCA. State Fund cross-moved for summary judgment, asserting that it correctly calculated Andrews' average weekly wage for purposes of TPD benefits.

¶ 2 The parties have agreed to the material facts and that this case is appropriate for summary judgment. However, because neither party correctly calculated Andrews' average weekly wage for purposes of TPD benefits under § 39-71-712(2), MCA, this Court denies Andrews' Motion for Summary Judgment and denies State Fund's Cross-Motion for Summary Judgment.

## FACTS

¶ 3 On July 23, 2019, Andrews suffered an industrial injury while working as a janitor.

¶ 4 The parties agree that good cause exists under § 39-71-123(3)(b), MCA, to use more than four pay periods before Andrews' injury to calculate her wages.<sup>1</sup> They agree that the correct period of time is the 21 weeks before her injury.

¶ 5 During this 21 weeks, Andrews' weekly hours varied. She worked 40 or more hours in 16 of the 21 weeks and less than 40 hours in 5 of the 21 weeks. Andrews worked a total of 885.5 hours in the 21 weeks.

¶ 6 During the 21 weeks, Andrews had different hourly rates. When she cleaned a state office building, she was paid the prevailing wage of \$18.54 per hour. When she cleaned private office buildings, she was paid the "regular wage" of \$12.50 per hour. In 15 of the 21 weeks, Andrews worked hours at the prevailing wage and at the regular wage. In the other 6 weeks, Andrews worked hours only at the prevailing wage. Andrews made \$15,770.89 during the 21 weeks, for an average weekly wage of \$750.99.

¶ 7 State Fund calculated Andrews' average weekly wage for purposes of TPD benefits under § 39-71-712(2), MCA, which states that the claimant's average weekly wage is "subject to a maximum of 40 hours a week," to be \$712.76.

¶ 8 From July 25, 2019, to January 8, 2020, and from January 18, 2022, to April 18, 2022, Andrews worked in a modified job and suffered a partial wage loss. State Fund paid her TPD benefits based on its calculation that her average weekly wage for purposes of TPD benefits is \$712.76.

¶ 9 Andrews maintains that her average weekly wage for purposes of TPD benefits under § 39-71-712(2), MCA, is \$741.60, and that State Fund owes her additional TPD benefits.

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<sup>1</sup> Section 39-71-123(3), MCA, states, in relevant part:

(a) Except as provided in subsection (3)(b), for compensation benefit purposes, the average actual earnings for the four pay periods immediately preceding the injury are the employee's wages, except that if the term of employment for the same employer is less than four pay periods, the employee's wages are the hourly rate times the number of hours in a week for which the employee was hired to work.

(b) For good cause shown, if the use of the last four pay periods does not accurately reflect the claimant's employment history with the employer, the wage may be calculated by dividing the total earnings for an additional period of time, not to exceed 1 year prior to the date of injury, by the number of weeks in that period, including periods of idleness or seasonal fluctuations.

## LAW AND ANALYSIS

¶ 10 This case is governed by the 2017 version of the Montana Workers' Compensation Act because that was the law in effect at the time of Andrews' industrial injury.<sup>2</sup>

¶ 11 TPD benefits are available to injured workers who return to modified or alternative employment before they reach maximum medical improvement but suffer a partial wage loss.<sup>3</sup>

¶ 12 State Fund and Andrews dispute the method that is to be used to calculate an injured worker's average weekly wage for TPD benefits under § 39-71-712(2), MCA, which states as follows:

An insurer's liability for temporary partial disability must be the difference between **the injured worker's average weekly wage received at the time of the injury, subject to a maximum of 40 hours a week**, and the actual weekly wages earned during the period that the claimant is temporarily partially disabled, not to exceed the injured worker's temporary total disability benefit rate.<sup>4</sup>

¶ 13 State Fund argues that the phrase "subject to a maximum of 40 hours a week" in § 39-71-712(2), MCA, requires a "weekly analysis" and means that the correct way to calculate an injured worker's average weekly wage for purposes of TPD benefits is to apply a "weekly cap" of 40 hours. Thus, for the weeks in which Andrews worked 40 hours or less, State Fund used the actual amount of wages that she earned that week. However, for the weeks in which Andrews worked more than 40 hours, State Fund started with the hours for which Andrews earned the prevailing wage and multiplied her \$18.54 wage by the number of hours she worked at that rate.<sup>5</sup> State Fund then added the wages Andrews earned at \$18.54 per hour to the wages she earned at \$12.50 per hour until it

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<sup>2</sup> *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

<sup>3</sup> See § 39-71-116(37), MCA, which states:

"Temporary partial disability" means a physical condition resulting from an injury, as defined in 39-71-119, in which a worker, prior to maximum healing:

- (a) is temporarily unable to return to the position held at the time of injury because of a medically determined physical restriction;
- (b) returns to work in a modified or alternative employment; and
- (c) suffers a partial wage loss.

