

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2022 MTWCC 5

WCC No. 2020-5321

CATHERINE THOMAS

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner argues that there is good cause to use additional earnings, from before the last four pay periods before her injury, to calculate her wages. Petitioner contends that her wages during the last four pay periods before her injury were lower than they should have been because her employer created intolerable working conditions that drove her to transfer positions and start working a part-time schedule and then retaliated against her decision to transfer by giving her fewer hours than she was supposed to work. Respondent argues that the last four pay periods accurately reflect Petitioner's employment history because they are the only pay periods during which Petitioner was working in the time-of-injury position. Respondent contends that looking back further would distort that history because Petitioner's previous position had different hours and a different rate of pay.

Held: There is good cause to use additional earnings, from before the last four pay periods before Petitioner's injury, to calculate her wages. Petitioner's wages during the last four pay periods before her injury were lower than they should have been because her employer created intolerable working conditions that drove her to transfer positions and start working a part-time schedule and then retaliated against her decision to transfer by giving her fewer hours than she was supposed to work. As a result, Petitioner's wages during those pay periods do not accurately reflect her employment history, which, under the facts of this case, is comprised of her earnings from her prior position.

¶ 1 The trial in this matter was held on June 7, 2021, and June 22, 2021, via Zoom. Petitioner Catherine Thomas was present and was represented by Thomas C. Bulman. Mark D. Meyer represented Respondent Montana State Fund (State Fund). Sarah Steinmetz, claims adjuster, was present on behalf of State Fund.

¶ 2 Exhibits: This Court admitted Exhibits 1 through 12 without objection.

¶ 3 Witnesses and Depositions: This Court admitted Thomas's deposition into evidence. Thomas, Steinmetz, Dennis Sines, and Dan Martin were sworn and testified at trial.

¶ 4 Issues Presented: This Court restates the issues set forth in the parties' Pretrial Order as follows:

Issue One: Is Thomas entitled to recalculation of her average weekly wage and payment of additional indemnity benefits?

Issue Two: Is Thomas entitled to costs, attorney fees, and a penalty?

FINDINGS OF FACT

¶ 5 This Court finds the following facts by a preponderance of the evidence.¹

¶ 6 On September 1, 2016, Thomas became a full-time bus driver for Karst Stage, Inc. (Karst Stage).

¶ 7 Karst Stage operates the bus systems of the cities of Bozeman and Big Sky. It also operates shuttles from the Bozeman airport to Big Sky and West Yellowstone, as well as charter buses. Karst Stage has its main office in Bozeman and a second office at the airport.

¶ 8 Winter is always the busiest season for Karst Stage because of Big Sky's ski-related offerings. And, between mid-December and mid-April every year, the company has fewer drivers than can meet the increased demand for its services. To deal with the driver shortage, it regularly gives all employees with commercial driver's licenses (CDLs) the opportunity to work overtime and borrows drivers from transit systems in other parts of the country to cover any remaining hours.

¶ 9 Over her first winter season, Thomas drove the maximum number of hours she was allowed each day, up to 70 hours a week.

¹ Ordinarily, the claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks. *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 201, 598 P.2d 1099, 1105-06 (1979) (citations omitted).

¶ 10 In September of 2017, Thomas transferred to the airport office to become a dispatcher. The position was full-time and paid \$16.50 an hour. Thomas spent the majority of her time performing the duties of a dispatcher. However, she also filled in periodically, driving airport routes when the company was short on drivers. For those jobs, she was paid \$14.50 an hour.

¶ 11 In September 2018, Karst Stage hired Sandra Martin (Sandra) to manage the airport office, which included supervising Thomas.

¶ 12 Shortly after she was hired, Sandra confided in Thomas that she was having an affair with the Assistant General Manager, Dennis Sines, who was her direct supervisor.

¶ 13 Over the course of the affair, Thomas's work conditions at the airport became intolerable. Sandra regularly left the office with Sines, leaving Thomas to pick up the slack while she was gone. And when she returned, often in tears, she expected Thomas to be there to listen and offer emotional support. Thomas grew frustrated as she did not approve of the affair and this arrangement gave her little time to attend to her own work. Sandra also asked her to lie to their coworkers to cover up the affair, which "morally went against everything [Thomas] believe[s] in."

¶ 14 Thomas could not complain to anyone at Karst Stage about the affair without risking retaliation. Her supervisors were the ones responsible for it, and their supervisor, Dan Martin (Martin), the owner of Karst Stage, knew about the affair and condoned it.

