IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2024 MTWCC 2

WCC Nos. 2023-6389 & 2023-00010

JORDAN PEREA

Petitioner

vs.

AMTRUST INS. Co.

Respondent/Insurer.

APPEALED TO MONTANA SUPREME COURT DA 24-0162 03/18/24

REVERSED AND REMANDED 06/24/25

ORDER DENYING PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT AND DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT ON ADDITIONAL ISSUES, AND ESTABLISHING APPLICABLE COMPENSATION RATES

Summary: The parties cross-move for summary judgment, asserting that their methods of calculating Petitioner's wage-loss benefit rates are correct. Petitioner also moves for summary judgment on the grounds that Insurer's incorrect calculation and recalculation of his wage-loss benefits throughout the adjustment of his claim was unreasonable, entitling him to attorney fees and a penalty, and that § 39-71-712(2), MCA, unconstitutionally violates his entitlements to equal protection and substantive due process. The parties submitted a Joint Statement of Facts, and requested a determination based on those facts.

Held: The Court finds that both parties' methods of calculating Petitioner's wage-loss benefit rates are incorrect. Petitioner's wages from his simultaneous employment are not aggregated for purposes of calculating his AWW at the time of injury because his simultaneous employment is not "concurrent employment" under § 39-71-123(4)(a), MCA. Likewise, Petitioner's wages from the same employer post-injury are not considered in calculating his TPD benefits because continued employment is not either

"modified employment" or "alternative employment" under § 39-71-712(1), MCA. Petitioner is not entitled to attorney fees or a penalty; because the calculation of wage-loss benefits for a person who works at two simultaneous jobs but, post-injury, can continue working at only one, is an issue of first impression in Montana, Insurer's attempts to arrive at the correct calculation of benefits were not unreasonable. Petitioner does not have standing to assert his equal protection challenge based on modified work or his substantive due process challenge. Petitioner's equal protection challenge based on the 40-hour cap fails under the facts of this case.

¶ 1 Petitioner Jordan Perea and Insurer AmTrust Ins. Co. (AmTrust) cross-moved for summary judgment, asserting that their methods of calculating Mr. Perea's wage-loss benefit rates were correct.

¶ 2 Mr. Perea also moved for summary judgment on the additional grounds that AmTrust's incorrect calculation and recalculation of his wage-loss benefits throughout the adjustment of his claim was unreasonable, entitling him to fees and penalties, and that § 39-71-712(2), MCA, unconstitutionally violates his entitlements to equal protection and substantive due process.

¶ 3 Following their initial briefing, the Court requested that the parties file a joint statement of facts and supplemental briefs on specific questions.

¶ 4 Upon review of the parties' submissions, the Court observed that some of their positions had changed and that they alternatively requested that the Court decide the case based on the Joint Statement of Facts.

¶ 5 As explained below:

> ¶ 5a **The parties' Cross-Motions for Summary Judgment** on the correctness of their methods of calculating Mr. Perea's wage-loss benefit rates **are denied.**
>
> ¶ 5b **Mr. Perea's Motion for Summary Judgment** on the additional grounds of his entitlement to fees and penalties and the constitutionality of § 39-71-712(2), MCA, **is denied.**
>
> ¶ 5c **The Court decides this case on the parties' Joint Statement of Facts.**

FACTS

¶ 6 The key events are set forth in the below chronology, with other facts referenced as needed in the analysis.

¶ 7 At the time of Mr. Perea's injury, he was working at two jobs. These were Truss Works and Life in Bloom.

¶ 8 At Truss Works, where he had worked for more than 8 weeks, Mr. Perea earned $21.50 per hour – plus a $1 per hour "differential" for being a "Foreman/Lead" except on holidays – and worked an average of 45.25 hours per week.

¶ 9 At Life in Bloom, where Mr. Perea had worked for just a couple of days, he was hired at the wage of $16.00 per hour for up to a 20-hour work week. In actuality, Mr. Perea worked an average of 14.74 hours per week over the course of his tenure there.

¶ 10 Mr. Perea was injured on November 11, 2022, while he was in the course and scope of his employment with Truss Works.

¶ 11 Due to his injury, the last day Mr. Perea was able to work at Truss Works was Friday, November 25, 2022.

¶ 12 Mr. Perea's injury had no impact on his employment with Life in Bloom, which he continued without interruption.

¶ 13 Mr. Perea's last day working at Life in Bloom was January 20, 2023. He left for reasons unrelated to his injury.

¶ 14 On December 3, 2022, Mr. Perea started working at The Block, earning $14.00 per hour.

¶ 15 Due to his need for injury-related surgery, Mr. Perea's last day working at The Block was March 4, 2023.

¶ 16 On March 5, 2023, Petitioner had the surgery and was completely taken off work through April 30, 2023.

¶ 17 Mr. Perea returned to work at Truss Works on May 1, 2023, earning $21.50 per hour.

¶ 18 Mr. Perea did not return to work at The Block following surgery.

¶ 19 AmTrust paid Mr. Perea temporary total disability (TTD) benefits based on his wages at Truss Works from November 28, 2022, until December 16, 2022.

¶ 20 In January 2023, AmTrust learned for the first time that Mr. Perea had continued working at Life in Bloom after his injury and was still doing so, and that he had begun a new job at The Block, as well.

¶ 21 In light of this information, AmTrust indicated that "TTD was paid by mistake," explaining:

> The benefits should be paid as TPD because wages cannot be earned while the injured worker is receiving TTD without the written approval of the

carrier. The carrier is not authorizing Mr. Perea to earn wages while collecting TTD.

