IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 18

WCC No. 2011-2729

JODY GUNDERMANN

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner suffered an injury as a seasonal farm worker. He contends that, since he did not work for four pay periods, his average weekly wage should be based on his hourly rate of pay times the number of hours in a week for which he was hired to work under § 39-71-123(3)(a), MCA. Respondent calculated Petitioner's average weekly wage based on Petitioner's four prior pay periods going back more than one year from the date of injury, given Petitioner's long history of seasonal employment with the same employer. The parties request the Court identify the proper method of calculating Petitioner's average weekly wage.

Held: As a seasonal farm worker with a long history working for the same employer and the reasonable relationship requirement of § 39-71-105(1), MCA, Petitioner's average weekly wage should be calculated pursuant to § 39-71-123(3)(b), MCA, by compiling his wages earned while working for his time-of-injury employer for a period of one year prior to the date of injury. For purposes of this calculation, Petitioner's wages would include the value of his room and board as well as the value of a truck that his employer gave him as compensation for his labor. Petitioner's wages should then be divided by the number of weeks in the year prior to his injury that Petitioner worked for his time-of-injury employer and periods of idleness during that year. Excluded from the calculation are periods during which Petitioner worked for another employer since those periods do not constitute "periods of idleness."

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-123. The language of § 39-71-123, MCA, recognizes the validity of using different calculation methods for different employment situations to arrive at a wage loss benefit that bears a reasonable relationship to actual wages lost. Where a seasonal employee worked for the same employer for 16 years, it is appropriate to use an average weekly wage calculation under § 39-71-123(3)(b), MCA, by taking the total earnings for the year prior to the injury divided by the number of weeks the wages were earned, including periods of idleness or seasonal fluctuations. Because Petitioner was not idle during those weeks he worked for a second employer, those weeks should not be used in the calculation.

Wages: Average Weekly Wage. The language of § 39-71-123, MCA, recognizes the validity of using different calculation methods for different employment situations to arrive at a wage loss benefit that bears a reasonable relationship to actual wages lost. Where a seasonal employee worked for the same employer for 16 years, it is appropriate to use an average weekly wage calculation under § 39-71-123(3)(b), MCA, by taking the total earnings for the year prior to the injury divided by the number of weeks the wages were earned, including periods of idleness or seasonal fluctuations. Because Petitioner was not idle during those weeks he worked for a second employer, those weeks should not be used in the calculation.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-105. The language of § 39-71-123, MCA, recognizes the validity of using different calculation methods for different employment situations to arrive at a wage loss benefit that, pursuant to § 39-71-105(1), MCA, bears a reasonable relationship to actual wages lost. Where a seasonal employee worked for the same employer for 16 years, it is appropriate to use an average weekly wage calculation under § 39-71-123(3)(b), MCA, by taking the total earnings for the year prior to the injury divided by the number of weeks the wages were earned, including periods of idleness or seasonal fluctuations. Because Petitioner was not idle during those weeks he worked for a second employer, those weeks should not be used in the calculation.

¶ 1 The trial in this matter was held on February 7, 2012, in the Civic Center, Commission Chambers, Great Falls, Montana. Petitioner Jody Gundermann was

present and represented by Keith D. Marr. Respondent Montana State Fund (State Fund) was represented by Daniel B. McGregor.

¶ 2 **Exhibits**: I admitted Exhibits 1 through 9 without objection.

¶ 3 **Witnesses and Depositions**: The parties agreed that the depositions of Jody Gundermann, Jennifer Moore Littrup (Moore), and Mark Linder can be considered part of the record. Gundermann and Moore were sworn and testified at trial.

Issues Presented: The Final Pretrial Order states the following contested issue of law:[1]

ISSUE ONE: The Court must determine the proper method of calculating Petitioner's average weekly wage.

FINDINGS OF FACT

¶ 4 On September 25, 2010, Gundermann suffered a fractured left heel injury in the course and scope of his employment with Mark Linder. At the time of the injury, Linder was insured by State Fund, which accepted liability for the claim and paid certain medical and indemnity benefits.[2]

¶ 5 During the fall harvest season, Gundermann began working for Linder on August 10, 2010. He made approximately $100 per day for his work, plus room and board. The parties agree that the room and board portion of Gundermann's claim has a value of $900 per month.[3]

¶ 6 Gundermann received one paycheck from Linder for the work he performed from August 10 through September 25, 2010. He had also worked the previous spring planting and fall harvest seasons for Linder. In order to document four pay periods to compute his average weekly wage, State Fund aggregated the four paychecks Gundermann received from Linder going back to May 29, 2009, which totaled $13,150.[4]

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[1] Final Pretrial Order at 3, Docket Item No. 25.

