IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2013 MTWCC 16

WCC No. 2008-2174

PHILLIP PETERS

Petitioner

vs.

AMERICAN ZURICH INS. COMPANY

Respondent/Insurer.

ORDER GRANTING IN PART AND DENYING IN PART PETITIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON AVERAGE WEEKLY WAGE
AND
ORDER DENYING PETITIONER'S MOTION TO AMEND PETITION AS MOOT

Summary: Petitioner argued that Respondent incorrectly calculated his average weekly wage by not including his annual bonus or vacation pay which he had accrued at the time of his industrial injury. Respondent objected, arguing that Petitioner's bonus had not fallen within four pay periods of his industrial injury and that Petitioner had not shown good cause to have his average weekly wage calculated under § 39-71-123(3)(b), MCA. Respondent further argued that Petitioner's vacation pay was correctly excluded from his average weekly wage under § 39-71-123(2)(c), MCA, and that Petitioner had either waived his right to have his bonus included in his average weekly wage calculation, or he was barred by either estoppel or laches. Petitioner further argued that if § 39-71-123(2)(c), MCA, precludes the inclusion of his vacation pay, then the statute is unconstitutional. Petitioner further contended that Respondent unreasonably refused to include his annual bonus in its calculation of his average weekly wage and that he should therefore be entitled to a penalty.

Held: Petitioner has shown good cause to have his average weekly wage calculated under § 39-71-123(3)(b), MCA, and his annual bonus is properly included. Petitioner's vacation pay is excluded from his average weekly wage calculation pursuant to § 39-71-123(2)(c), MCA. Petitioner has not proven that § 39-71-123, MCA, is unconstitutional, nor has Petitioner proven that he is entitled to a penalty under § 39-71-2907, MCA.

Topics:

Wage: Average Weekly Wage. Merely demonstrating that using a different calculation method or time period would result in a higher average weekly wage does not mean that good cause exists to do so under § 39-71-123(3)(b), MCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-123. Since Petitioner did not receive his annual bonus within the last four pay periods preceding his industrial injury, using § 39-71-123(3)(a), MCA, to calculate his average weekly wage would disregard the bonus and therefore his average weekly wage calculation would not bear a reasonable relationship to his actual wages lost. Therefore, good cause exists to calculate Petitioner's average weekly wage under § 39-71-123(3)(b), MCA.

Wage: Average Weekly Wage. Since Petitioner did not receive his annual bonus within the last four pay periods preceding his industrial injury, using § 39-71-123(3)(a), MCA, to calculate his average weekly wage would disregard the bonus and therefore his average weekly wage calculation would not bear a reasonable relationship to his actual wages lost. Therefore, good cause exists to calculate Petitioner's average weekly wage under § 39-71-123(3)(b), MCA.

Statutes and Statutory Interpretation: Legislative History. Where Petitioner raises a legislative intent argument but provides no support for the argument by way of legislative history, the Court will not find the argument persuasive.

Constitutional Law: Equal Protection. Where any given worker could receive some, all, or none of the fringe benefits identified in both classes, two separate classes of claimants do not exist and no equal protection analysis is necessary.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-2907. No grounds exist to order an "automatic" penalty under § 39-71-2907, MCA, nor may the Court award a penalty merely because a matter requires the time and resources of the Court or the opposing party.

Penalties: Generally. No grounds exist to order an "automatic" penalty under § 39-71-2907, MCA, nor may the Court award a penalty merely because a matter requires the time and resources of the Court or the opposing party.

¶ 1 Petitioner Phillip Peters moves this Court for summary judgment in his favor on the issue of the calculation of his average weekly wage and further moves that this Court award him a penalty under § 39-71-2907, MCA, for Respondent American Zurich Ins. Company's (Zurich) refusal to include his yearly bonus in its average weekly wage calculation for his claim.[1] Zurich opposes Peters' motion and responds that it correctly calculated Peters' average weekly wage pursuant to § 39-71-123, MCA, and that Peters is neither entitled to a different calculation nor to a penalty.[2]

Undisputed Facts[3]

¶ 2 On January 18, 1999, Peters suffered an industrial injury while employed by Roscoe Steel. At the time of his industrial accident, Peters earned $10.00 per hour.

¶ 3 Zurich accepted liability for the claim and has paid medical, temporary total, permanent partial, and permanent total disability benefits.