Accordingly, AmTrust recalculated Mr. Perea's benefits as temporary partial disability (TPD) benefits from November 28, 2022, until December 14, 2022.

¶ 22 Mr. Perea objected to AmTrust's recalculation of his benefits.

¶ 23 AmTrust recalculated those benefits several more times for various reasons but continued to maintain that Mr. Perea was limited to TPD benefits.

¶ 24 Throughout February 2023, the parties exchanged multiple e-mails disputing one another's methods of calculation.

¶ 25 In March 2023, counsel for AmTrust requested that counsel for Mr. Perea give him a call so that they could discuss the issue; counsel for Mr. Perea did not respond.

¶ 26 In April 2023, counsel for AmTrust began paying back TPD benefits for the period November 28, 2022, to March 4, 2023, and back TTD benefits for the period March 5, 2023, to April 15, 2023, in accordance with Mr. Perea's proposed calculations, "under a reservation of rights."

¶ 27 The following list of key dates is provided for the convenience of the reader:

- November 25, 2022 - last day at Truss Works
- December 3, 2022 - first day at The Block
- January 20, 2023 - last day at Life in Bloom
- March 4, 2023 - last day at The Block
- March 5, 2023 - surgery
- May 1, 2023 - first day back at Truss Works post-surgery

LAW AND ANALYSIS

¶ 28 This case is governed by the 2021 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Mr. Perea's industrial accident.[1]

¶ 29 To prevail on a motion for summary judgment, the moving party must meet its initial burden of showing the "absence of a genuine issue of material fact and entitlement to judgment as a matter of law."[2] "[If] the moving party meets its initial burden to show the

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

[2] *Begger v. Mont. Health Network WC Ins. Trust*, 2019 MTWCC 7, ¶ 15 (citation omitted).

absence of a genuine issue of fact and entitlement to judgment, the burden shifts to the party opposing summary judgment either to show a triable issue of fact or to show why the undisputed facts do not entitle the moving party to judgment."[3]

¶ 30 The parties' cross-motions raise three main questions.

A. What is the correct method of calculating Mr. Perea's wage-loss benefit rates?

¶ 31 The Court has determined there are three distinct time periods to which this question applies.

¶ 32 The following summary of law applied to facts is provided for the convenience of the reader:

- November 28, 2022 – December 2, 2022 (Period #1)
  Status TTD, § 39-71-701, MCA
  Not able to work at Truss Works.
  Life in Bloom not considered.
- December 3, 2022 – March 4, 2023 (Period #2)
  Status TPD, § 39-71-712, MCA
  Not able to work at Truss Works.
  Working at The Block.
  Life in Bloom not considered/Not working at Life in Bloom.
- March 5, 2023 – April 30, 2023 (Period #3)
  Status TTD, § 39-71-701, MCA
  Not working anywhere.

i. November 28, 2022, through December 2, 2022[4]

¶ 33 Determining how to compensate Mr. Perea during this time period involves a question of first impression, i.e., how is compensation determined when a petitioner is working two simultaneous jobs at the time of injury, is then temporarily totally disabled from the first job, but the injury has no impact on the second job? The parties agree that Petitioner was disabled during this period; the question is whether he was temporarily partially disabled or temporarily totally disabled. The answer depends on the specific wording of the statutes.

¶ 34 A worker is eligible for TTD benefits under § 39-71-701(1), MCA:

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[3] *Richardson v. Indem. Ins. Co. of N. Am.*, 2018 MTWCC 16, ¶ 24 (alteration added) (citation omitted), *aff'd,* 2019 MT 160, 396 Mont. 325, 444 P.3d 1019.

[4] In other words, the next business day after Mr. Perea's last day of work at Truss Works through the last day before Mr. Perea began working at The Block.

(a) when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing; or

(b) until the worker has been released to return to the employment in which the worker was engaged at the time of the injury or to employment with similar physical requirements.[5]

¶ 35 A worker qualifies for TPD benefits under § 39-71-712(1), MCA:

> [I]f prior to maximum healing an injured worker has a physical restriction and is ***approved to return to*** a modified or alternative employment that the worker is able and qualified to perform and the worker suffers an actual wage loss as a result of a temporary work restriction . . . .[6]

¶ 36 To determine Mr. Perea's average weekly wage (AWW) received at the time of his injury, which is required to calculate either TTD or TPD benefits, the Court must decide whether Mr. Perea's average actual earnings from Truss Works and Life in Bloom should be aggregated. Section 39-71-123(4)(c), MCA, provides, in pertinent part:

> The compensation benefits for an employee working at two or more concurrent remunerated employments must be based on the aggregate of average actual monetary wages of all employments . . . from which the employee is disabled by the injury incurred.

Section 39-71-123 (4)(a), MCA, provides, in pertinent part:

> 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***.[7]

¶ 37 Thus, the average actual earnings from Truss Works and Life in Bloom should be aggregated only if they are concurrent employments. To be concurrent employments, Mr. Perea had to be "actually employed" at each at the time of his injury. He was. Further, however, Mr. Perea must have been unable to continue in each employment as a result of the injury. This requirement is not met because, although Mr. Perea was unable to continue working at Truss Works as a result of his injury, the injury had no impact on his ability to continue working at Life in Bloom. Because Mr. Perea's employment at Life in Bloom does not constitute concurrent employment under § 39-71-123, MCA, his wages from Life in Bloom are completely disregarded in the calculation of his benefits.

