IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 4

WCC No. 2006-1583

AUGUSTINA STURCHIO

Petitioner

vs.

WAUSAU UNDERWRITERS INSURANCE COMPANY

Respondent/Insurer.

DECISION AND JUDGMENT

Appealed to Supreme Court February 12, 2007

Affirmed 12/06/07

Summary: Petitioner suffered a work-related injury on June 11, 2005. At the time of her injury, Petitioner held five concurrent employments. Petitioner and Respondent disagree as to whether § 39-71-123, MCA, requires the same calculation method to be used in determining the average weekly wage for every concurrent employment, and disagree about the weekly rate of Petitioner's TTD benefits.

Held: Petitioner correctly interprets § 39-71-123, MCA, to allow for different calculation methods to be used for each concurrent employment, according to the specific facts of each employment. Using Petitioner's average weekly wage calculations for four of her five employments, and the Court's own calculations for a fifth employment, the Court concludes Petitioner is entitled to a weekly rate of $318.48 in TTD benefits.

Topics:

> **Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-123.** Where a claimant has multiple concurrent employments, each employment is to be considered individually and the average weekly wage of each employment is to be calculated by whatever

method found in § 39-71-123, MCA, best suits the facts of that particular employment.

Wages: Concurrent Employment. Where a claimant has multiple concurrent employments, each employment is to be considered individually and the average weekly wage of each employment is to be calculated by whatever method found in § 39-71-123, MCA, best suits the facts of that particular employment.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-123. Section 39-71-123, MCA, sets forth the calculation methods by which one may achieve the reasonable relationship to actual wages lost as mandated by § 39-71-105(1), MCA. Although the majority of employments may allow the four-pay-periods calculation method to determine a wage-loss benefit which bears a reasonable relationship to actual wages lost, the legislature recognized that not all employment situations will fit within this formula. Occasionally, the wages of the previous four pay periods do not bear a reasonable relationship to actual wages lost.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-105. Section 39-71-105(1), MCA, mandates a reasonable relationship between benefits and actual wages lost, which the calculation methods found in § 39-71-123, MCA, are intended to achieve. Where a claimant has multiple concurrent employments, each employment is to be considered individually and the average weekly wage calculated by whatever method found in § 39-71-123, MCA, best maintains a reasonable relationship between benefits and actual wages lost.

Wages: Average Weekly Wage. Section 39-71-105(1), MCA, mandates a reasonable relationship between benefits and actual wages lost, which the calculation methods found in § 39-71-123, MCA, are intended to achieve. Where a claimant has multiple concurrent employments, each employment is to be considered individually and the average weekly wage calculated by whatever method found in § 39-71-123, MCA, best maintains a reasonable relationship between benefits and actual wages lost.

Wages: Average Weekly Wage. This Court has previously held that if a prior employment was terminated and a claimant was not guaranteed reemployment with the same employer, only the wages earned after the rehire may be used under § 39-71-123(3)(b), MCA, to calculate average weekly wage. *Brodie v. Liberty Northwest Ins. Corp.*, 2001 MTWCC 30, ¶ 6. Where fewer than four pay periods occurred between Petitioner's rehire date

and the date of her industrial injury, the Court calculated her average weekly wage by dividing the hours Petitioner worked from the date of her rehire into the number of weeks she worked.

¶ 1 Petitioner Augustina Sturchio petitions this Court for resolution of the average weekly wage calculation to be used in determining her weekly rate of temporary total disability (TTD) benefits. The parties have agreed to submit this case for decision based on the stipulated facts set forth below.

STIPULATED FACTS[1]

¶ 2 Petitioner injured her back on June 11, 2005, while performing her duties as an on-call certified nursing assistant (CNA) for Priorcare at Liberty County Nursing Home in Chester, Liberty County, Montana.

¶ 3 Respondent accepted liability for the claim and has paid medical benefits and some wage-loss benefits.

¶ 4 As a result of this injury, Petitioner began treating with Dr. Lance Stewart on June 17, 2005, and was taken off work for two weeks.

¶ 5 Dr. Stewart released Petitioner to light-duty work on July 6, 2005. Petitioner performed some light-duty work between July 7, 2005, and August 31, 2005, at which point no more light-duty work was available to her.

