IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2022 MTWCC 2

WCC No. 2021-5416

ROBERTA FITE

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Summary: In 2019 and 2020, Petitioner was employed by a transportation company as a school bus driver and as a groundskeeper. In the 2019-2020 school year, she was contractually employed by a school district as a paraprofessional and aide. She suffered an industrial injury in the summer of 2020, at which time she was working only for the transportation company. Petitioner contends that she had concurrent employment with the school district at the time of her injury under the definition in § 39-71-123(4)(a), MCA, because she had already signed the contract under which she was to work for the school district during the 2020-2021 school year, thereby making her future employment guaranteed. Thus, she argues that Respondent must include her earnings from the school district when calculating her wages and, in turn, her TTD rate.

Held: Petitioner did not have concurrent employment under the definition in § 39-71-123(4)(a), MCA, because her employment with the school district was not "employment in which [she] was actually employed at the time of the injury." Under the express language of her employment contracts, Petitioner was between her terms of employments with the school district. Thus, Respondent correctly calculated Petitioner's wages and, in turn, her TTD rate, solely on her earnings from the transportation company.

¶ 1 Petitioner Roberta Fite and Respondent Montana State Fund (State Fund) have filed cross-motions for summary judgment on the issue of whether State Fund correctly

calculated her wages under § 39-71-123, MCA. Fite argues that she had concurrent employment at the time of her injury under the definition in § 39-71-123(4)(a), MCA, and that State Fund must therefore include her earnings from her concurrent employment when calculating her wages and, in turn, increase her rate for temporary total disability (TTD) benefits under § 39-71-701(3), MCA. State Fund argues that it correctly calculated Fite's wages and, in turn, her TTD rate because she did not have concurrent employment at the time of her injury.

¶ 2 The parties agreed to submit this case on their summary judgment motions with an agreed statement of facts.[1]

¶ 3 For the following reasons, this Court grants State Fund's Motion for Summary Judgment and denies Fite's Motion for Summary Judgment.

FACTS

¶ 4 In 2019 and 2020, Fite was employed by Handley Transportation, Inc. (Handley Transportation) as a school bus driver during the school year and as a groundskeeper during the summer break.

¶ 5 During the 2019-2020 school year, Fite also worked as a contract employee for the Clinton Elementary School District (School District) as a paraprofessional and as an aide. Section 1 of the 2019 – 2020 Employment Contract states:

> The Board, by and on behalf of the District, does hereby employ the Employee, and the Employee does hereby accept employment as the **Para Professional/Aide** for the District for a term of one (1) year, commencing on October 21, 2019 and ending on or before June 5, 2020. The employee shall work up to 141 days during this time period, as scheduled by the District. The parties agree that there is no contractual obligation or expectancy of continued employment beyond the contract term.[2]

¶ 6 Fite's employment for the School District for the 2019-2020 school year ended on May 31, 2020.

¶ 7 Toward the end of the 2019-2020 school year, the School District offered Fite a contract to be a paraprofessional and an aide during the 2020-2021 school year. On May 13, 2020, Fite signed the 2020-2021 Employment Contract. On May 26, 2020, the Board Chair for the School District signed the 2020-2021 Employment Contract. Section 1 of the 2020-2021 Employment Contract states:

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[1] Because Fite agreed to submit this case on an agreed statement of facts, this Court does not consider the additional facts that she set forth in her opening brief.

[2] Emphasis in original.

> The Board, by and on behalf of the District, does hereby employ the Employee, and the Employee does hereby accept employment as the **Para Professional/Aide** for the District for a term of one (1) year, commencing on August 24, 2020 and ending on or before June 4, 2021. The employee shall work up to 178 days during this time period, as scheduled by the District. The parties agree that there is no contractual obligation or expectancy of continued employment beyond the contract term.[3]

¶ 8 On June 19, 2020, Fite was injured in the course of her employment with Handley Transportation.

¶ 9 State Fund accepted liability for Fite's claim.

¶ 10 State Fund eventually agreed that the four pay periods before Fite's injury did not accurately reflect her employment history with Handley Transportation. Therefore, under § 39-71-123(3)(b), MCA, State Fund included her earnings from bus driving during the 2019-2020 school year when calculating her wages. State Fund calculated her average weekly wage to be $432.04 and her TTD rate to be $288.03.

¶ 11 However, State Fund rejected Fite's demand to include her wages from her employment with the School District during the 2019-2020 school year in its calculation of her wages on the grounds that she did not have concurrent employment with the School District at the time of her injury under the definition in § 39-71-123(4)(a), MCA.