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[5] For present purposes, the statutory exceptions do not apply.

[6] Emphases added. For present purposes, the statutory exception does not apply.

[7] Emphases added.

¶ 38 In *Barnhart v. Montana State Fund*,[8] Barnhart worked at two concurrent employments at the time of her injury: Youth Dynamics, Inc. (YDI) and Dairy Queen (DQ).[9] After the injury, she "was sometimes able to work and sometimes not."[10] However, upon reaching maximum medical improvement (MMI), she was able to return to her job at YDI but not DQ.[11] The Insurer, Montana State Fund (State Fund), advised Barnhart that it would pay her PPD indemnity benefits based only on her DQ wages.[12] Barnhart argued that State Fund erroneously excluded her YDI wages from its PPD indemnity benefit rate calculation.[13] The Workers' Compensation Court (WCC) ruled in Barnhart's favor.[14] The WCC read § 39-71-123(4)(c), MCA ("[C]ompensation benefits for injured workers with concurrent employments 'must be based on the aggregate of average actual wages of all employments . . . from which the employee is disabled by the injury incurred,' ")[15] together with § 39-71-703(6), MCA ("The weekly benefit rate for permanent partial disability is 66 2/3% of the wages received at the time of injury . . . .") and interpreted them to mean that "if any wage loss occurs, then all time-of-injury wages are included in the PPD indemnity benefit rate calculation."[16]

¶ 39 State Fund appealed.[17] The issue on appeal was "Whether the Workers' Compensation Court erred when it ruled that a permanently partially disabled worker's aggregate wages, calculated at the time of injury, are used to determine the worker's permanent partial disability benefit rate regardless of the worker's actual wage loss at maximum healing."[18] Or, in other words, whether Barnhart's PPD indemnity benefit rate should be based on the aggregate AWW from both of her time-of-injury concurrent employments or based only on her AWW from DQ, since she did not suffer an actual wage loss from her YDI job upon reaching MMI.[19]

¶ 40 In a previous case, the Montana Supreme Court held that "[p]ermanent disability benefits are calculated at MMI because an injured worker's entitlement to either PPD or permanent total disability indemnity benefits cannot be determined until the worker

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[8] *Barnhart*, 2022 MT 250, 411 Mont. 138, 522 P.3d 418.

[9] *Id*., ¶ 3.

[10] *Id*., ¶ 4.

[11] *Id*.

[12] *Id*., ¶ 6.

[13] *Id*., ¶ 7.

[14] *Id*., ¶ 8.

[15] *Id*., ¶ 12 (emphasis omitted).

[16] *Id*., ¶ 21 (emphasis omitted).

[17] *Id.,* ¶ 8.

[18] *Id*., ¶ 2 (emphasis omitted).

[19] *Id*., ¶¶ 11, 12.

reaches MMI."[20] Here, the court added, "[Actual] wage loss is the primary factor to consider in determining Barnhart's eligibility for PPD indemnity benefits, and it must be viewed in light of the policy considerations of § 39-71-105(1), MCA," including that "the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease."[21] The court rejected the WCC's interpretation of the applicable statutes because aggregating Barnhart's wages from both employments resulted in PPD indemnity benefits that exceeded her actual wage loss.[22]

¶ 41 Here, the court held that, with respect to PPD indemnity benefits, the only employment to be used in calculating wage-loss benefits is the employment from which claimant experienced actual wage loss upon reaching MMI. Or, in other words, Barnhart's PPD indemnity benefit rate should be based only on her AWW at DQ since that was the only employment to which she was unable to return after she reached MMI.[23] The court explained that this interpretation leads to a reasonable result wherein the wage-loss benefit bears a reasonable relationship to actual wages lost as a result of the work-related injury.

¶ 42 When Mr. Perea's wages from Life in Bloom are disregarded, as they must be,[24] Mr. Perea meets the criteria to be eligible for TTD benefits during the specified timeframe.[25] He suffered a total loss of wages at Truss Works and had not yet reached maximum healing. Moreover, he had not been released to return to the employment in which he was engaged at the time of injury or to employment with similar physical requirements.

¶ 43 Notwithstanding that Mr. Perea suffered an actual wage loss after his injury, he does not meet the criteria to be eligible for TPD benefits during the specified timeframe. Mr. Perea's employment with Life in Bloom was not a modified or alternative employment to which Mr. Perea was approved to return. Mr. Perea could not return to his employment with Life in Bloom if he never left it; it was not a limited version of his job with Truss Works,

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[20] *Id*., ¶ 13 (citation omitted).

[21] *Id*., ¶¶ 19, 23.

[22] *Id*., ¶¶ 22, 23.

[23] *Id*., ¶ 19.

[24] *Cf. Barnhart*, 2022 MT 250, ¶ 24 (holding that, with respect to permanent partial disability benefits, the only employment to be used in calculating wage-loss benefits is the employment from which Petitioner experienced an actual wage loss upon reaching MMI).