¶ 15 In the summer of 2019, Thomas discovered that Sandra was sharing their personal conversations with Sines, who, in turn, was sharing them with Martin. Thomas concluded that she could not continue to work under these conditions. To remove herself from the intolerable working conditions, Thomas decided to transfer back to a bus driving position.

¶ 16 Thomas told Sines that the stress of being a dispatcher was too much and she wanted to transfer back to her old position. Thomas did not specify what was causing her stress, because she wanted to avoid directly confronting Sines about the affair. She asked to work part time, hoping it would help her recover from the whole situation, including her disappointment at having to leave her "dream job." While Thomas also wanted more time to take care of her husband, who is a disabled veteran, she would not have requested the transfer or the part-time schedule had it not been for the intolerable working conditions, which Sandra and Sines created, and Martin allowed to continue.

¶ 17 Karst Stage granted Thomas's request to transfer back to bus driving, scheduling her to work 21.75 hours a week at \$17 an hour, or, for charters, \$14.50 an hour plus tips. Although she wanted to work part-time at first, Thomas expected that she would work a full overtime schedule, i.e., 70 plus hours a week, throughout the winter season.

¶ 18 Sandra and Sines believed that Thomas's departure would disrupt the status quo, making it harder for them to carry on their affair. During Thomas's last week as a

dispatcher and her first week as a bus driver, Sandra and Sines retaliated against her. Although Thomas wanted to work and there was plenty of work, Sandra and Sines made sure Thomas saw little of it. They did not schedule her to work, told drivers not to ask her to be a substitute, and directed assignments, including opportunities to drive charters and make tips, away from Thomas and toward others instead. As a direct result of this retaliation, Thomas's hours and earnings for the pay period of August 3 through August 16, 2019, were abnormally low, 23.7 hours and \$385.21, respectively. Had it not been for the retaliation, Thomas would have worked in excess of 50 hours and earned in excess of \$900 in that pay period.

¶ 19 Over the five weeks after that pay period, Thomas drove an average of 27.91 hours a week and had one opportunity to drive a charter. However, notwithstanding her continued expectation that she would work more in the winter, Thomas requested fewer hours and began driving an average of 21.31 hours a week beginning September 23, 2019.

¶ 20 On the morning of October 10, 2019, Thomas suffered an industrial injury.

¶ 21 As it had been in the past, the winter season that followed, December 15, 2019, through April 15, 2020, was a busy one for Karst Stage. And, as it usually did, the company gave its CDL-holding drivers the opportunity to work overtime and borrowed drivers from other states to cover the remaining hours.

¶ 22 State Fund accepted liability for Thomas's claim. Sarah Steinmetz was the claims examiner.

¶ 23 Steinmetz spoke with Thomas, Sines, and Martin; confirmed Thomas's current hours and pay; and requested her pay stubs. She was aware of Thomas's recent job transfer and the reasons for it. Steinmetz used the last four pay periods before Thomas's injury to calculate her wages.

¶ 24 As correctly calculated by State Fund and shown below in Figure 1, Thomas's average weekly wage (AWW) and temporary total disability/permanent partial disability (TTD/PPD) rate for the last four pay periods before her injury, during which she worked primarily as a bus driver, are \$433.27 and \$288.85, respectively.

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Figure 1
Thomas's Earnings from Last Four Pay Periods Before Injury

8/03/19 – 8/16/19	\$ 385.21
8/17/19 – 8/30/19	\$1,279.92
8/31/19 – 9/13/19	\$ 944.53
9/14/19 – 9/27/19	\$ 856.46

Total wages during this time period: \$3,466.12

AWW during this time period: \$433.27

TTD/PPD rate based on this AWW: $66 \frac{2}{3}\% \times \$433.27 =$ \$288.85

¶ 25 Thomas objected to the way State Fund calculated her AWW, because “[t]he week ending August 16, 2019 is unacceptably low (\$385.21).” Thomas asserted that “[t]he most equitable method” to calculate her AWW was to “use the gross year-to-date wages from the paystub paying through September 27, 2019 (\$26,385.30) divided by 39 weeks, which is an AWW of \$676.54. This leaves her correct Temporary Total Disability[/Permanent Partial Disability (TTD/PPD)] rate at \$451.03 per week.”

¶ 26 As shown below in Figure 2, Thomas’s AWW over her employment history, during which she worked primarily as a dispatcher, is \$609.02.