¶ 4 Peters received a $2,000 bonus each year at Roscoe Steel.

¶ 5 Peters accrued "vacation pay" at Roscoe Steel and he had the option of either taking vacation or being paid for the vacation pay.

¶ 6 From July 22, 1998, through January 18, 1999, Peters earned 60 hours of vacation pay at a rate of $10.00 per hour, for a total of $600. This time period is 25.57 weeks long and $600 divided by 25.57 equals $23.46 per week.

¶ 7 On July 7, 1999, Roscoe Steel paid Peters the vacation pay which Peters had earned prior to his industrial injury.

---

[1] Petitioner's Motion for Summary Judgment on Average Weekly Wage and Brief in Support (Opening Brief), Docket Item No. 17.

[2] Brief in Opposition to Peters' Motion for Summary Judgment and Cross-Motion for Summary Judgment (Response Brief), Docket Item No. 20.

[3] Unless otherwise noted, taken from Peters' statement of uncontested facts, Opening Brief, at 1-2. Zurich has raised no objection to the statement of uncontested facts Peters presented in the Opening Brief. Therefore, the Court accepts Peters' statement of facts as true.

¶ 8 Zurich did not include Peters' annual bonus and his accrued vacation pay in its calculation of Peters' average weekly wage.

¶ 9 In 2007, Peters asked Zurich to recalculate his average weekly wage to include his annual bonus and his accrued vacation pay. Zurich denied Peters' request.

Analysis and Decision

¶ 10 For the Court to grant summary judgment, the moving party must establish that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.[4] The material facts necessary for disposition of the issues presented in this motion are undisputed.[5] Accordingly, these issues are appropriate for summary disposition.

¶ 11 This case is governed by the 1997 version of the Montana Workers' Compensation Act (WCA) since that was the law in effect at the time of Peters' industrial accident.[6]

¶ 12 Peters raises two different issues regarding the calculation of his average weekly wage: whether the Court should order Zurich to include his annual bonus, and whether the Court should order Zurich to include Peters' "vacation pay," in its average weekly wage calculation.

¶ 13 Section 39-71-123, MCA, defines "wages" and provides the methods by which an injured worker's average weekly wage may be calculated under the WCA. The parts of § 39-71-123, MCA, pertinent to the present controversy state:

> (1) "Wages" means all remuneration paid for services performed by an employee for an employer . . . . The term includes but is not limited to:
>
> (a) commissions, bonuses, and remuneration at the regular hourly rate for overtime work, holidays, vacations, and sickness periods . . .
>
> . . . .
>
> (2) The term "wages" does not include any of the following:
>
> . . . .

---

[4] ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

[5] Although Peters styles his motion as a motion for summary judgment, his Petition for Hearing contains additional issues not addressed in his motion and brief. Therefore, I consider his motion as a motion for partial summary judgment.

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

> (c) vacation or sick leave benefits accrued but not paid . . .
>
> . . . .
>
> (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. . . .
>
> (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.

¶ 14 In his opening brief, Peters has not indicated whether Zurich calculated his average weekly wage under § 39-71-123(3)(a), MCA, or § 39-71-123(3)(b), MCA. Peters argues, however, that § 39-71-123, MCA, does not require that unpaid accrued vacation be paid within the last four pay periods.[7] In its response brief, Zurich argues, "Petitioner has not shown good cause for looking beyond the four pay periods preceding his injury."[8] From Zurich's response, I have surmised that it used § 39-71-123(3)(a), MCA, in calculating Peters' average weekly wage. Since the undisputed facts note both that Peters' bonus was paid on an annual basis and there is no indication from the evidence presented that the bonus was paid during the four pay periods preceding Peters' industrial injury, I must first determine whether good cause exists to calculate Peters' average weekly wage under § 39-71-123(3)(b), MCA.

¶ 15 Peters argues that good cause exists because including the bonus would increase his average weekly wage and there is "so much money . . . at stake" for him. He further argues, "Other Insurers do include the bonus in the average weekly wage."[9] Neither of these arguments deserves any weight. Under Peters' first argument, every claimant who would have a higher average weekly wage if it were calculated under § 39-71-123(3)(b), MCA, would be able to show good cause to use § 39-71-123(3)(b), MCA. It has been well established that in determining whether an injured worker's

---

[7] Opening Brief at 13.