[25] *See Kuykendall v. Liberty Nw.*, 1998 MTWCC 8, ¶ 26 (where claimant demonstrated that he could not return to his preinjury job or to employment with similar characteristics, he was entitled to TTD benefits for those periods pre-MMI when he was not working); *Lockhart v. NH Ins. Co.*, 1997 MTWCC 67, Findings of Fact 14, Conclusions of Law 7 (where claimant was injured while doing construction work, was not yet at MMI, and had only been released to do clerical work, he was entitled to TTD benefits for the few days of work lost immediately following his injury and the two-week interval between his termination of employment with his time-of-injury employer and his commencement of work for a pawn shop, during which time he suffered a total loss of wages).

nor was it something that he chose instead of his job at Truss Works.[26] After his injury, Mr. Perea's work at Life in Bloom was merely a continuation of one of the two jobs he had previously worked simultaneously.[27]

¶ 44 Under § 39-71-701(3), MCA, TTD benefits are "66 2/3% of the wages received at the time of the injury," with the maximum weekly amount limited to the state's AWW at the time of injury. Pursuant to § 39-71-123(3)(a), MCA, for compensation benefits purposes, Mr. Perea's wages received from Truss Works at the time of the injury are: "the average actual earnings for the four pay periods immediately preceding the injury." The Court extracted the following earnings information for Mr. Perea's last four pay periods at Truss Works from the Parties' Joint Statement of Facts:[28]

Pay Period Dates	**Dollars Earned**[29]	**Hours Worked**
9/5/22-9/18/22[30] (paid 9/19/22)	$2,107.00 ($1,935 + $172)[31]	94
9/19/22-10/2/22 (paid 10/3/22)	$2,081.25	92.5
10/3/22-10/16/22 (paid 10/17 /22)	$1,935.00	86
10/17 /22-10/30/22 (paid 10/31 /22)	$2,013.75[32]	89.5
TOTALS	**$8,137.00**	**362 hours**

[26] *But see Long v. NH Ins. Co.*, 2009 MTWCC 14, ¶ 68 (referring, in dicta and without analysis, to the worker's release to return to concurrent employment as "alternate employment"). For further discussion of the terms "modified" and "alternative" employment, see discussion below at A.ii.

[27] *See Bowles v. James Lumber Co.*, 345 Mich. 292, 294, 295, 75 N.W.2d 822 (1956), a Michigan case in which the state supreme court held that the only wages to be considered after claimant's accident are "those earned from the 'same' employment in which he was hurt or from 'another' employment which he ***undertook in its place***," which did not include the wages the claimant continued to earn at the job he worked at simultaneously with the job of injury. (emphases added) (internal quotation marks and citation omitted) ("If defendant's liability for compensation may not be increased by taking into consideration what plaintiff was earning on another job at time of injury, it follows, as a matter of logic and justice, that it may not be decreased by taking into account what he continued to earn on that other job after injury.") (citation omitted). This Court finds this analysis consistent with the Montana Workers' Compensation Act, while acknowledging that it is not a Montana case.

[28] Because the parties have requested summary judgment that they have used the proper methods of calculating Mr. Perea's wage-loss benefit rates, the Court provides the proper methods and rates but stops short of calculating the actual amount of benefits due to Mr. Perea. The parties may perform these calculations based on the benefit rates provided. However, the Court will retain jurisdiction for a reasonable amount of time for the purpose of assisting the parties should a dispute arise between them in calculating the amount of wage-loss benefits to which Mr. Perea is entitled.

[29] Mr. Perea's wage rate was $21.50 per hour, plus a "differential" of $1/hour for being a "Foreman/Lead" employee except on holidays. All overtime pay has been reduced to regular pay.

[30] This check is erroneously dated 8/23/22 – 9/5/22 but was paid on 9/19/22.

[31] Note: for the pay period 9/5/22 – 9/18/22, dollars earned is not simply a calculation of wage rate x hours worked because Mr. Perea did not receive the bump up in pay for an 8-hour holiday during that period.

[32] The Court uses $2,013.75, calculated by multiplying 89.5 hours by $22.50 per hour, rather than $2,013.00, which was set forth in the Joint Statement of Facts.

¶ 45 Mr. Perea earned $8,137.00 over the course of 4 pay periods (8 weeks). Thus, his AWW was $1,017.13. Mr. Perea is entitled to 66 2/3% of this AWW.[33] Thus, Mr. Perea is entitled to TTD benefits in the amount of $678.09 per week during the specified timeframe.[34]

ii. December 3, 2022, through March 4, 2023[35]

¶ 46 When Mr. Perea began working at The Block on December 3, 2022, he was no longer eligible for TTD benefits because, although he had not yet reached maximum healing, he no longer had a total loss of wages as a result of his injury. That is because when he started working at The Block, he began earning the wage of $14.00 per hour.

¶ 47 However, when Mr. Perea started working at The Block on December 3, 2022, he became eligible for TPD benefits. Again, a worker qualifies for TPD benefits under § 39-71-712(1), MCA:

> [I]f prior to maximum healing an injured worker has a physical restriction and is approved to return to a ***modified or alternative employment*** that the worker is able and qualified to perform and the worker suffers an actual wage loss as a result of a temporary work restriction . . . .[36]

Thus, to receive benefits under § 39-71-712, MCA, there are four threshold requirements that must be met. First, the worker must not have reached maximum healing. Second, the worker must have a physical restriction. Third, the worker must return to a modified or alternative employment. Fourth, the worker must suffer a wage loss.

¶ 48 The first requirement is met because Mr. Perea had not reached maximum healing during the specified timeframe; indeed, he underwent surgery to treat his injury at the end of this period.

¶ 49 The second requirement is met because Mr. Perea was placed on injury-related physical restrictions on November 16, 2022. These physical restrictions, which persisted through the specified timeframe, kept Mr. Perea from being able to return to employment like he had at Truss Works until after his surgery to treat the injury and post-surgery recovery.