¶ 6 The following wage-loss benefits have been paid to Petitioner by Respondent:

Benefit Type/Date	Benefit Rate	Amount Paid by Respondent
TTD & TPD 6/16/05 - 8/31/05	$224.80 per week	$2,472.80
TTD 9/1/05 - 11/18/05		$0.00
TTD 11/19/05 - 1/20/06	$450.44 per week	$4,053.96
TTD 1/21/06 - 2/17/06	$343.00 per week	$1,372.00
TTD 2/18/06 - 9/15/06	$224.80 per week	$6,744.00

[1] All stipulated facts to be decided by the Court are taken from the parties' Statement of Agreed Facts, Docket Item No. 18.

TOTAL		$14,642.76

¶ 7 Respondent continues to pay Petitioner's TTD benefits from September 15, 2006, at the rate of $224.80 per week.

¶ 8 Petitioner started working for Priorcare in March 2004. Petitioner was paid weekly by Priorcare. Petitioner was on vacation for the week preceding her injury and thus received no pay during that week.

¶ 9 At the time of her work-related injury, Petitioner had four additional concurrent employers: Prairie Travelers, Toole County Ambulance, Marias Medical Center ("Marias"), and Saints Nursing.

¶ 10 Petitioner started working for Prairie Travelers as a traveling on-call CNA in November 2004. She was paid sporadically, as work was available and as she was available.

¶ 11 Petitioner started working for Toole County Ambulance as an on-call EMT First Responder in September 2004.

¶ 12 Petitioner started working for Marias as an on-call CNA on or about March 21, 2003. Similar to her position with Prairie Travelers, she was paid sporadically, as work was available and as she was available. She resigned this position on November 19, 2004, but resumed it again in May 2005. She received shift differential pay for certain shifts and she also worked overtime hours.

¶ 13 Petitioner started working for Saints Nursing as a traveling CNA on or about January 18, 2005. Again, she was paid as work was available and as she was available.

¶ 14 But for her injury and light-duty restrictions, Petitioner could have continued to work for all five of her employers.

¶ 15 The mediation provisions set forth in § 39-71-2401, MCA, have been met.

ISSUES

¶ 16 The parties agree that the following are the issues to be decided:

a. Whether the same average weekly wage calculation method under subsections (3) and (4) of § 39-71-123, MCA, has to be used for time-of-injury employment and all concurrent employments.

b. What is the weekly rate of temporary total disability benefits that Petitioner is entitled to receive?[2]

DISCUSSION

¶ 17 This case is governed by the 2003 version of the Montana Workers' Compensation Act as that was the law in effect at the time of Petitioner's injury.[3]

¶ 18 Petitioner and Respondent disagree as to how the average weekly wage calculation methods found in § 39-71-123(3)-(4), MCA, are to be used when an injured worker has concurrent employments. Petitioner argues that each employment is to be considered individually and the average weekly wage of each employment is to be calculated by whatever method found in § 39-71-123, MCA, best suits the facts of that particular employment. Respondent argues that the average weekly wage of all concurrent employments must be calculated using a single calculation method found within § 39-71-123, MCA.

¶ 19 Section 39-71-123, MCA, states in pertinent part:

> (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 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.
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> (4) (a) For the purpose of calculating compensation benefits for an employee working concurrent employments, the average actual wages must be calculated as provided in subsection (3). As used in this subsection, "concurrent employment" means employment in which the employee was actually employed at the time of the injury and would have continued to be employed without a break in the term of employment if not for the injury.
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> . . . .

[2] Statement of Agreed Facts at 3.

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

> (c) The compensation benefits for an employee working at two or more concurrent remunerated employments must be based on the aggregate of average actual wages of all employments, except for the wages earned by individuals while engaged in the employments outlined in 39-71-401(3)(a) who elected not to be covered, from which the employee is disabled by the injury incurred.

¶ 20 Respondent calculated Petitioner's average weekly wage by using the four pay periods prior to the date of injury for every one of her five concurrent employments. Respondent states that it would be amenable to calculating Petitioner's average weekly wage by going back in time up to one year for all her employments.[4] However, Respondent maintains that only one method of calculation may be used for all concurrent employments, and that Petitioner cannot use the four-pay-periods method of § 39-71-123(3)(a), MCA, for some employments and the longer-period-of-time method described in § 39-71-123(3)(b), MCA, for others.