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Figure 2

Thomas's Earnings over Her Employment History

1/05/19 – 1/18/19	\$1,518.15
1/19/19 – 2/01/19	\$1,529.55
2/02/19 – 2/15/19	\$1,683.33
2/16/19 – 3/01/19	\$1,688.61
3/02/19 – 3/15/19	\$1,074.81
3/16/19 – 3/29/19	\$ 929.94
3/30/19 – 4/12/19	\$1,279.575
4/13/19 – 4/26/19	\$1,159.125
4/27/19 – 5/10/19	\$1,271.325
5/11/19 – 5/24/19	\$ 429.00
5/25/19 – 6/07/19	\$1,168.335
6/08/19 – 6/21/19	\$ 996.91
6/22/19 – 7/05/19	\$ 915.59
7/06/19 – 7/19/19	\$1,115.99
7/20/19 – 8/02/19	\$1,510.38

Total wages during this time period: \$18,270.62

AWW during this time period: \$609.02

TTD/PPD rate based on this AWW: $66 \frac{2}{3}\% \times \$609.02 =$ \$406.01

¶ 27 Thomas's AWW for the last four pay periods before her injury is \$175.75 lower than her AWW over her employment history. Without Sandra's and Sines' retaliation, there would have been a similar, albeit smaller, gap.

¶ 28 Had Thomas not been injured on October 10, 2019, she would have continued working part time, except during the winter rush. Between December 15, 2019, and April 15, 2020, she would have worked around 70 hours a week. Based on this schedule, Thomas's AWW would have been higher than it is during both the last four pay periods before her injury, which is \$433.27, and between January 5 and September 27, 2019, which, averaging the total wages in Figures 1 and 2, is \$572.02.

¶ 29 Based on Thomas's AWW between January 5 and September 27, 2019, which is \$572.02, her TTD/PPD rate is \$381.35, which is an increase of \$92.51 over the rate calculated by State Fund, which is \$288.84.

¶ 30 Although this Court concludes below that State Fund used the incorrect method to calculate Thomas's AWW and TTD/PPD rate, State Fund's investigation was adequate, and its handling of Thomas's claim was reasonable in light of the case involving legitimate factual and legal disputes.

CONCLUSIONS OF LAW

¶ 31 This case is governed by the 2019 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Thomas's industrial accident.²

Issue One: Is Thomas entitled to recalculation of her average weekly wage and payment of additional indemnity benefits?

¶ 32 Thomas argues that State Fund should calculate her wages under § 39-71-123(3)(b), MCA, which provides:

(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.

Thomas proposes that State Fund use all of her earnings between January 1 and September 27, 2019, to calculate her wages. She contends that there is good cause to do so because her wages during the last four pay periods before her injury were lower than they should have been. Thomas blames Karst Stage for the lower wages because her supervisors created intolerable working conditions that drove her to transfer positions and start working a part-time schedule, and because they then retaliated against her decision to transfer by giving her fewer hours than she was supposed to work.³

¶ 33 State Fund argues that the appropriate method of calculating Thomas's wages is set forth in § 39-71-123(3)(a), MCA, which provides, in pertinent part:

(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

State Fund contends that Thomas does not have good cause to use § 39-71-123(3)(b), MCA, because her earnings in the four pay periods before her injury both accurately reflect her employment history as a bus driver, and reasonably relate to the actual wages she lost, consistent with the public policy described in § 39-71-105(1), MCA. State Fund also contends that Thomas does not have good cause because the conditions in the

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

³ Due to this Court's resolution of Thomas's main argument, it need not reach her alternative argument, in which she proposes using other methods of calculating her wages in order to reflect the seasonal fluctuation in the earnings of Karst Stage bus drivers.

airport office did not amount to a “constructive discharge”⁴ under *Snell v. Montana-Dakota Utilities Co.*,⁵ and, per *Peters v. American Zurich Ins. Co.*, because simply “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.”⁶

¶ 34 As set forth in the parties’ arguments, § 39-71-123(3), MCA, lists the methods for calculating an employee’s AWW. These methods include the general rule of using earnings from the last four pay periods before the employee’s injury, which is set forth in § 39-71-123(3)(a), MCA,⁷ and, for good cause shown, using earnings from up to one year before the employee’s injury, which is set forth in § 39-71-123(3)(b), MCA. In determining which method to use, this Court looks to § 39-71-105(1), MCA,⁸ which states, in pertinent part: “the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease.” This Court has found good cause to use additional pay periods to calculate a claimant’s wages in a variety of circumstances, including where the last four pay periods overstated claimant’s wages because they occurred during a busy time of year,⁹ where claimant was paid at irregular intervals and in varying sums depending on the project,¹⁰ and where the last four pay periods did not reflect the claimant’s substantial quarterly bonuses.¹¹

¶ 35 This Court concludes that Thomas has shown good cause for her AWW to be calculated under § 39-71-123(3)(b), MCA, because she has shown why use of the four pay periods before her injury does not accurately reflect her employment history, and because she has shown that her rates as calculated with the last four pay periods before her injury do not reflect her actual wages lost.