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[33] § 39-71-701(3), MCA.

[34] Since Mr. Perea's TTD benefit rate during the specified timeframe is $678.09 per week, which is less than the state's average weekly wage of $916.74 for 2022, Mr. Perea is in compliance with the limitation set forth in § 39-71-701(3), MCA. *See* Montana Dep't of Labor & Industry, Average Weekly Wages, *available at* https://lmi.mt.gov/qcewWkWage.

[35] In other words, Mr. Perea's first day of work at The Block through his last day of work at The Block before Mr. Perea had surgery to treat his injury.

[36] Emphases added.

¶ 50 In regard to the third requirement – that the worker must return to modified or alternative employment – § 39-71-116, MCA, the definition section for Chapter 71, defines neither the term "modified" nor "alternative." Thus, those terms are to be understood according to their normal usage. According to Black's Law Dictionary, the term "modified" is used to describe something that is "ma[d]e more moderate or less sweeping"; "reduce[d] in degree or extent"; . . . "limit[ed], qualif[ied], or moderate[d]."[37] According to Black's Law Dictionary, the term "alternative" means "[o]ne or the other of two things; giving an option or choice; allowing a choice between two or more things or acts to be done."[38]

¶ 51 Mr. Perea's employment at The Block was not a "return to a modified . . . employment" because it was not a limited version of his job at Truss Works, but rather, a different kind of work altogether and for a different employer. Mr. Perea's employment at The Block was, however, "alternative employment." As his Affidavit explains, he "los[t] [his] $21.50 per hour time of injury job" at Truss Works, and afterward, he could not afford to not work "because [AmTrust] was not paying [his] wage loss based on an alleged over payment." Thus, because Mr. Perea needed a job and could not work at Truss Works, he chose another or alternative option instead, i.e., to work at The Block. That The Block is alternative employment is made all the clearer by the fact that, after Mr. Perea's surgery and post-surgery recovery, he "chose not to return to [T]he Block since he was able to return to Truss Works full time." He never worked at Truss Works and The Block at the same time; it was always one or the other.

¶ 52 The fourth requirement is also met because Mr. Perea suffered an actual wage loss as a result of choosing alternative employment. Whereas he earned $21.50 per hour, or more with the differential, at Truss Works, he earned only $14.00 per hour at The Block.

¶ 53 Section 39-71-712(5), MCA, does contain a requirement that the time-of-injury employer and the new employer reach agreement regarding alternative employment. The Joint Statement of Facts is silent on this issue, but the parties' actions and briefing negate any argument that -712 does not apply. Neither party raises this issue in briefing, and AmTrust actually argues for TPD benefits during this time. The Court concludes that this requirement is either met or waived by the parties.

¶ 54 Since Mr. Perea meets the requirements, he is entitled to TPD benefits for the specified timeframe. Under § 39-71-712(2), MCA:

> 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

[37] *See* BLACK'S LAW DICTIONARY (11th ed. 2019) (second definition).

[38] BLACK'S LAW DICTIONARY (2d ed. 1910).

> wages earned during the period that the claimant is temporarily partially disabled, not to exceed the injured worker's temporary total disability benefit rate.[39]

Thus, Mr. Perea's TPD compensation rate is the difference between his AWW, subject to 40 hours per week, and the actual weekly wages he earned while working for The Block, not to exceed his TTD rate of $678.09 per week.

¶ 55 As explained above, Mr. Perea's AWW received at the time of injury was $1,017.13 and based on his wages at Truss Works alone. If he worked 362 hours in 8 weeks, then he worked an average of 45.25 hours per week. And if he earned an AWW of $1,017.13 over 45.25 hours, then he earned an average hourly wage of $22.48. Multiplying Mr. Perea's hourly wage of $22.48 by 40 provides an AWW capped at 40 hours per week of $899.20.

¶ 56 The Court extracted the following wage and hour information from The Block pay stubs provided at Appendix 2 to the parties' Joint Statement of Facts:

Pay Period	**Hours**	**Overtime Hours**	**Regular Pay (at $14/hour)**	**Overtime Pay (at $21/hour)**
12/1/22-12/14/22	67.52	0	$945.28	0
12/15/22-12/31/22	72.35 + 2.93 OT hours = 75.28 total hours[40]	~~2.93~~	$1,012.90 + $41.02 OT converted to regular time = $1,053.92 total pay	~~$61.53~~
1/1/23-1/14/23	69.45	0	$972.30	0
1/15/23-1/31/23	80.51 + .47 OT hours = 80.98 total hours	~~.47~~	$1,127.14 + $6.58 OT converted to regular time = $1,133.72 total pay	~~$9.87~~
2/1/23-2/14/23	65.33	0	$914.62	0
2/15/23-2/28/23	82.99	0	$1,161.86	0
3/1/23-3/14/23	23.94	0	$335.16	0
TOTALS	**465.49**	**0**	**$6,516.86**	**0**

[39] The Court addresses the constitutionality of § 39-71-712(2), MCA, below.

[40] Overtime hours must be converted to straight time pursuant to § 39-71-123(1)(a), MCA. Section 39-71-123(1)(a), MCA, provides that the term "wages" includes but is not limited to: "monetary commissions, bonuses, and remuneration at the regular hourly rate for overtime work, holidays, vacations, and periods of sickness."