[8] Response Brief at 5.

[9] Opening Brief at 3.

average weekly wage should be calculated under § 39-71-123(3)(a), MCA, or § 39-71-123(3)(b), MCA, this Court looks to § 39-71-105(1), MCA,[10] which states:

> It is an objective of the Montana workers' compensation system to provide, without regard to fault, wage supplement 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; they are intended to assist 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.

¶ 16 In *Leigh v. Montana State Fund*,[11] I rejected using the time period suggested by the injured worker for calculating his average weekly wage under § 39-71-123(3)(b), MCA, because I found that using this period would result in a higher average weekly wage than the worker's typical wages and would not bear a reasonable relationship to the actual wages lost as § 39-71-105(1), MCA, requires.[12] In the present case, demonstrating that using a different calculation method or time period would result in a higher average weekly wage calculation does not mean that good cause exists to do so.

¶ 17 As to Peters' second argument, he has provided no proof of his assertion that other insurers include bonuses in average weekly wage calculations and therefore I give this argument no weight.

¶ 18 Zurich argues that Peters has not shown good cause to look beyond the four pay periods preceding his injury and that, since Peters received no bonus during the four pay periods preceding his injury, no bonus should be included in his average weekly wage calculation. Zurich further argues that Peters "has waived his entitlement to a change in his benefits" and that Peters is barred by equitable estoppel and laches from asserting a right to change his benefits.[13]

¶ 19 In reply, Peters argues that under § 39-71-105(1), MCA, good cause exists to include his bonus in his average weekly wage calculation because inclusion of the

---

[10] *See, e.g., Leigh v. Montana State Fund*, 2010 MTWCC 37, ¶ 36; *Sturchio v. Wausau Underwriters Ins. Co.*, 2007 MTWCC 4, ¶¶ 22-23 (***aff'd*** 2007 MT 311, 340 Mont. 141, 172 P.3d 1260); *Negethon v. Montana State Fund*, 2006 MTWCC 40, ¶ 41.

[11] *Leigh v. Montana State Fund*, 2010 MTWCC 37.

[12] *Leigh*, ¶ 36.

[13] Response Brief at 5.

bonus more accurately reflects his actual wages lost.[14] Peters further argues that, pursuant to § 39-71-409, MCA, he cannot waive his right to benefits, and contends that he is not estopped from asserting his right to an increased average weekly wage calculation.[15] Peters does not address Zurich's laches argument.

¶ 20 In *Siaperas v. Montana State Fund*, the claimant received regular quarterly bonuses.[16] The Court held that good cause existed to calculate her average weekly wage under § 39-71-123(3)(b), MCA, because the claimant's last four pay periods did not reflect her typical earnings and using the calculation method found in § 39-71-123(3)(a), MCA, disregarded the substantial bonuses the claimant regularly received.[17] Likewise in the present case, since Peters did not receive his annual bonus within the last four pay periods preceding his industrial injury, using § 39-71-123(3)(a), MCA, to calculate his average weekly wage would disregard the annual bonus he regularly received and therefore his average weekly wage calculation would not bear a reasonable relationship to his actual wages lost. Since using § 39-71-123(3)(a), MCA, to calculate Peters' average weekly wage would result in a calculation which does not bear a reasonable relationship to actual wages lost, good cause exists to calculate Peters' average weekly wage under § 39-71-123(3)(b), MCA.

¶ 21 As noted above, § 39-71-123(3)(b), MCA, provides for an additional period of time, not to exceed one year prior to the date of injury, to be used in calculating an injured worker's average weekly wage. Since Peters received his bonus on an annual basis, and with no argument from the parties suggesting the time period to use, I conclude that Peters' average weekly wage should be calculated pursuant to § 39-71-123(3)(b), MCA, using a time period of one year prior to his date of injury.

¶ 22 Zurich advances several equitable arguments as to why Peters should be foreclosed from now asserting the right to have his annual bonus included in his average weekly wage calculation: waiver, equitable estoppel, and laches.

¶ 23 "Waiver is an equitable doctrine, applicable when there is an intentional or voluntary relinquishment of a known right, claim or privilege, or such conduct as

---

[14] Petitioner's Combined Brief: 1. Supporting Petitioner's Motion for Summary Judgment on the Average Weekly Wage and 2. Opposing Respondent's Motion for Summary Judgment on Social Security Offset (Reply Brief), Docket Item No. 27, at 4.