[2] Statement of Uncontested Facts, ¶¶ 1-3, Final Pretrial Order.

[3] *Id.*,¶ 4.

[4] *Id.*, ¶¶ 5, 6.

¶ 7 State Fund took the 524 days that comprised the period from April 20, 2009, to September 25, 2010, and divided the days into the total wages of $13,150 to arrive at an average daily wage of $25.10, or a weekly wage of $175.70.[5]

¶ 8 State Fund then determined the room and board portion of Gundermann's claim which, at $900 per month for an average of four months per year, came to $3,600 per year, divided by 52.14 weeks in a year, for an average weekly value of $69.04. This, added to the weekly wages of $175.70, gave a final average weekly wage calculated by State Fund of $244.74, with a temporary total disability rate of $163.16.[6]

¶ 9 State Fund's average weekly wage computation considered only wages earned with Linder. From approximately October through March or April of each year, Gundermann also earned wages as a truck driver and mechanic for Tom Thompson & Sons (Thompson) in Glasgow, Montana, earning $11 per hour. Absent the September 25, 2010, injury, Gundermann would have returned to work for Thompson after finishing work with Linder in the fall, and he expected to be employed there full-time until the spring of 2011.[7]

¶ 10 Because of his injury, Gundermann was precluded from returning to work for Thompson in the fall of 2010, and the winter and spring of 2011. His medical providers did not release him to return to work in any capacity until November 2, 2011, at which time he was released with restrictions.[8]

¶ 11 Gundermann testified at trial. I found Gundermann to be a credible witness. He testified that he worked for Linder every year since 1994 as a farm laborer during the spring planting and fall harvest seasons on Linder's farm.[9] Generally, he worked for Linder for two months each fall harvest season, during the months of August and September.[10] Gundermann also worked the spring planting season which ran generally from sometime in April until some time in May and occasionally into June, averaging about two months each spring.[11]

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[5] *Id.,* ¶ 7.

[6] *Id*., ¶¶ 8, 9.

[7] *Id*., ¶¶ 10, 11.

[8] *Id*., ¶ 12.

[9] Trial Test.; Gundermann Dep. 6:11 - 7:4.

[10] Gundermann Dep. 13:24 - 14:17.

[11] Gundermann Dep. 14:18 - 16:8; Linder Dep. 42:16-20; Trial Test.

¶ 12 In the fall, Gundermann's farm work included fueling, servicing, and running a combine, as well as other work when not combining.[12] The hours in his work day differed from between 6 to 13, but averaged around 11 or 12 hours per day at harvest time, unless he had a day off because of rain.[13] Gundermann testified that if he did not work, he was not paid.[14]

¶ 13 For the harvest season of 2010, Gundermann earned on average $100 per day or $550 per week working for Linder up until the date of injury, for a total of $3,800.[15]

¶ 14 Since 2008, Gundermann also usually worked for Thompson if he was not working for Linder. In 2010, Gundermann worked for Thompson from January until March, then returned to work for Linder for the spring planting season after taking a week off between the two jobs.[16] In May 2010, after spring planting, Gundermann took the months of June and July off, as he had done in previous years.[17] Gundermann never worked concurrently for Linder and Thompson.[18] Linder generally paid Gundermann at the end of the two months of work, unless Gundermann needed money before that time.[19]

¶ 15 Gundermann performed a combination of mechanic work and truck driving for Thompson when he stopped working for Linder in the fall, taking no time off.[20] He made $11 per hour working for Thompson for a 40-hour work week.[21] According to his 2009 W-2 tax statements, Gundermann's gross earnings that year were $11,141 from Thompson and $10,065.28 from Linder.[22]

¶ 16 Linder testified by deposition. He stated that he was present when Gundermann was injured on September 25, 2010.[23] They were working together putting tin onto the roof of a shed when he heard Gundermann fall off the roof onto the ground, a distance

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[12] Gundermann Dep. 7:16 - 8:2, 11:13-21; Trial Test.