<sup>4</sup> Emphasis added.

<sup>5</sup> Pursuant to § 39-71-123(1)(a), MCA, which states that, when calculating an injured worker's wages, overtime wages are to be reduced to the worker's "regular hourly rate," State Fund used Andrews' \$18.54 hourly rate for the hours in which she worked overtime on the prevailing wage job. See also *Wombold v. Mont. State Fund*, 2009 MTWCC 40, ¶ 22 (ruling that § 39-71-123(1)(a), MCA, mandates "that a worker's overtime rate-of-pay be reduced to the workers' regular-time rate-of-pay for purposes of calculating the worker's average weekly wage.").

reached 40 hours, which gave it the amount of wages for that week; i.e., State Fund excluded the wages that Andrews earned for the hours she worked beyond 40 hours in a week.<sup>6</sup> State Fund then added the amount of wages it had calculated for Andrews for each week and divided by 21 weeks to calculate her average weekly wage for purposes of TPD benefits to be \$712.76.

¶ 14 Andrews argues that State Fund does not correctly interpret § 39-71-712(2), MCA. She argues, *inter alia*, the phrase “subject to a maximum of 40 hours a week” does not mandate a “weekly cap” of 40 hours. Instead, she argues that this phrase modifies the phrase “the injured worker’s average weekly wage received at the time of the injury” and, therefore, means that the injured worker’s average weekly wage is calculated and then compared to her hourly rate multiplied by 40 hours. Andrews also argues that State Fund’s method is flawed because the weeks in which she worked less than 40 hours bring down her average weekly wage for purposes of TPD benefits while weeks in which she worked more than 40 hours do not raise her average weekly wage. Thus, Andrews explains that State Fund’s method does not accurately calculate her average weekly wage.

¶ 15 Andrews argues that the correct way to calculate a claimant’s average weekly wage for purposes of TPD benefits is to follow a two-step process. She contends that the first step is to calculate the injured worker’s average weekly wage. Because § 39-71-712(2), MCA, states that the injured worker’s average weekly wage is “subject to a maximum of 40 hours a week,” Andrews contends that the second step is to multiply the injured worker’s hourly rate by 40 hours. Andrews argues that the claimant’s average weekly wage for purposes of TPD benefits is the lesser of these calculations. Andrews applies these steps and argues that her average weekly wage for purposes of TPD benefits is \$28.84 higher than the amount that State Fund has calculated applying a “weekly cap.” Under the first step, Andrews calculates her average weekly wage for the 21 weeks to be \$750.99. Under the second step, Andrews multiplies her prevailing wage hourly rate of \$18.54 by the maximum 40 hours, which equals \$741.60. Andrews explains that, under her method, her average weekly wage for purposes of TPD benefits under § 39-71-712(2), MCA, is \$741.60.

¶ 16 The following table, copied from State Fund’s opening brief, shows the differences in the parties’ methods of calculating Andrews’ average weekly wage for purposes TPD benefits:

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<sup>6</sup> For example, applying a “weekly cap” of 40 hours, State Fund asserts that it correctly excluded the wages that Andrews earned for 10.5 hours of the 50.5 hours that Andrews worked during the week of March 4, 2019. State Fund explains that Andrews worked 32 hours at the prevailing wage of \$18.54, which totals \$593.28 in “wages” as defined in § 39-71-123(1)(a), MCA, and that she worked 18.5 hours at the regular rate of \$12.50, which totals \$231.25 in wages. For its calculation of Andrews’ wages for that week, State Fund added the \$593.28 in wages for the 32 hours that she worked at the prevailing wage to \$100, for only 8 out of the 18.5 hours that she worked at her regular rate of \$12.50. Thus, State Fund asserts that the number of wages to be used for that week to calculate Andrews’ average weekly wage for purposes of TPD benefits is \$693.28.