¶ 21 Respondent argues that to allow each concurrent employment's average weekly wage to be calculated using different methods would require this Court to insert language into § 39-71-123(3), MCA. Respondent relies upon *King v. State Compensation Ins. Fund,*[5] in which, it argues, the Montana Supreme Court rejected a liberal construction of § 39-71-123, MCA, which would have maximized a claimant's TTD rate by using only three pay periods preceding her injury instead of four.[6] Petitioner argues that *King* is not relevant to the issue at hand because she is not asking for a new statutory exception – allowing a period *shorter than* four pay periods – as was requested in *King*, nor does *King* address the issue of using different calculation methods for different concurrent employments.

¶ 22 Pursuant to § 39-71-105(1), MCA, an objective of Montana's workers' compensation system is to provide wage-loss benefits to a worker suffering from a work-related injury. Specifically, the statute states:

> 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. (Emphasis added.)

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[4] Respondent/Insurer's Reply Brief at 3. Although Respondent calls this document a "Reply," it is actually the response brief to Petitioner's Initial Brief Submitting Case on Agreed Facts.

[5] *King v. State Compensation Ins. Fund*, 282 Mont. 335, 938 P.2d 607 (1997).

[6] *King*, 282 Mont. at 338, 938 P.2d at 609.

¶ 23 Section 39-71-123, MCA, sets forth the calculation methods by which one may achieve the reasonable relationship to actual wages lost as mandated by § 39-71-105(1), MCA. In enacting this statute, the legislature did not create a one-size-fits-all formula. Although the majority of employments may allow the less complex four-pay-periods calculation method to determine a wage-loss benefit which bears a reasonable relationship to actual wages lost, the legislature recognized that not all employment situations will fit within this formula. As prior cases have demonstrated, there are occasions when the wages of the previous four pay periods do not bear a reasonable relationship to actual wages lost.[7] The difficulty with the approach Respondent urges is that it would sacrifice the ability to calculate wage-loss benefits so that they bear a reasonable relationship to actual wages lost by limiting the ability of the parties to use statutorily-approved calculation methods on a case-by-case basis.

¶ 24 Another difficulty with Respondent's interpretation of the statute is how one would determine which statutorily-described calculation method to use for all employments when, as is the case here, some of those employments would have been calculated using the method described in § 39-71-123(3)(a), MCA, while others would have been calculated using the exception found in § 39-71-123(3)(b), MCA. This would require injured workers with concurrent employments to sacrifice the reasonable relationship between their wage-loss benefits and their actual wages lost for the sake of using a single calculation method, when the express language of § 39-71-123, MCA, recognizes the validity of using different calculation methods for different employment situations.

¶ 25 Petitioner identifies three acceptable methods of calculating average weekly wage pursuant to § 39-71-123, MCA.[8] The first is the general rule which provides that average actual earnings for the four pay periods immediately preceding the injury constitute the employee's wages for benefit calculation purposes. Petitioner argues that this is the appropriate calculation method to use for her employments with Priorcare and Toole County Ambulance because her pay was fairly regular for these two jobs.

¶ 26 The second calculation method Petitioner identifies is only applicable if the term of employment for that employer was less than four pay periods. Although Petitioner argues that her employment with Marias more appropriately fits into the third category, described below, the Court determines Petitioner's employment with Marias fits into this exception.

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[7] *See, e.g. Siaperas v. Montana State Fund*, 2004 MTWCC 4 (claimant's wages for the previous four pay periods do not accurately reflect her wages since she received substantial quarterly bonuses); *Lindskog v. State Compensation Ins. Fund*, 2000 MTWCC 61 (significant fluctuations in claimant's semi-monthly pay led to use of the previous years' wages in calculating average weekly wage where the last four pay periods overstated earnings).

[8] Petitioner's Initial Brief Submitting Case on Agreed Facts at 5.

¶ 27 As stated in the stipulated facts above, Petitioner started working for Marias as an on-call CNA on or about March 21, 2003. She resigned that position on November 19, 2004, and started work at that position again in May 2005. Because four pay periods did not occur between May 2005 and Petitioner's industrial injury, Petitioner argues that the Court should look back to Petitioner's prior period of employment with Marias and use a longer time span to calculate her average weekly wage. However, Respondent points out that in *Brodie v. Liberty Northwest Ins. Corp.,*[9] this Court held that if a prior employment was terminated and a claimant was not guaranteed reemployment with the same employer at some time in the future, only the wages earned after the claimant was rehired may be used under § 39-71-123(3)(b), MCA.[10] Therefore, the Court cannot use Petitioner's earlier employment to calculate her average weekly wage at Marias. However, under Respondent's interpretation of § 39-71-123, MCA, this Court would be restricted to calculating Petitioner's average weekly wage with Marias to the general rule of using four pay periods. Since Petitioner was not employed for four pay periods, it is not possible to do so. This further reinforces the Court's conclusion that Respondent's interpretation of § 39-71-123, MCA, is incorrect.