¶ 57 At The Block, Mr. Perea worked 465.49 hours in 7 pay periods (14 weeks). That is an average of 33.25 hours per week. At his rate of $14.00 per hour, he earned an average of $465.50 per week during the period he was temporarily partially disabled.

¶ 58 Thus, Mr. Perea's TPD benefit rate during the specified timeframe is $433.70 per week, or the difference between $899.20 (Mr. Perea's AWW capped at 40 hours per week), and $465.50 (the actual weekly wages he earned during the period that he was temporarily partially disabled), not to exceed his TTD rate of $678.09 per week, which it does not.

¶ 59 While working at The Block, Mr. Perea's total weekly compensation was $433.70 in TPD benefits plus $465.50 in actual wages from The Block. That is a total income of $899.20 per week.

¶ 60 Mr. Perea's TTD rate prior to starting at The Block was $678.09 per week. Thus, by finding alternative employment and returning to work, he increased his total weekly income by $221.11. This refutes Mr. Perea's argument that he could have made more by not working during this time.

iii. <u>March 5, 2023, through April 30, 2023</u>[41]

¶ 61 When Mr. Perea had surgery on March 5, 2023, he was taken completely off work. He was unable to work anywhere during his recovery period, which lasted through April 30, 2023. He returned to work at Truss Works on May 1, 2023.

¶ 62 During the specified period, Mr. Perea suffered a total loss of wages as a result of his injury. Thus, he is entitled to TTD benefits. Again, under § 39-71-701(3), MCA, TTD benefits are "66 2/3% of the wages received at the time of the injury" or $678.09 per week. These benefits are based on only his time-of-injury wages from Truss Works, as that is the only job affected by his injury. ***At no time did Mr. Perea's injury cause loss of any Life in Bloom wages.*** Mr. Perea continued working at Life in Bloom without interruption after his injury, and he had already left his job at Life in Bloom for reasons unrelated to the injury before the date of his surgery. Although Mr. Perea stopped working at The Block at the time of his surgery, he is not entitled to wage-loss benefits from that job as he was not working at The Block at the time of his injury.

B. Was AmTrust's adjustment of Mr. Perea's claim unreasonable?

¶ 63 Both the applicable attorney fee statute (§ 39-71-612, MCA) and penalty statute (§ 39-71-2907, MCA) require a finding that the actions of the insurer were unreasonable. As the Court noted above, the calculation of Mr. Perea's benefits involves an issue of first impression in Montana. As a result, both parties struggled to determine the correct

[41] In other words, the day Mr. Perea had surgery through the last day before he returned to work at Truss Works.

method of calculation.[42] The fact that AmTrust continued to recalculate Mr. Perea's benefits, though frustrating from Mr. Perea's point-of-view, is evidence that it took seriously its duty to continue investigating throughout its adjustment of the claim. Moreover, AmTrust ultimately requested a phone call from Mr. Perea – in an attempt to work together to come up with the correct calculations – to which Mr. Perea did not respond. Taken as a whole, AmTrust's conduct was not unreasonable.

¶ 64 The requested attorney fees and penalty are denied.

C. Does § 39-71-712(2), MCA, unconstitutionally infringe upon Mr. Perea's rights to equal protection and substantive due process?

¶ 65 Mr. Perea makes several arguments in this regard, including:

¶ 65a Section 39-71-712(2), MCA, violates equal protection, on its face and as applied to Mr. Perea, because there is no legitimate government purpose for capping benefits for temporarily partially disabled workers when they return to work but not when there is no modified work available, as has occurred with Mr. Perea. The 40-hour cap, which the Montana Legislature applies only to temporarily partially disabled workers who return to work, causes workers to lose income by returning to work, which obstructs the intent of the Workers' Compensation Act to provide benefits that bear a reasonable relationship to wages lost, return workers to work as soon as possible, and minimize reliance on lawyers and the courts to obtain benefits and interpret liabilities.[43]

¶ 65b Section 39-71-712(2), MCA,[44] violates substantive due process because the 40-hour cap is arbitrary and unfair.

¶ 65c When the unconstitutional cap is removed, the AWW for temporary partial disability (TPD) is the same as the AWW for TTD, which promotes efficiency and eliminates complications in calculation.[45]

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[42] *Cf. Marcott v. La. Pac. Corp.*, 275 Mont. 197, 205, 911 P.2d 1129, 1134 (1996) ("[A]s a general rule, where a court of competent jurisdiction has clearly decided an issue regarding compensability in advance of an insurer's decision to contest compensability, the clear applicability of the earlier decision constitutes substantial evidence supporting a finding by the Workers' Compensation Court that the contest over compensability is unreasonable. Conversely, where the issue upon which an insurer bases its legal interpretation has not been clearly decided, the lack of clear decision may constitute substantial evidence supporting a finding by the Workers' Compensation Court that the insurer's legal interpretation is not unreasonable.") (internal citation omitted); *Wommack v. Nat'l Farmers Union Prop. & Cas. Co.*, 2017 MTWCC 8, ¶ 89 ("An insurer's legal interpretation may be incorrect without being unreasonable, and the existence of a genuine doubt, from a legal standpoint, that liability exists constitutes a legitimate excuse for denial of a claim.") (citation omitted).

[43] Petitioner's Motion for Summary Judgment at 14.

[44] Petitioner's Motion for Summary Judgment at 14.

[45] Petitioner's Reply to Petitioner's Motion for Summary Judgment at 7.