¶ 36 In *Deshner v. Town & Country Foods, Inc.*, the Montana Supreme Court explained that, under § 39-71-123(3)(b), MCA, “if the claimant can show good cause *as to why* the use of the four pay periods does not accurately reflect the claimant’s employment history,

⁴ § 39-2-903(1), MCA (2019) (defining “constructive discharge” in pertinent part as “the voluntary termination of employment by an employee because of a situation created by an act or omission of the employer which an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative.”).

⁵ 198 Mont. 56, 65-66, 643 P.2d 841, 846 (1982) (a determination of constructive discharge is not a foregone conclusion whenever employment discrimination is followed by the victim’s resignation, and its existence depends, not merely on an employee’s subjective belief that working conditions were intolerable but, on the totality of the circumstances (citations omitted)).

⁶ 2013 MTWCC 16, ¶ 16.

⁷ Section 39-71-123(3)(a), MCA, lists another method of calculation for newly hired employees; however, neither party has argued that it applies in this case.

⁸ *Peters*, ¶ 15.

⁹ *Lindskog v. State Comp. Ins. Fund*, 2000 MTWCC 61, ¶ 15.

¹⁰ *Cardwell v. Uninsured Employers’ Fund*, 2008 MTWCC 24, ¶ 30.

¹¹ *Siaperas v. Mont. State Fund*, 2004 MTWCC 4, *aff’d* 2004 MT 264N (unpublished decision).

then additional pay periods can be used.”¹² Deshner had earned \$6 an hour during most of the four pay periods before his injury.¹³ But 16 days before his injury, he was given a raise to \$7.25 an hour.¹⁴ Under § 39-71-123(3)(b), MCA, the court considered both the fact and the reason that the four pay periods did not accurately reflect Deshner’s employment history. The court held that, where Deshner had received a raise shortly before his injury, such that his pay rate during the four prior pay periods was significantly lower than it was at the time of injury, an AWW based on his old hourly wages did not accurately reflect his employment history with the employer.¹⁵ Thus, the court held that Deshner had demonstrated that there was good cause to use a pay period that accurately reflected his actual wages at the time of the injury, which was \$7.25 an hour, to determine his wage benefit.¹⁶ The court then added that “This decision also conforms with the public policy of the State regarding wage-loss benefits,” because “A weekly compensation benefit calculated at \$7.25 per hour bears a much more reasonable relationship to Deshner’s *actual wages lost* as a result of his injury than does a calculation using \$6.00 per hour.”¹⁷

¶ 37 Likewise, Thomas has not only shown that her wages from the last four pay periods before her injury were too low to accurately reflect her employment history, but she has also shown why. The main reason why her wages during those pay periods were so low, is that she transferred positions to flee intolerable working conditions at the airport office and was working a part-time schedule to recover from her stress and disappointment. The other main reason why the wages from Thomas’s last four pay periods before her injury were so low, is that during the first of those pay periods, Thomas worked fewer hours than she wanted to, and otherwise would have, as a direct result of Sandra’s and Sines’ retaliation.

¶ 38 In *Peters*, Peters argued that his wages should be calculated under § 39-71-123(3)(b), MCA, because the last four pay periods before his injury did not include an annual bonus that he had received from his employer each year.¹⁸ Peters contended that, “under § 39-71-105(1), MCA, good cause exist[ed] to include his bonus in his average weekly wage calculation because inclusion of the bonus more accurately reflect[ed] his actual wages lost.”¹⁹ This Court agreed, ruling that there was good cause to calculate Peters’ AWW under § 39-71-123(3)(b), MCA, because doing so under § 39-71-123(3)(a),

¹² 266 Mont. 352, 356, 880 P.2d 1300, 1302-03 (1994) (emphasis added).

¹³ *Deshner*, 266 Mont. at 353, 880 P.2d at 1301.