¶ 12 If Fite's earnings from the School District are included in the calculation of her wages, and if her wages from the School District are calculated under the method set forth in § 39-71-123(3)(b), MCA, Fite's average weekly wage would increase to $521.73, and her TTD rate would increase to $347.82.

LAW AND ANALYSIS

¶ 13 This case is governed by the 2019 version of the Montana Workers' Compensation Act because that was the law in effect at the time of Fite's industrial injury.[4]

¶ 14 State Fund argues that Fite's job with the School District was not "concurrent employment" under the definition in § 39-71-123(4)(a), MCA, because she was not "actually employed" by the School District at the time of her injury. State Fund argues that, under the express language of her employment contracts with the School District, Fite was between her terms of employment. Thus, it argues that Fite's earnings from her employment with School District are not to be included in the calculation of her wages and that it correctly calculated her TTD rate under § 39-71-701(3), MCA, which states, in

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[3] Emphasis in original.

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

relevant part: "Weekly compensation benefits for injury producing temporary total disability are 66 2/3% of the wages received at the time of the injury. The maximum weekly compensation benefits may not exceed the state's average weekly wage at the time of injury."

¶ 15 Fite contends that under *Dunnington v. State Compensation Ins. Fund*,[5] a claimant with seasonal employment is "actually employed" during her off season if her seasonal employer has guaranteed future employment. Thus, she argues that she had concurrent employment with the School District at the time of her injury under § 39-71-123(4)(a), MCA, because she and the School District had entered into a binding contract for her to work during the 2020-2021 school year. She therefore asserts that State Fund must include her earnings from the School District from the 2019-2020 school year when calculating her wages and, in turn, increase her TTD rate.

¶ 16 Section 39-71-123, MCA, governs the calculation of a claimant's wages. Subsections (1) and (2), MCA, set forth the definition of "wages." Subsection (3) sets forth the methods for calculating the wages for a claimant with one employer at the time of her injury. Subsection (4) sets forth the law governing claimants with more than one employment at the time of her injury. It provides that if the other employment is "concurrent employment," as defined, the earnings from that employment are to be included in the calculation of the claimant's wages; it states, in relevant part:

> (4)(a) For the purpose of calculating compensation benefits for an employee working concurrent employments, the average actual wages must be calculated as provided in subsection (3). ***As used in this subsection, "concurrent employment" means employment in which the employee was actually employed at the time of the injury and would have continued to be employed without a break in the term of employment if not for the injury***.
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> . . . .
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> (c) The compensation benefits for an employee working at two or more concurrent remunerated employments must be based on the aggregate of average actual wages of all employments . . . from which the employee is disabled by the injury incurred.[6]

¶ 17 State Fund is correct that Fite did not have concurrent employment with the School District under the definition in § 39-71-123(4)(a), MCA, because the express language of the contracts proves that Fite was not "actually employed" by the School District on June 19, 2020, the date of her injury. The 2019-2020 Employment Contract states that the term of Fite's employment for that school year was to end "on or before June 5, 2020," and it is undisputed that Fite's employment with the School District for that school year

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[5] 2000 MT 349, 303 Mont. 252, 15 P.3d 475.

[6] Emphasis added.

ended on May 31, 2020. The 2020-2021 Employment Contract states that the term of Fite's employment for that school year was to begin on August 24, 2020. Therefore, on June 19, 2020, the date of her injury, Fite was not "actually employed" by the School District; instead, she was between the terms of her employments with the School District. Because Fite did not have concurrent employment with the School District under the definition in § 39-71-123(4)(a), MCA, State Fund correctly calculated her wages, and, in turn, her TTD rate, solely on her earnings from her employment with Handley Transportation.

¶ 18 The Supreme Court's decision in *Dunnington* does not support Fite's position. During road construction season, Dunnington worked for Century Construction.[7] At the end of the road construction season, Dunnington was laid-off.[8] During the off-season, Dunnington worked for Mor-Berg, a company that cleaned construction equipment.[9] Dunnington was injured while working for Mor-Berg in the winter.[10] Relying upon cases holding that employees with seasonal employment are deemed to be "actually employed" in the off-season, he argued that he had concurrent employment with Century Construction at the time of his injury.[11] The court first held that the cases on which Dunnington relied were inapplicable because they interpreted versions of § 39-71-123(4)(a), MCA, which did not include the definition of "concurrent employment," which was added in 1995.[12] Under the definition of "concurrent employment" in § 39-71-123(4)(a), MCA, the court stated, "a claimant is concurrently employed if, when he or she is injured at one job, the claimant has a second job which, in fact, exists at that time."[13] The court then held that Dunnington did not have concurrent employment; it reasoned as follows:

> Here, the WCC found that, at the time he was injured, Dunnington was employed only by Mor-Berg, he was not employed by Century and his future employment with Century was not guaranteed. The WCC's findings of fact — findings which Dunnington does not challenge — make it clear that Dunnington's employment with Century did not in fact exist at the time he was injured at Mor-Berg. As a result, Dunnington was not "actually employed" by Century at the time he was injured and, under the plain language of § 39-71-123(4)(a), MCA (1995), he was not "concurrently

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[7] *Dunnington*, ¶ 3.