¶ 66 Mr. Perea's arguments state two equal protection challenges and one substantive due process challenge.

i. Equal Protection Challenges

¶ 67 Equal Protection claims arise under Article II, Section 4 of the Montana Constitution. Petitioner argues that "Section 39-71-712(2), MCA, is unconstitutional facially and as applied to this case as it treats similarly situated injured workers differently and acts as a deterrent in returning injured workers to work when they could stay home and earn more."

¶ 68 Equal protection claims which do not involve a fundamental right are subjected to a rational basis analysis.

> The rational basis test requires that (1) the statute's objective was legitimate, and (2) [ ] the statute's objective bears a rational relationship to the classification used by the [L]egislature. We defer to the Legislature's policy choices; in doing so, we recognize that cost control may be considered in conjunction with other legitimate interests but cannot alone justify disparate treatment of similar classes. Because the rational basis test requires that a statute rationally relate to a legitimate government interest, we take into account the public policy considerations underlying Montana's workers' compensation system in coming to a conclusion.[46]

a. Equal Protection Theory #1

¶ 69 Petitioner's theory challenges the distinction between injured workers with modified work available from their employer and those where the employer does not offer modified work. Mr. Perea argues that reducing a claimant's benefits if the employer has modified work available but not doing so where the employer does not have modified work available is an improper distinction and violates the rights of the worker who returns to modified employment.

¶ 70 Mr. Perea argues that he has standing as he loses income by continuing to work at Life in Bloom, because his AWW for TPD benefits is capped at 40 hours per week.

¶ 71 The facts in this case, however, are that Mr. Perea's employer, Truss Works, did not have modified work available during any part of the period of disability at issue, November 28, 2022, through April 30, 2023. And the employment to which Mr. Perea actually refers – Life in Bloom – was not modified employment. Therefore, Mr. Perea did not receive any benefits – let alone a reduction in benefits – based on the availability of

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[46] *Hensley v. Mont. State Fund*, 2020 MT 317, ¶ 23, 402 Mont. 277, 477 P.3d 1065 (alteration in original) (internal quotation marks & citations omitted).

modified work. Because Mr. Perea does not belong to the class he has identified as having its rights violated, he does not have standing to assert this claim.

¶ 72 However, even if Mr. Perea had standing, and the Court assumed without deciding that the classes he identified were similarly situated, the statute would pass the rational basis test. The rational basis test requires that the statute's objective is legitimate, and that the objective bears a rational relationship to the classification used by the Legislature.[47] The purpose of the workers' compensation system is set forth in § 39-71-105, MCA[48]:

> For the purposes of interpreting and applying this chapter, the following is the public policy of this state:
>
> (1) An objective of the Montana workers' compensation system is to provide, without regard to fault, wage-loss and medical benefits to a worker suffering from a work-related injury or disease. Wage-loss benefits are not intended to make an injured worker whole but are intended to provide assistance to a worker at a reasonable cost to the employer. Within that limitation, the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease.

¶ 73 In the issue as framed by Mr. Perea, one class has modified work available and the other does not. The public policy is to provide a wage-loss benefit reasonably related to the wage loss. If an employee has modified work available, then the wage loss is less than if there is no modified work available. Since the wage loss is less, the Legislature has a rational basis for making the benefit less. This provides a rational basis for the statute.

b. <u>Equal Protection Theory #2</u>

¶ 74 This theory challenges the distinction between temporarily partially disabled workers who were working more than 40 hours per week prior to injury, and temporarily partially disabled workers who were working less than 40 hours per week prior to injury.[49] Mr. Perea argues that the 40-hour cap on AWW for TPD violates equal protection because it treats these classes differently without a rational basis supporting their distinction.

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[47] Hensley, ¶ 23.

[48] Hensley, ¶ 27.

[49] Although he first argued a scenario based on a claimant working 65 hours per week, Mr. Perea did not work 65 hours per week before his injury. One cannot gain standing by asserting the rights of a hypothetical claimant whom, nor relying on a hypothetical set of facts which, is not before the Court. *Horizon Custom Homes, Inc, v. Uninsured Emp'rs Fund*, 2007 MTWCC 8, ¶ 17.

¶ 75 The only distinguishing factor between these classes is the number of hours worked per week prior to injury. Thus, the classes are similarly situated.

¶ 76 Mr. Perea was working more than 40 hours per week at Truss Works. The 40-hour cap is contained in § 39-71-712(2), MCA. Thus, this only affects Mr. Perea's weekly income during the time he was working at The Block and entitled to TPD benefits from the loss of his Truss Works income.

¶ 77 Applying the rational basis test, the question then becomes whether Mr. Perea has made a case that beyond a reasonable doubt there is no rational basis for the Legislature limiting AWW for TPD benefits to 40 hours, with any doubt being resolved in favor of upholding the statute.

¶ 78 The public policy of the act is stated as: "Wage-loss benefits are not intended to make an injured worker whole but are intended to provide assistance to a worker at a reasonable cost to the employer."[50] Mr. Perea argues for a made whole standard – or compensation for all hours worked preinjury – but the purpose of the act is to provide assistance, not to make the worker whole.

¶ 79 Both parties make broad assertions about how many hours typical employees work, and that many workers have multiple employments with hours worked exceeding 40 hours per week. Unsubstantiated arguments of counsel are not evidence. These facts are not in evidence and cannot be considered by the Court in reaching its decision.