[13] Gundermann Dep. 12:2-15; Linder Dep. 36:12-23; Trial Test.

[14] Gundermann Dep. 24:14-17.

[15] Trial Test.; Ex. 5 at 3.

[16] Trial Test.; Gundermann Dep. 25:2-25.

[17] Trial Test.; Gundermann Dep. 26:7 - 27:23; Linder Dep. 43:8-11.

[18] Trial Test.; Gundermann Dep. 28:3-6.

[19] Gundermann Dep. 28:22 - 29:22.

[20] Trial Test.; Gundermann Dep. 25:6-25, 29:23 - 31:25.

[21] Trial Test.

[22] Ex. 8 at 6.

[23] Linder Dep. 7:21-28.

of approximately eleven feet.[24] Linder transported Gundermann to Plentywood for medical treatment.[25]

¶ 17 Since 1994, when Gundermann started working for Linder, there was no formal application process and no written contract.[26] They simply called each other and Gundermann was put to work each year in the spring and fall.[27] Each time he worked for Linder in the spring and fall was like a separate job.[28] However, there was an unwritten agreement between Gundermann and Linder that Linder would always have work for Gundermann during spring planting and fall harvest.[29] Linder also had work for Gundermann in the summer of 2010, but Gundermann was taking his vacation.[30]

¶ 18 In 2010, Gundermann worked for Linder from approximately April 7 until the last week in May. Linder paid Gundermann for the spring work with a used pickup truck valued at approximately $3,000, which Gundermann believed was equal to the value of the work he performed for Linder.[31]

¶ 19 Linder agreed that Gundermann's statement of wages earned in the fall of 2010 for the period of August 10 through September 25 in the amount of $3,800 was accurate.[32]

¶ 20 Moore testified at trial. I found Moore to be a credible witness. She has been a claims examiner for the State Fund for about four-and-one-half years. During that period, she has handled a number of claims involving seasonal employees in the fields of farming and ranching, snow removal, landscaping, lawn maintenance, and construction.[33]

¶ 21 Moore understood that Linder paid Gundermann for only the days he worked, and although he averaged $100 per day, some days he earned $75 and other days he

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[24] Linder Dep. 8:1-16.

[25] Linder Dep. 9:7-12.

[26] Linder Dep. 23:3-7, 24:11-13, 27:1-3, 50:11-14.

[27] Trial Test.; Gundermann Dep. 33:16 - 34:3; Linder Dep. 27:4-9, 49:20 - 50:4.

[28] Linder Dep. 21:19-22, 27:10-15.

[29] Linder Dep. 23:25 - 24:3, 49:25 - 50:4.

[30] Linder Dep. 24:27 - 25:27.

[31] Trial Test.

[32] Ex. 5 at 3; Linder Dep. 18:21 - 19:9; Linder Dep. Ex. 2.

[33] Moore Dep. 7:6-17, 11:3 - 12:15.

earned $125. Moore understood that Gundermann had work lined up with Thompson when he completed work with Linder in the fall of 2010.[34]

¶ 22 Moore adjusted Gundermann's average weekly wage several times over the course of her handling of his claim, finally settling on an average weekly wage of $244.74.[35] Each time Moore recalculated the wage rate, she increased Gundermann's benefits then paid him the retroactive increase back to the start of his benefits.[36] Moore's repeated recalculations were an attempt to get Gundermann's wages as close as possible to accurately reflecting what Gundermann earned from Linder at the time of his injury.[37]

CONCLUSIONS OF LAW

¶ 23 This case is governed by the 2009 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Gundermann's industrial accident.[38]

¶ 24 I restate the following issue from the Final Pretrial Order, presented for this Court's determination:

ISSUE ONE: What is the proper method of calculating Petitioner's average weekly wage for compensation benefit purposes?

¶ 25 The injured worker bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[39]

¶ 26 Section 39-71-123, MCA, of the Workers' Compensation Act provides the methods for calculating an injured worker's wages:

> (3) (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

[34] Trial Test.; Moore Dep. 37:20 - 38:17.

[35] Trial Test.; Ex. 9 at 2; Moore Dep. 49:21 - 53:4; Moore Dep. Ex. 6.

[36] Trial Test.

[37] Trial Test.