[8] *Dunnington*, ¶ 3.

[9] *Dunnington*, ¶¶ 3, 4.

[10] *Dunnington*, ¶ 4.

[11] *Dunnington*, ¶¶ 4, 5, 9, 11.

[12] Dunnington, ¶ 12.

[13] *Dunnington*, ¶ 14.

> employed." We hold that the WCC correctly concluded that Dunnington was not concurrently employed at the time of his injury.[14]

Thus, the court affirmed this Court's ruling that "Dunnington's wages from the two employments could not be aggregated and the State Fund correctly calculated Dunnington's disability benefits using only his Mor-Berg wages."[15]

¶ 19 Fite points to the Supreme Court's statement that Dunnington's "future employment with Century was not guaranteed" and reasons that *Dunnington* stands for the proposition that if the future employment is guaranteed at the time of injury, it is to be deemed "employment in which the employee [is] actually employed" under § 39-71-123(4)(a), MCA. Because she had already signed a contract to work for the School District for the 2020-2021 school year, Fite asserts that her future employment with the School District was guaranteed.

¶ 20 However, Fite takes more from *Dunnington* than is there. A full reading of *Dunnington* reveals that the court did not base its decision on the fact that Dunnington's future employment with Century Construction was not guaranteed; instead, the court based its decision on the fact that Dunnington was not actually working for Century Construction at the time of his injury because he had been laid off when the construction season ended and, therefore, was not, " 'actually employed' by Century at the time he was injured."[16] Under *Dunnington*, Fite did not have concurrent employment with the School District at the time of her injury because her first contractual term of employment had ended and her second contractual term of employment had not yet started. Thus, she was not "actually employed" by the School District at the time of her injury; she was employed only by Handley Transportation.

¶ 21 Fite also argues that even if she did not have concurrent employment at the time of her injury, her earnings from the School District should be included in the calculation of her wages under the policy set forth in § 39-71-105(1), MCA, which states, in relevant part, that "the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease." However, the Montana Supreme Court has held that this policy cannot "be used to ignore the Legislature's express statutory language" in § 39-71-123, MCA.[17] As set forth above, the express language of

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[14] *Dunnington*, ¶ 15.

[15] *Dunnington*, ¶¶ 5, 15.

[16] *See Dunnington*, ¶ 15. *See also* this Court's decision in *Dunnington*, which is *Dunnington v. State Comp. Ins. Fund*, 1998 MTWCC 80, ¶ 47 (ruling that Dunnington was not concurrently employed because he "was not 'actually employed' by Century at the time of his injury. He had been laid off by Century since the construction season had ended.").

[17] *Sturchio v. Wausau Underwriters Ins. Co.*, 2007 MT 311, ¶ 17, 340 Mont. 141, 172 P.3d 1260. *See also King v. State Comp. Ins. Fund*, 282 Mont. 335, 938 P.2d 607 (1997) (rejecting claimant's argument that, under the policy in § 39-71-105(1), MCA, the three pay periods before her injury should be used to calculate her wages because she worked less hours than normal in the earliest of the four pay periods before her injury because the plain language

§ 39-71-123(4), MCA, allows only earnings from a "concurrent employment" to be added to the earnings from the claimant's time-of-injury job when calculating her wages.[18]

¶ 22 Accordingly, this Court enters the following:

ORDER AND JUDGMENT

¶ 23 State Fund's Motion for Summary Judgment is **granted.**

¶ 24 Fite's Motion for Summary Judgment is **denied**.

¶ 25 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED this 12th day of January, 2022.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Andrew J. Miller
Mark D. Meyer

Submitted: May 17, 2021

of § 39-71-123(3)(a), MCA, mandated that her wages be calculated on the basis of the four pay periods preceding her injury).

[18] *See Dunnington*, ¶¶ 5, 15. *See also David v. State Comp. Mut. Ins. Fund*, 267 Mont. 435, 441-42, 884 P.2d 778, 782 (1994) (holding that the claimant's earnings as a sole proprietor were correctly excluded from the calculation of his wages under § 39-71-123, MCA, because the claimant's work as a sole proprietor was not "concurrent employment.").