¶ 28 Regarding Petitioner's Marias employment, Petitioner completed only one pay period aside from the pay period in which she suffered her industrial injury. During that pay period, Petitioner worked 8 hours for which she received $77.20, or $9.65 per hour.[11] From the stubs submitted, it appears that Petitioner was paid on a monthly basis. In June 2005, Petitioner's pay stub indicates that she worked 26.5 hours for Marias between June 1 and June 11, the day of her work-related injury. Although Petitioner asserts that the Court cannot consider this pay stub in its calculations because it includes the date of injury, nothing in the statute prevents the Court from so doing. Five and a half weeks passed between May 1, 2005, and Petitioner's injury on June 11, 2005. During that time, Petitioner worked 34.5 hours for Marias at a rate of $9.65 per hour. This works out to an average weekly wage of $60.53.[12]

¶ 29 The third calculation method Petitioner identifies is codified in § 39-71-123(3)(b), MCA. 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 one year prior to the date of injury, by the number of weeks in that period, including periods of idleness

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

[10] *Brodie*, ¶ 6.

[11] Exhibit 4 to Statement of Agreed Facts at 7.

[12] *34.5 x $9.65 = $332.93, $332.93 ÷ 5.5 = $60.53.*

or seasonal fluctuations. Petitioner argues that her employment with Prairie Travelers and Saints Nursing both fit into this category. Petitioner's work with both these employers was sporadic and she worked on an as-needed and as-available basis.

¶ 30 Petitioner argues that, because of the sporadic nature of her work with both Prairie Travelers and Saints Nursing, the calculation method which would provide the most accurate pay history would be to use her entire period of employment with each of those entities and, pursuant to § 39-71-123(3)(b), MCA, divide the total earnings by the period of employment, which was seven months for Prairie Travelers, and four months for Saints Nursing.

¶ 31 Petitioner has provided the Court with her own calculations for each of her employments. Except for drawing the Court's attention to *Brodie*, Respondent has not raised any concerns about the accuracy of her calculations, and Respondent has not proposed alternate calculations on a job-by-job basis. Therefore, with the exception of the Marias employment, the Court has no reason to reject Petitioner's calculations for her average weekly wage at Priorcare, Toole County Ambulance, Prairie Travelers, and Saints Nursing, which Petitioner calculated as $177.07, $33.42, $115.98, and $90.70, respectively.

¶ 32 Pursuant to § 39-71-123(4)(c), MCA, the compensation benefits for an employee working at two or more concurrent remunerated employments must be based on the aggregate of average actual wages of all employments. In Petitioner's case, this aggregate is $477.70.[13] Pursuant to § 39-71-701(3), MCA, weekly compensation benefits for injury producing temporary total disability are 66 2/3% of the wages received at the time of injury. Therefore, Petitioner is entitled to a weekly rate for TTD benefits of $318.48.[14]

¶ 33 Furthermore, as the prevailing party, Petitioner is entitled to her costs.[15]

ORDER AND JUDGMENT

¶ 34 The same average weekly wage calculation method under subsections (3) and (4) of § 39-71-123, MCA, **does not** have to be used for time-of-injury employment and all concurrent employments.

¶ 35 The weekly rate for TTD benefits that Petitioner is entitled to receive is $318.48.

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[13] *$177.07 + $33.42 + $115.98 + $90.70 + $60.53 = $477.70.*

[14] *$477.70 x 66.67% = $318.48.*

[15] *Marcott v. Louisiana Pac. Corp.*, 1994 MTWCC 109 (*aff'd after remand at* 1996 MTWCC 33).

¶ 36 Petitioner is entitled to her costs.

¶ 37 This JUDGMENT is certified as final for purposes of appeal.

¶ 38 Any party to this dispute may have twenty days in which to request reconsideration from this DECISION AND JUDGMENT.

DATED in Helena, Montana, this 30th day of January, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: J. Kim Schulke
Larry W. Jones
Submitted: October 26, 2006