[38] *Buckman v. Montana Deaconess Hosp*., 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

[39] *Ricks v. Teslow Consol.,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

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.

¶ 27 Gundermann argues that the only proper method of calculating his average weekly wage should be based upon his hourly rate times the number of hours in a week for which he was hired by Linder to work during the fall harvest season, since his term of employment was less than four pay periods. In furtherance of his position, Gundermann cites to *Brodie v. Liberty Northwest Ins. Corp.*[40] and *Robertson v. Aero Power-Vac, Inc.*[41] Gundermann's reliance on both cases is misplaced.

¶ 28 In *Brodie*, this Court ruled that it was appropriate to use the employee's last four pay periods rather than going back a year in her seasonal employment because her employer made it clear in writing that the employee had to reapply for employment at the beginning of each season, and she was not guaranteed rehire. In *Robertson,* the claimant was a temporary employee hired to work for less than a week and was injured during his first shift. These cases are distinguishable from Gundermann's situation, in that he had a long history of seasonal employment each planting and harvest season for 16 years with the same time-of-injury employer, and there was an understanding between them that Linder would always have work for Gundermann during spring planting and fall harvest.

¶ 29 State Fund argues that Gundermann's long history of seasonal employment with Linder's farm dating back to 1994, and the steadiness of this employment, though never guaranteed, should be taken into account when calculating Gundermann's average weekly wage. State Fund therefore calculates Gundermann's average weekly wage by going back more than twelve months in finding four pay periods from Linder.

¶ 30 The problem with both parties' methods is that neither calculation bears a reasonable relationship to Gundermann's actual wages lost as a result of his injury. Section 39-71-105, MCA, provides that an injured worker's wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease. In *Sturchio v. Wausau Underwriters Ins. Co.*, the Montana Supreme Court

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[40] *Brodie v. Liberty Northwest Ins. Corp.*, 2001 MTWCC 30.

[41] *Robertson v. Aero Power-Vac, Inc.,* 272 Mont. 85, 899 P.2d 1078 (1995).

affirmed my reasoning that "the express language of § 39-71-123, MCA, recognizes the validity of using different calculation methods for different employment situations."[42] In *Sturchio*, I rejected the notion that § 39-71-123, MCA, required "a one-size-fits-all formula", reasoning that varied employment situations and the public policy language in § 39-71-105, MCA, requires an interpretation that serves a reasonable relationship to actual wages lost.[43]

¶ 31 To implement the legislative objective of § 39-71-123, MCA, this Court will look to the plain language of the statute if the legislative intent can be discerned, "noting the directive that, [i]n the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted, § 1-2-101, MCA . . . ."[44]

¶ 32 Previously, this Court has interpreted § 39-71-123, MCA, as disallowing the use of an injured worker's last four pay periods if their use would have overstated the claimant's actual wages lost.[45] In the present case, the use of Gundermann's hourly rate times the number of hours in a week for which he was hired to work would grossly overstate his actual wages lost, contrary to the public policy set forth in § 39-71-105(1), MCA.

¶ 33 It is undisputed that Gundermann had a long history of working for Linder during the spring planting and fall harvest seasons on Linder's farm. In such cases, the Montana Supreme Court has consistently recognized that, "when calculating compensation, a court should consider the seasonal nature of a job."[46]

¶ 34 In *Gregory*, the court recognized the employment history the injured employee had with his employer in the seasonal logging industry, which spanned some 59 weeks but of which the employee only worked 31. In those circumstances, the court found the language of § 39-71-123(3)(b), MCA, instructive:

> [W]here sporadic, seasonal work is at issue, it is reasonable when calculating "usual" salary to calculate on a larger scale than four pay periods; therefore, reliance on subsection (b) of Sec. 39-71-123(3), MCA,

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[42] *Sturchio v. Wausau Underwriters Ins. Co.,* 2007 MTWCC 4*, ¶ 24, aff'd,* 2007 MT 311*, 3*40 Mont. 141, 146, 172 P. 3d 1260, 1263.

[43] *Sturchio v. Wausau Underwriters Ins. Co.,* 2007 MTWCC 4, ¶ *23.*

[44] *Simms v. State Compen. Ins. Fund*, 2005 MT 175, 327 Mont. 511, 515, 116 P.3d 773, 776 (internal quotations omitted).