¹⁴ *Id.*

¹⁵ *Deshner*, 266 Mont. at 356, 880 P.2d at 1303.

¹⁶ *Id.*

¹⁷ *Deshner*, 266 Mont. at 356-57, 880 P.2d at 1303 (emphasis in original).

¹⁸ *Peters*, ¶¶ 12, 14.

¹⁹ *Peters*, ¶ 19.

MCA, disregarded the annual bonus he regularly received, and, thus, would not bear a reasonable relationship to his actual wages lost.²⁰

¶ 39 Here, as in *Peters*, State Fund’s calculation of Thomas’s AWW under § 39-71-123(3)(a), MCA, does not bear a reasonable relationship to her actual wages lost. State Fund’s use of her last four pay periods assumes that Thomas would have continued to work part time regardless of the season. But this Court found that, had she not been injured, Thomas would have driven around 70 hours a week during the winter rush, between December 15 and April 15, and earned a higher AWW than she did both during the last four pay periods before her injury, which is \$433.27, and between January 5 and September 27, 2019, which is \$572.02. As a result, the higher AWW, which is the one this Court calculated under § 39-71-123(3)(b), MCA, and is \$572.02, bears a more reasonable relationship to the wages Thomas actually lost on account of her injury.

¶ 40 When this Court considers that Thomas’s wages from the last four pay periods before her injury do not accurately reflect her employment history and the reasons why, and that the AWW calculated under § 39-71-123(3)(b), MCA, bears a closer relationship to Thomas’s actual lost wages, consistent with the policy in § 39-71-105(1), MCA, this Court, like the Supreme Court in *Deshner* and this Court in *Peters*, concludes that there is good cause to calculate Thomas’s wages under § 39-71-123(3)(b), MCA. Because the evidence provided to this Court only dates back to the beginning of 2019, and no party has proposed using another timeframe, this Court calculates Thomas’s AWW from the period January 5 through September 27, 2019,²¹ which, as found above, is \$572.02. As also found above, Thomas’s correct TTD/PPD rate is \$381.35, which is \$92.51 higher than the rate calculated by State Fund. Thus, State Fund must recalculate Thomas’s benefits retroactively and prospectively based on the new rate.

¶ 41 State Fund makes numerous arguments against using § 39-71-123(3)(b), MCA, to calculate Thomas’s wages. But none have merit. First, State Fund contends that, under *Deshner*, the wages to be used to calculate the AWW are the claimant’s actual wages at the time of injury. However, this case is distinguishable from *Deshner* in this regard. While using *Deshner*’s actual wages at the time of his injury to calculate his AWW bore a more reasonable relationship to his actual wages lost than his pre-raise wages did, the same cannot be said in this case. Here, the actual wages Thomas was earning at the time of her injury do not bear a reasonable relationship to her actual wages lost because of the dramatic increase in what she would have earned in the winter season but for her injury.

¶ 42 Second, State Fund cites *Peters* to argue, “demonstrating that using a different calculation method or time period would result in a higher average weekly wage

²⁰ *Peters*, ¶ 20.

²¹ Consistent with Thomas’s proposal that this Court consider her wages through September 27, 2019, which is the end date of the last full pay period before Thomas’s injury, this Court considers her wages starting on January 5, 2019, rather than January 1, 2019, because it is the first date of the first full pay period in 2019.

calculation does not mean that good cause exists to do so.”²² As a general proposition, State Fund is correct. Indeed, in *Peters*, this Court explained that it gave no weight to Peters’ “higher AWW under § 39-71-123(3)(b), MCA,” argument, because in some cases, an AWW calculated under § 39-71-123(3)(b), MCA, can be so much higher than the worker’s typical wages that it does not bear a reasonable relationship to the actual wages lost as § 39-71-105(1), MCA, requires.²³ Nonetheless, that ruling was not dispositive of Peters’ claim, because, as outlined above, the support for good cause was not limited to the fact that his AWW would be higher under § 39-71-123(3)(b), MCA, than under § 39-71-123(3)(a), MCA. Likewise, the support for good cause is not so limited here either. That support includes that, precisely because it is higher, the AWW under § 39-71-123(3)(b), MCA, bears a much more reasonable relationship to her actual wages lost than the AWW under § 39-71-123(3)(a), MCA.