[15] Reply Brief at 5-6.

[16] *Siaperas v. Montana State Fund*, 2004 MTWCC 4, ¶ 29.

[17] *Siaperas*, ¶ 51-52.

warrants an inference of the relinquishment of such a right."[18] "To establish a knowing waiver, the party asserting waiver must demonstrate the other party's knowledge of the existing right, acts inconsistent with that right, and resulting prejudice to the party asserting waiver."[19] Similarly, both equitable estoppel and laches require that the party asserting the benefit of these doctrines establish that it changed its position for the worse or was otherwise prejudiced by the other party's conduct.[20]

¶ 24 Although Zurich does not specifically address the prejudice element in its waiver or laches arguments, it does address the prejudice issue in its estoppel argument. Because a showing of prejudice is an essential element of all three doctrines, the three doctrines are treated collectively.

¶ 25 Zurich argues: "[Zurich] has been prejudiced by [Peters'] failure to raise this issue [incorrect average weekly wage calculation] as it has paid benefits based on what it fairly understood to be the appropriate payment for all this time – to now be required to pay additional benefits that it was unaware of would be unfairly prejudicial."[21] Beyond this assertion, Zurich does not expound as to how it would be prejudicial to require it to now pay the benefits to which it should have paid since the inception of Peters' claim.

¶ 26 In *Young v. Montana State Fund,*[22] I held that an insurer was not equitably estopped from recouping an overpayment of benefits to the extent that the claimant would not suffer a loss if ordered to repay the funds.[23] In that respect, I held that the claimant could not show prejudice from his use of the overpayment to pay bills he would have had to pay irrespective of the overpayment of benefits.[24] Hitting even closer to home, I relied on my previous order in *Young* in a contemporaneous order in this case in holding that Zurich was not estopped from recovering an overpayment of benefits to

---

[18] *Sperry v. Montana State Univ.*, 239 Mont. 25, 30, 778 P.2d 895, 898 (1989).

[19] *VanDyke Constr. Co. v. Stillwater Mining Co.*, 2003 MT 279, ¶ 15, 317 Mont. 519, 78 P.3d 844. *See also, Tynes v. Bankers Life Co.*, 224 Mont. 350, 374, 730 P.2d 1115, 1130 (1986).

[20] *City of Whitefish v. Troy Town Pump, Inc.*, 2001 MT 58, ¶ 15, 304 Mont. 346, 21 P.3d 1026 (estoppel). *Cole v. State ex rel. Brown*, 2002 MT 32, ¶ 25, 308 MT 265, 42 P.3d 760 (laches).

[21] Response Brief at 7.

[22] *Young v. Montana State Fund*, 2008 MTWCC 2.

[23] *Id.*, ¶ 35.

[24] *Id.*

Peters because Peters' general averment that he had spent the overpayment was insufficient to establish prejudice.[25]

¶ 27 In *Young*, I noted that the claimant's receipt of funds to which he was not entitled essentially amounted to an interest free loan. Therefore, I held that the claimant had not established that he would be prejudiced as a result of being required to repay the overpayment. I fail to appreciate a distinction in this case which would call for a different result. Zurich has not demonstrated how it would be prejudiced by paying the benefits it should have had to pay from the beginning but for the miscalculation of Peters' average weekly wage.

¶ 28 In addition to the inclusion of his annual bonus in his average weekly wage calculation, Peters further contends that certain vacation pay which he had accrued at the time of his industrial injury should be included in his average weekly wage. Peters argues that Zurich misinterpreted § 39-71-123(2)(c), MCA, which holds that "wages" as defined in § 39-71-123, MCA, does not include, "**[v]acation** . . . benefits **accrued but not paid**."[26] At the time of his industrial injury, Peters had accrued 60 hours of vacation pay which he had not used, and some months after his industrial injury, Peters' employer paid him $600 for the value of that vacation pay.[27] Peters argues that this vacation pay was therefore both "accrued" and "paid" and thus does not fall under the statutory exception. Peters therefore contends that Zurich erred in not including this vacation pay as part of Peters' average weekly wage.[28]