[45] *Siaperas v. Montana State Fund,* 2004 MTWCC 4; *Lindskog v. State Compen. Ins. Fund,* 2000 MTWCC 61.

[46] *Gregory v. Michael Bailey & Sons Logging*, 255 Mont. 190, 194, 841 P.2d 525, 527 (1992).

> is appropriate. Fairness demands that sporadic, seasonal employment be determined in such a way as to "accurately reflect the claimant's employment history with the employer" as subsection (b) dictates. Further, it is inappropriate when determining compensation for a sporadic, seasonal job, to rely on subsection (a) of Sec. 39-71-123(3), MCA, as such calculations will be unreasonable and unfair.[47]

¶ 35 Citing the above excerpt from *Gregory*, *supra*, I concluded in *Leigh v. Montana State Fund*[48] that a seasonal employee with "[a]n ongoing, multi-year relationship in which the claimant is periodically terminated and rehired is certainly part of the 'employment history with the employer,'" as contemplated by § 39-71-123(3)(b), MCA. In *Leigh*, I found the Montana Supreme Court's rejection of the hourly calculation for a seasonal employee in *Gregory* compelling, and concluded that the State Fund's calculation of Leigh's average weekly wage for the purpose of his workers' compensation benefits by using the entire calendar year was appropriate.

¶ 36 In both *Gregory* and *Leigh*, the injured employees had no guarantee of re-employment with their seasonal employer, yet it was appropriate to use an average weekly wage calculation under § 39-71-123(3)(b), MCA, based upon the employees' history with their seasonal employer. Like Gregory and Leigh, Gundermann had no guarantee of re-employment with his seasonal employer, Linder. But where Gundermann's history of seasonal employment with the same employer spanned some 16 years, far greater than those of Gregory and Leigh, it is most appropriate to use a similar analysis to accurately reflect the injured workers' employment history and average weekly wage computation for benefit purposes.

¶ 37 Finally, unlike the claimant in *Gregory,* where the seasonal logger was forced to take periods of idleness, Gundermann voluntarily chose to take time off amounting to one week in April, 2010 and the months of June, July and a portion of August until starting work for Linder on August 10, 2010. The inclusion of these months in the calculation of Gundermann's average wage is appropriate since Linder actually had work for Gundermann to perform during the summer of 2010, but Gundermann was on vacation and unavailable.

¶ 38 However, in determining the period of time by which to divide Gundermann's wages, it is inappropriate to include the time he worked for Thompson. Section 39-71-123(3)(b), MCA, requires that the total wages should be divided by the number of weeks during which the wages were earned including "periods of idleness or seasonal

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[47] *Gregory*, 255 Mont at 194, 841 P.2d at 527-28 (1992) (internal citation omitted).

[48] *Leigh*, 2010 MTWCC 37, ¶ 38.

fluctuations." Within the context of employment, Webster's defines "idle" as being "not occupied or employed: as . . . having no employment."[49] Gundermann was not idle while working at his second job with Thompson; thus, those periods should not be included in the computation of average weekly wage under § 39-71-123(3)(b), MCA.

¶ 39 I conclude that the appropriate method of calculating Gundermann's average weekly wage is pursuant to § 39-71-123(3)(b), MCA. Gundermann's earnings with Linder during the period of one year prior to the date of his injury shall be divided by the number of weeks Gundermann worked for Linder and periods of idleness. Periods of idleness do not include the time Gundermann was employed by Thompson. Gundermann's earnings shall include the agreed amount of $900 per month in room and board for those months or portions thereof actually received as well as the value of the truck Gundermann received in return for work he performed for Linder.

JUDGMENT

¶ 40 Petitioner's average weekly wage shall be computed pursuant to § 39-71-123(3)(b), MCA, by taking the earnings he made while working for his time-of-injury employer over a period of one year prior to the date of his injury, including in those wages the agreed amount of $900 per month in room and board for those months or portions thereof actually received, and the value of the truck Gundermann received from Linder in return for his work. This amount shall be divided by the actual months of employment for his time-of-injury employer and those months that Gundermann was idle.

¶ 41 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 in Helena, Montana, this 4th day of June, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Keith D. Marr
Daniel B. McGregor
Submitted: February 7, 2012

[49] WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 598 (9th ed. 1991).