Pay Period Dates	Reg Hours	Reg Rate	Reg Total	PW Reg Hours	PW OT Hours	PW Rate	PW RegTotal	PW OT Total	Total Hours Worked	Total for AWW	Total for TPD AWW applying 40 hour per week cap	Petitioner's TPD AWW disregarding the 40 hour 'a week' cap			
2/25/2019	3/3/2019	3	\$12.50	\$37.50	37	3	\$18.54	\$685.98	\$55.62	43	\$779.10	\$741.60	\$741.60		
3/4/2019	3/10/2019	18.5	\$12.50	\$231.25	21.5	10.5	\$18.54	\$398.61	\$194.67	50.5	\$824.53	\$693.28	\$593.28 + \$100	\$741.60	
3/11/2019	3/17/2019	19	\$12.50	\$237.50	21	11.25	\$18.54	\$389.34	\$208.58	51.25	\$835.42	\$694.80	\$597.92 + \$96.88	\$741.60	
3/18/2019	3/24/2019	9	\$12.50	\$112.50	31	8	\$18.54	\$574.74	\$148.32	48	\$835.56	\$735.56	\$723.06 + \$12.50	\$741.60	
3/25/2019	3/31/2019		\$12.50	\$0.00	40		\$18.54	\$741.60	\$0.00	40	\$741.60	\$741.60		\$741.60	
4/1/2019	4/7/2019	5.5	\$12.50	\$68.75	26.5		\$18.54	\$491.31	\$0.00	32	\$560.06	\$560.06		\$741.60	less than 40
4/8/2019	4/14/2019		\$12.50	\$0.00	37		\$18.54	\$685.98	\$0.00	37	\$685.98	\$685.98		\$741.60	less than 40
4/15/2019	4/21/2019		\$12.50	\$0.00	40		\$18.54	\$741.60	\$0.00	40	\$741.60	\$741.60		\$741.60	
4/22/2019	4/28/2019		\$12.50	\$0.00	40		\$18.54	\$741.60	\$0.00	40	\$741.60	\$741.60		\$741.60	
4/29/2019	5/5/2019	8.75	\$12.50	\$109.38	31.25	9.75	\$18.54	\$579.38	\$180.77	49.75	\$869.52	\$741.60		\$741.60	
5/6/2019	5/12/2019		\$12.50	\$0.00	40		\$18.54	\$741.60	\$0.00	40	\$741.60	\$741.60		\$741.60	
5/13/2019	5/19/2019	1	\$12.50	\$12.50	39	1	\$18.54	\$723.06	\$18.54	41	\$754.10	\$741.60		\$741.60	
5/20/2019	5/26/2019	3.75	\$12.50	\$46.88	36.25	3.25	\$18.54	\$672.08	\$60.26	43.25	\$779.21	\$738.58	\$732.33 + \$6.25	\$741.60	
5/27/2019	6/2/2019	6	\$12.50	\$75.00	31.5		\$18.54	\$584.01	\$0.00	37.5	\$659.01	\$659.01		\$741.60	less than 40
6/3/2019	6/9/2019	4	\$12.50	\$50.00	36	3	\$18.54	\$667.44	\$55.62	43	\$773.06	\$735.56	\$723.06 + \$12.50	\$741.60	
6/10/2019	6/16/2019	3	\$12.50	\$37.50	37	3	\$18.54	\$685.98	\$55.62	43	\$779.10	\$741.60		\$741.60	
6/17/2019	6/23/2019	9.5	\$12.50	\$118.75	31.5		\$18.54	\$584.01	\$0.00	41	\$702.76	\$690.26	\$584.01 + \$106.25	\$741.60	
6/24/2019	6/30/2019	7	\$12.50	\$87.50	33	7	\$18.54	\$611.82	\$129.78	47	\$829.10	\$741.60		\$741.60	
7/1/2019	7/7/2019	4.5	\$12.50	\$56.25	31.25		\$18.54	\$579.38	\$0.00	35.75	\$635.63	\$635.63		\$741.60	less than 40
7/8/2019	7/14/2019	4.5	\$12.50	\$56.25	35.5	3	\$18.54	\$658.17	\$55.62	43	\$770.04	\$732.54	\$713.79 + \$18.75	\$741.60	
7/15/2019	7/21/2019		\$12.50	\$0.00	39.5		\$18.54	\$732.33	\$0.00	39.5	\$732.33	\$732.33		\$741.60	less than 40
<b>Totals</b>										\$15,770.89	\$14,967.99	\$15,573.60			
2/25/19 - 7/21/19 = 21 weeks															
AWW: \$15,770.89 / 21 weeks = \$750.99															
Respondent TPD AWW: \$14,967.99 / 21 weeks = \$712.76															
Petitioner TPD AWW: \$15,73.60 / 21 weeks = \$741.60															

¶ 17 The Montana Supreme Court has set forth the following rules of statutory construction:

We interpret a statute first by looking to its plain language. We construe a statute by reading and interpreting the statute as a whole, “without isolating specific terms from the context in which they are used by the Legislature.” We will not interpret the statute further if the language is clear and unambiguous. We look to legislative intent if the language is not clear and unambiguous, and give effect to the legislative will. Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it. We must harmonize statutes relating to the same subject, as much as possible, giving effect to each.<sup>7</sup>

Under these rules of statutory construction, neither party correctly calculated Andrews’ average weekly wage for purposes of TPD benefits under § 39-71-712(2), MCA.