¶ 29 Zurich responds that it correctly excluded Peters' accrued vacation pay from the average weekly wage calculation because the vacation pay had not been paid at the time of Peters' industrial injury. Zurich notes that similar facts existed in *Briese v. Ace Am. Ins. Co.*, and this Court held that vacation benefits not paid prior to an injury are excluded from the definition of wages and that vacation pay "accrued preinjury but paid post-injury" are properly excluded from the average weekly wage calculation.[29]

¶ 30 In *Briese*, the injured worker accrued 2.4 hours of vacation time during the four pay periods prior to his industrial injury. Sometime after the date of his injury, his

---

[25] *Peters v. American Zurich Ins. Co*., 2013 MTWCC 17, ¶ 38.

[26] Opening Brief at 4 (emphasis in Opening Brief).

[27] *See* Undisputed Facts, above.

[28] Opening Brief at 5.

[29] Response Brief at 8; *Briese v. Ace Am. Ins. Co.*, 2009 MTWCC 5, ¶ 8.

employer paid him for his accrued vacation time.[30] The injured worker then argued that the vacation pay he accrued during the four pay periods prior to his injury should be included in his average weekly wage calculation because the vacation pay was paid, albeit post-injury.[31] I rejected this argument, reasoning that when reading § 39-71-123, MCA, as a whole, vacation benefits paid subsequent to an industrial injury are not part of the period of time ***preceding*** the injury which the statute uses in calculating the average weekly wage. I therefore concluded the claimant was not entitled to an increase in his wage calculation to include vacation pay accrued preinjury but paid post-injury.[32]

¶ 31 Peters acknowledges that his situation is factually similar to *Briese*. He asserts, however, that he is raising a new argument which was not raised in *Briese*: Peters contends that § 39-71-123, MCA, focuses on "earnings" and does not limit earnings to what is "paid" in the last four pay periods. Peters further argues that § 39-71-123(2)(c), MCA, is intended to apply only to a "'use it or lose it' scenario" where a worker cannot "cash out" accrued vacation but can opt only to either take the time off or lose it.[33]

¶ 32 I am not persuaded by Peters' first new argument. The language of § 39-71-123(2)(c), MCA, itself focuses on what is "paid." As to Peters' second new argument, he appears to raise a legislative intent argument; however, he provides no support by way of legislative history. Therefore I find his argument unpersuasive as it is unsupported by any evidence.

¶ 33 Peters has not distinguished his situation from that of *Briese*, nor has he raised any persuasive arguments as to why my interpretation of § 39-71-123(2)(c), MCA, in *Briese* should not stand. I therefore conclude he is not entitled to have his accrued vacation time included in his average weekly wage calculation.

¶ 34 Peters further argues, however, that if I reach this conclusion, I must further conclude that § 39-71-123, MCA, is unconstitutional as applied to the facts of his case. Peters alleges that if § 39-71-123(2)(c), MCA, is interpreted to disallow the inclusion of

---

[30] *Briese*, ¶¶ 3c, 3d.

[31] *Briese*, ¶ 6.

[32] *Briese*, ¶ 8.

[33] Reply Brief at 7.

his accrued vacation pay, then he has been denied equal protection under Mont. Const. art. II, § 4 and due process under Mont. Const. art. II, § 17.[34]

¶ 35 Peters argues that § 39-71-123, MCA, is unconstitutional because, "some workers receive the value of fringe benefits (free meals, etc.) within the benefit rate [and o]ther workers are denied the value of fringe benefits (accrued vacation)," while no rational basis exists for the distinction between these two classes.[35] In *Briese*, the injured worker raised a similar constitutional argument against this statute, arguing that the statute violated equal protection because it excluded certain retirement benefits under § 39-71-123(2)(b)(i), MCA (2003). In that matter, I stated:

> In this case, Petitioner has identified the classes at issue as: (1) injured workers who receive part of their compensation in fringe benefits such as room and board and/or free meals; and (2) injured workers who receive part of their compensation in a savings/401(k) plan. Petitioner's challenge must fail because he has attempted to artificially create two classes where only one exists. . . . In order to be two distinct classes, the alleged class members must indeed be distinguishable from each other. . . . [T]he mere fact that certain fringe benefits are or are not included does not create distinct classes of workers. Any given individual may receive some, all, or none of the fringe benefits Petitioner has identified in ***both*** classes. . . . Since there are not two separate classes of claimants, therefore, an equal protection analysis is not necessary.[36]

¶ 36 Likewise in the present case, Peters has not identified two separate classes of claimants: just as in *Briese*, where a worker could receive some, all, or none of the fringe benefits the injured worker identified in both classes, in Peters' case, a worker could receive some, all, or none of the fringe benefits Peters has identified in both classes. Since two separate classes of claimants do not exist, an equal protection analysis is not necessary in this case.