¶ 80 The 40-hour cap must bear a reasonable relationship to a legitimate government interest. It does. The government interest is to provide a system of no-fault compensation to injured workers while maintaining a reasonable cost for employers. Putting a 40-hour ceiling on the AWW for TPD benefits is a reasonable approach to accomplishing that interest.

ii. Substantive Due Process Challenge

¶ 81 Substantive due process challenges to a statute arise under Article II, Section 17 of the Montana Constitution. Section 17 establishes that, "No person shall be deprived of life, liberty, or property without due process of law." This has been interpreted to mean that a statute must be reasonably related to a permissible legislative objective in order to satisfy guarantees of substantive due process.[51]

¶ 82 As the Supreme Court has explained:

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[50] § 39-71-105(1), MCA.

[51] *Newville v. State*, *Dep't of Family Services*, 267 Mont. 237, 250, 251, 883 P.2d 793, 801 (1994) (citations omitted).

> The constitutionality of a legislative enactment is prima facie presumed. The party challenging the constitutionality of a statute bears the burden of proving the statute unconstitutional beyond a reasonable doubt. We ask not whether it is possible to condemn, but whether it is possible to uphold the challenged statute. If any doubt exists, it must be resolved in favor of the statute.[52]

¶ 83 Mr. Perea argues that § 39-71-712(2), MCA, violates substantive due process principles because it arbitrarily and unfairly reduces injured workers' AWW and subsequently their benefits for returning to work at a modified position. Petitioner argues that there is no rational basis related to a permissible legislative objective that justifies limiting the AWW to 40 hours just because an employer may have some modified work available, which is unconstitutional.

¶ 84 Mr. Perea does not have standing to assert this claim. During the period of disability at issue, November 28, 2022, through April 30, 2023, he was never offered, nor did he ever return to, a modified position with his employer Truss Works. And, as above, his continuation of work at Life in Bloom did not constitute modified employment. Mr. Perea did return to work in an alternative employment position at The Block, but, contrary to his argument that he cannot be punished for returning to work and earning less money, his weekly income of wages plus TPD benefits increased:

- Pre-injury
    - AWW at Truss Works = **$1,017.13**
- November 28, 2022 – December 2, 2022 (Period #1).
    - TTD benefit based on Truss Works wage. (66 2/3% of AWW)= ***$678.09***
- December 3, 2022 – March 4, 2023 (Period #2).
    - AWW at Truss Works less wages earned at The Block, then add the difference between Truss Works less The Block.
    - $899.20 (AWW at Truss Works with 40-hour max) - $465.50 (Average Actual Wage per week at The Block) = $433.70
    - $465.50 + 433.70 = ***$899.20***
- March 5, 2023 – April 30, 2023 (Period #3).
    - TTD benefits based on Truss Works wage, as above. ***$678.09***

¶ 85 Mr. Perea's TTD Rate is $678.09 per week and his AWW for TPD, which is the sum of his average weekly earnings from The Block and his TPD benefits, is $899.20. Thus, contrary to his contention, Mr. Perea did not lose income by returning to work. As shown above, when his benefits are calculated correctly, Mr. Perea's TTD rate is lower than his total income while receiving TPD, thereby upholding the Workers' Compensation

[52] *Hensley*, ¶ 7 (internal quotation marks omitted).

Act's (WCA) policies to incentivize the return to work and pay benefits that have a relationship to the actual wages lost. Furthermore, the fact that the correct calculations are in harmony with the statute's purpose makes it less likely that a self-represented litigant will feel compelled to seek the help of lawyers and the courts.[53]

¶ 86 Accordingly, the Court enters the following:

ORDER

¶ 87 **The parties' Cross-Motions for Summary Judgment** on the correctness of their methods of calculating Mr. Perea's wage-loss benefit rates **are denied**.

¶ 88 **Mr. Perea's Motion for Summary Judgment** on the additional grounds of his entitlement to fees and penalties and the constitutionality of § 39-71-712(2), MCA, **is denied.**

¶ 89 Based on the parties' Joint Statement of Facts, the Court rules the following as a matter of law:

¶ 90 Mr. Perea is entitled to TTD benefits, based only on his wages from Truss Works, for the period November 28, 2022, to December 2, 2022, in the amount of $678.09 per week.

¶ 91 Mr. Perea is entitled to TPD benefits for the period December 3, 2022, to March 4, 2023, in the amount of $433.70 per week.

¶ 92 Mr. Perea is entitled to TTD benefits, based only on his wages from Truss Works, for the period March 5, 2023, to April 30, 2023, in the amount of $678.09 per week.

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[53] According to § 39-71-105, MCA, the public policy of the state of Montana includes but is not limited to the following:

> (1) . . . Wage-loss benefits are not intended to make an injured worker whole but are intended to provide assistance to a worker at a reasonable cost to the employer. Within that limitation, the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease.
>
> . . . .
>
> (3) A worker's removal from the workforce because of a work-related injury or disease has a negative impact on the worker, the worker's family, the employer, and the general public. Therefore, an objective of the workers' compensation system is to return a worker to work as soon as possible after the worker has suffered a work-related injury or disease.
>
> (4) Montana's workers' compensation and occupational disease insurance systems are intended to be primarily self-administering. Claimants should be able to speedily obtain benefits, and employers should be able to provide coverage at reasonably constant rates. To meet these objectives, the system must be designed to minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities.

JUDGMENT

¶ 93 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 29th day of January, 2024.

(SEAL)

/s/ Lee Bruner
JUDGE LEE BRUNER

c: Stacy Tempel-St. John
Steven W. Jennings

Submitted: November 17, 2023