¶ 18 State Fund’s argument that § 39-71-712(2), MCA, mandates a “weekly cap” of 40 hours is unsupported by its plain language. Andrews is correct that the phrase “subject to a maximum of 40 hours a week” modifies the phrase “the injured worker’s average weekly wage received at the time of the injury.” Thus, under the plain language of § 39-71-712(2), MCA, it is the average weekly wage that is subject to a maximum of 40 hours per week, i.e., the injured worker’s average weekly wage is calculated and then the 40-

<sup>7</sup> *Mont. Sports Shooting Ass’n, Inc. v. State*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003 (internal citations omitted).

hour per week maximum is applied if the worker, on average, worked more than 40 hours per week. Thus, Andrews is correct that State Fund's method did not result in an accurate calculation of her average weekly wage under the statute because the weeks in which she worked less than 40 hours brought down her average weekly wage for purposes of TPD benefits while the weeks in which she worked more than 40 hours did not raise it.

¶ 19 Furthermore, Andrews is correct that State Fund's method of applying a "weekly cap" would lead to absurd results, as injured workers who worked the same number of hours at the same wage in the period used to calculate their average weekly wage would have different average weekly wages under § 39-71-712(2), MCA, depending solely on their work schedules. For example, a worker who worked 40 hours each week at \$10.00 per hour for the 8 weeks before his injury would have an "average weekly wage received at the time of the injury, subject to a maximum of 40 hours a week," of \$400 for the 320 hours he worked. But a worker who alternated working 35 hours one week and 45 hours the next week for the 8 weeks before her injury, would have an "average weekly wage received at the time of the injury, subject to a maximum of 40 hours a week," of only \$375 for the 320 hours she worked because State Fund would apply the "weekly cap" in the weeks that she worked 45 hours. This Court is convinced that the Legislature did not intend for injured workers to receive a different amount of TPD benefits based solely on their work schedules, a result that would be arbitrary and contrary to the intent of TPD benefits, which is to provide injured workers who return to modified or alternative work with approximately "the same money received when they were working between the new wages and [TPD benefits]."<sup>8</sup>

¶ 20 However, Andrews' method does not result in an accurate calculation of her "average weekly wage received at the time of the injury, subject to a maximum of 40 hours a week." Her method is flawed, and unsupportable under § 39-71-712(2), MCA, because her second step does not account for the fact that she did not always make \$18.54 per hour for 40 hours a week. In fact, Andrews worked 40 hours a week at \$18.54 an hour in only 9 out of the 21 weeks. By not accounting for the weeks in which she worked less than 40 hours, and by not accounting for the hours in which she worked for \$12.50 per hour, Andrews' calculation of her "average weekly wage received at the time of the injury, subject to a maximum of 40 hours a week," is not accurate because it is not based on the actual hours that she worked nor on the actual amounts that she was paid.

¶ 21 Because Andrews had different rates of pay during the 21 weeks and because her weekly hours varied, the correct method to calculate her "average weekly wage received at the time of the injury, subject to a maximum of 40 hours a week," as required by § 39-

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<sup>8</sup> *House Select Workers' Compensation Committee*, 53<sup>rd</sup> Legislature – Regular Session p. 5 of 13 (Mar. 12, 1993) (statement of Rep. Driscoll, Member, H. Select Comm.). See also *Senate Select Committee on Workers' Compensation*, 53<sup>rd</sup> Legislature – Regular Session p. 14 of 27 (Apr. 6, 1993) (statement of Nancy Butler, General Counsel of Montana State Fund) (explaining that TPD benefits would be the difference between what the injured worker was making at the time of her injury and the amount she was making in her modified or alternative job, with the maximum TPD benefit being the state's average weekly wage.).

71-712(2), MCA, is to calculate her average hours per week and her average hourly wage. Andrews worked 885.5 hours during the 21 weeks before her injury and earned a total of \$15,770.89. Thus, Andrews worked an average of 42.17 hours per week and had an average hourly wage of \$17.81. Because the average number of hours she worked is more than 40 hours per week, and § 39-71-712(2), MCA, states that the average weekly wage is “subject to a maximum of 40 hours a week,” the 40 hours per week maximum is multiplied by her average hourly wage of \$17.81, which results in an “average weekly wage received at the time of the injury, subject to a maximum of 40 hours a week,” of \$712.40.

¶ 22 Because neither party correctly calculated Andrews’ average weekly wage for purposes of TPD benefits, this Court enters the following:

ORDER

¶ 23 IT IS ORDERED that Andrews’ Motion for Summary Judgment is **denied**.

¶ 24 IT IS FURTHER ORDERED that State Fund’s Cross-Motion for Summary Judgment is **denied**.

¶ 25 IT IS FURTHER ORDERED that the parties shall schedule a conference with this Court to discuss if any additional issue needs to be resolved before this Court enters final judgment.

DATED this 9<sup>th</sup> day of November, 2022.

(SEAL)

/s/ DAVID M. SANDLER  
JUDGE

c: Lucas A. Wallace  
Melissa Quale

Submitted: July 12, 2022