¶ 37 Peters further argues that § 39-71-123, MCA, is unconstitutional because it violates his right to due process. In support of his position, Peters cites generally to

---

[34] Opening Brief at 6.

[35] Opening Brief at 6.

[36] *Briese*, ¶ 21. (Citations omitted. Emphasis in original.)

Bowers v. State Compen. Ins. Fund.[37] Peters' argument is little more than a conclusory statement that § 39-71-123, MCA, violates due process. In the absence of any analysis of his position, Peters has not met his heavy burden to prove that § 39-71-123, MCA, violates his right to due process.

¶ 38 Peters further argues that he is entitled to a 20% penalty against Zurich pursuant to § 39-71-2907, MCA, for Zurich's failure to include his annual bonus in his average weekly wage calculation.[38] Peters argues that the inclusion of this penalty should be "automatic" because Zurich consumed the time and resources of the Court and himself. Peters further argues that Zurich has no "proper excuse" for not including his annual bonus in the average weekly wage calculation and that Zurich's failure to do so was unreasonable.[39]

¶ 39 Under the pertinent provisions of § 39-71-2907, MCA, I may increase by 20% the full amount of benefits due a claimant during a period of delay or refusal to pay when an insurer unreasonably delays or refuses to make payment. Under this statute, there are no grounds to order an "automatic" penalty as Peters suggests, nor may the Court award a penalty merely because a matter requires the time and resources of the Court or the opposing party. A penalty may be awarded only if I find that the insurer unreasonably delayed or refused to pay benefits due.

¶ 40 In the present case, Peters argues that Zurich unreasonably failed to include his annual bonus in its average weekly wage calculation. However, as Zurich pointed out in its brief, Peters' bonus could only be included in the average weekly wage calculation if Peters' average weekly wage were calculated under § 39-71-123(3)(b), MCA. As Zurich further set forth, good cause must be shown in order to use the calculation method of § 39-71-123(3)(b), MCA. Although I rejected Zurich's arguments that either waiver, estoppel, or laches barred a recalculation of Peters' average weekly wage to include his bonus, they were colorable arguments nonetheless. Therefore, although I have concluded that Peters' average weekly wage should be calculated under § 39-71-123(3)(b), MCA, with his annual bonus included, I also conclude that Zurich did not act unreasonably when it failed to include Peters' bonus in its initial average weekly wage calculation.

---

[37] *Bowers v. State Compen. Ins. Fund*, 1998 MTWCC 64.

[38] Opening Brief at 1.

[39] Opening Brief at 13.

¶ 41 As I determined that vacation pay is excluded from Petitioner's average weekly wage calculation pursuant to § 39-71-123(2)(c), MCA, Petitioner's motion to amend his petition is **denied as moot**.

ORDER

¶ 42 Petitioner's motion for partial summary judgment on the issue of the calculation of his average weekly wage is **GRANTED** in part. Respondent shall calculate Petitioner's average weekly wage under § 39-71-123(3)(b), MCA, using a period of one year prior to Petitioner's industrial injury and include Petitioner's annual bonus within the calculation.

¶ 43 Petitioner's motion for partial summary judgment on the issue of the calculation of his average weekly wage is **DENIED** in part. Respondent shall not include Petitioner's accrued vacation pay in its calculation of Petitioner's average weekly wage.

¶ 44 Petitioner's motion for partial summary judgment on the issue of his entitlement to a penalty pursuant to § 39-71-2907, MCA, is **DENIED**.

¶ 45 Petitioner's motion to amend his petition is **DENIED AS MOOT**.

DATED in Helena, Montana, this 31st day of July, 2013.

(SEAL)

JAMES JEREMIAH SHEA
JUDGE

c: Chris J. Ragar
Joe C. Maynard

Submitted: May 24, 2010 & February 24, 2011