¶ 43 Third, State Fund argues that one would have to speculate to determine what schedule Thomas would have worked had she not been injured, and that, regardless, under *Stuber v. Moodie Implement*²⁴ and *Greene v. Uninsured Employers’ Fund*,²⁵ consideration of post-injury wages or anticipated wage information in the calculation of the claimant’s usual wages is improper. This Court does not have to rely on speculation to find that Thomas would have worked 70 hours a week in the winter season had she not been injured. Rather, the weight of the evidence proves that she would have worked those hours, including the testimony of multiple witnesses that, as happened each winter, Karst Stage was very busy and short on drivers in the winter of 2019/2020. Moreover, this Court did not consider Thomas’s anticipated wages for the purpose of calculating her AWW; this Court calculated Thomas’s AWW using only her pre-injury wages. Instead, this Court considered her anticipated wages for the sole purpose of confirming that its calculation of Thomas’s AWW under § 39-71-123(3)(b), MCA, bears a more reasonable relationship to her actual wages lost than it would under § 39-71-123(3)(a), MCA. Some degree of consideration must be given to a claimant’s anticipated wages, because they are the “actual wages lost as a result of a work-related injury” and the actual wages lost to which § 39-71-105(1), MCA, requires the wage benefit be reasonably related.²⁶

¶ 44 And fourth, State Fund’s argument that Thomas cannot show good cause because her working conditions did not amount to a constructive discharge under *Snell* is not persuasive. Although voluntary termination would have been a reasonable choice for

²² *Peters*, ¶ 16.

²³ *Peters*, ¶¶ 15-16.

²⁴ 236 Mont. 189, 193, 769 P.2d 1205, 1207-08 (1989).

²⁵ 2003 MTWCC 27, ¶ 102.

²⁶ See, e.g., *Deshner*, 266 Mont. at 356-57, 880 P.2d at 1303 (holding that a wage benefit based on \$7.25 per hour bore a much more reasonable relationship to Deshner’s actual wages lost [which he anticipated would continue to be \$7.25 per hour] as a result of his injury than does a calculation using \$6 per hour); *Peters*, ¶ 20 (ruling that a wage benefit that left out the annual bonus Peters regularly received would not bear a reasonable relationship to actual wages lost [which he anticipated would continue to be his regular wages plus his annual bonus]).

Thomas, as the working conditions in Karst Stage's airport office would be intolerable to any objective, reasonable person, the Workers' Compensation Act does not require Thomas to prove a constructive discharge to show good cause. And State Fund concedes that it "is not aware of any caselaw" addressing whether "the facts surrounding Petitioner's decision to change positions with Karst [Stage] satisfy the requisite 'good cause' referenced in § 39-71-123(3)(b), MCA." While the *Deshner* Court held that the "why" behind the last four pay periods' failure to accurately reflect the claimant's employment history is relevant, it did not require that "why" to fit any particular mold; as a result, good cause is determined based on the particular facts of each case.

Issue Two: Is Thomas entitled to costs, attorney fees, and a penalty?

¶ 45 Thomas asserts that she is entitled to attorney fees and costs under §§ 39-71-611 and -612, MCA, and a penalty on all delayed benefits under § 39-71-2907, MCA. She contends that State Fund's conduct was unreasonable because its decision to calculate her wages under § 39-71-123(3)(a), MCA, instead of § 39-71-123(3)(b), MCA, was not based on a set policy, and because it failed to adequately investigate her employment history with Karst Stage, including the circumstances of her recent transfer back to, or the seasonal fluctuations involved in, being a bus driver for this particular employer.

¶ 46 Having prevailed in this matter, Thomas is entitled to costs. However, with respect to attorney fees and a penalty, an insurer need not have or follow a set policy as to how to choose the method it will use to calculate a claimant's wages as long as its handling of the claim is reasonable under the Workers' Compensation Act, and case law interpreting it. Because this Court has found that State Fund's handling of Thomas's claim was reasonable, she is not entitled to attorney fees or a penalty.

JUDGMENT

¶ 47 Thomas is entitled to the payment of additional wage-loss benefits in accordance with this Court's recalculation of her AWW under § 39-71-123(3)(b), MCA.

¶ 48 Because State Fund's handling of Thomas's claim was reasonable, Thomas is not entitled to attorney fees or a penalty.

¶ 49 Nevertheless, because Thomas prevailed, she is entitled to costs under § 39-71-612, MCA.

¶ 50 After awarding Thomas her costs, this Court will certify this Judgment as final.

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DATED this 16th day of February, 2022.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Thomas C. Bulman, Bradley J. Jones, and R. Spencer Bradley
Mark D. Meyer

Submitted: June 22, 2021