

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2009 MTWCC 40

WCC No. 2009-2253

---

RITA M. WOMBOLD, Personal Representative of the Estate of  
BLAINE LEE WOMBOLD

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

---

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND  
GRANTING PETITIONER THE OPPORTUNITY TO BE HEARD AS TO WHY  
SUMMARY JUDGMENT SHOULD NOT BE GRANTED IN FAVOR OF RESPONDENT

**Summary:** Petitioner moved the Court for summary judgment, arguing that Respondent incorrectly calculated the average weekly wages of the decedent by including overtime wages at the rate of pay the decedent was paid for non-overtime work. Respondent responds that § 39-71-123(1), MCA, is clear on its face regarding the inclusion of overtime in average weekly wage calculations and that the statute provides that overtime hours are included, not at the overtime rate, but at the worker's "regular hourly rate" – which Montana State Fund interprets to be the rate at which the employee is paid for non-overtime work.

**Held:** While Petitioner has argued that the statute in question unambiguously supports her interpretation, she urges the Court to interpret the applicable statute differently than it has previously been interpreted by this Court and others. The statute is, at best, ambiguous. Following the rules of statutory construction, the Court has examined the legislative history of the statute. The legislative history makes it clear that Respondent's interpretation of the statute is consistent with the legislature's intent. Therefore, Petitioner's motion for summary judgment is denied. Although Respondent did not file a cross-motion for summary judgment, since this issue is purely an issue of law and no issues of material fact remain, it may be appropriate to grant summary judgment in favor of Respondent. Before entering judgment in favor of the nonmoving party, however, Petitioner must be afforded notice and an opportunity to be heard. Therefore, the Court reserves entering judgment in this matter until such time as Petitioner has had the opportunity to be heard.

## Topics:

**Statutes and Statutory Interpretation: Legislative History.** Where it is indisputable from the minutes of a committee meeting that the legislators, proponents, opponents, and other interested parties who testified all interpreted the language of the existing statute in the same manner, the legislative intent is clear regarding the meaning of the statute.

**Statutes and Statutory Interpretation: Plain Meaning.** The claimant argued that the Court should disregard the legislative history provided by the opposing insurer which supported the insurer's position because the statute was allegedly clear on its face and therefore it would be inappropriate for the Court to reach beyond the plain meaning. The Court disagreed with the claimant that the statute was clear on its face, noting that it was consistently interpreted contrary to the interpretation the claimant urged the Court to embrace.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-123.** Under § 39-71-123(1)(a), MCA, an injured worker's average weekly wage is calculated by using his regular-time wage instead of his overtime rate of pay.

**Wages: Average Weekly Wage.** Under § 39-71-123(1)(a), MCA, an injured worker's average weekly wage is calculated by using his regular-time wage instead of his overtime rate of pay.

**Wages: Overtime.** Under § 39-71-123(1)(a), MCA, an injured worker's average weekly wage is calculated by using his regular-time wage instead of his overtime rate of pay.

**Summary Judgment: Motion for Summary Judgment.** Where the claimant moved for summary judgment and the insurer did not cross-motion in a case where the issue was purely an issue of law with no issues of material fact remaining, the Court concluded that while it may be appropriate to grant summary judgment in favor of the non-moving party with no formal cross-motion, the claimant must be afforded notice and an opportunity to be heard. The Court therefore reserved entering judgment for a period of time to allow the claimant to respond.

**Procedures: Motions: Cross-Motions.** Where the claimant moved for summary judgment and the insurer did not cross-motion in a case where the

issue was purely an issue of law with no issues of material fact remaining, the Court concluded that while it may be appropriate to grant summary judgment in favor of the non-moving party with no formal cross-motion, the claimant must be afforded notice and an opportunity to be heard. The Court therefore reserved entering judgment for a period of time to allow the claimant to respond.

¶ 1 Petitioner Rita M. Wombold (Wombold), Personal Representative of the Estate of Blaine Lee Wombold (Blaine), moves this Court for summary judgment pursuant to ARM 24.5.329. Wombold alleges that Respondent Montana State Fund (State Fund) incorrectly calculated her benefits because it incorrectly interpreted the Montana Workers' Compensation Act's definition of "wages." State Fund opposes Wombold's motion.

#### Uncontroverted Facts<sup>1</sup>

¶ 2 Blaine was an employee of Redrock Drilling, LLC (Redrock). Redrock is a Texas entity operating an oil drill in Blaine County, Montana.

¶ 3 From August 21, 2005, through September 3, 2005, Blaine worked 80 hours at \$13 per hour, which equals \$1,040, and he worked 22 hours at \$19.50 per hour, which equals \$429.

¶ 4 From September 4, 2005, through September 17, 2005, Blaine worked 62 hours at \$13 per hour, which equals \$806.

¶ 5 From September 18, 2005, through October 1, 2005, Blaine worked 80 hours at \$13 per hour, which equals \$1,040; and he worked 28 hours at \$19.50 per hour, which equals \$546.

¶ 6 From October 2, 2005, through October 15, 2005, Blaine worked 72 hours at \$13 per hour, which equals \$936; and he worked 16 hours at \$15 per hour, which equals \$240.

¶ 7 On October 20, 2005, Blaine was traveling from Havre to Redrock's drilling operation in Blaine County as a passenger in a vehicle driven by another Redrock employee. Blaine was injured and died as a result of the motor vehicle accident.

¶ 8 Wombold is Blaine's beneficiary, as defined by § 39-71-116(4), MCA.

---

<sup>1</sup> Brief in Support of Motion for Summary Judgment at 1-4.

¶ 9 State Fund accepted liability of payment of death benefits to Wombold and to Blaine's surviving children.

¶ 10 On October 2, 2008, State Fund recalculated Wombold's weekly benefit rate at \$386 per week.

¶ 11 On October 28, 2008, State Fund explained the basis for its recalculation:

10/02/05 through 10/15/05-

\$936.00 paid at \$13 regular wage; \$240 shop overtime paid at \$15 shop overtime rate. The 16 hours overtime in the shop must be reduced to straight shop time and paid at \$10 per hour.

Therefore,  $\$936 + \$160 = \$1096$ , divided by two, totals an average weekly wage of \$548.

09/18/05 through 10/01/05-

\$1040 paid at \$13 regular wage; \$546 paid at rig overtime rate of \$19.50. The 28 hours overtime on the rig must be reduced to straight time and paid at \$13 per hour. Therefore,  $\$1040 + \$364 = \$1404$ , divided by two, totals an average weekly wage of \$702.

09/04/05 through 09/17/05-

\$806 paid at \$13 regular wage. \$806, divided by two, totals an average weekly wage of \$403.

08/21/05 through 09/03/05-

\$1040 paid at \$13 regular wage; \$429 paid at rig overtime rate of \$19.50. The 22 hours overtime on the rig must be reduced to straight time and paid at \$13 per hour. Therefore,  $\$1040 + \$286 = \$1326$ , divided by two, totals an average weekly wage of \$663.

The total of the four pay periods =  $\$2316$  divided by four =  $\$579 \times 2/3 = \$386$ .

### Summary Judgment

¶ 12 For summary judgment to be granted, 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.<sup>2</sup> In the present case, no genuine issues of material fact exist. However,

---

<sup>2</sup> ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

for the reasons set forth below, I have concluded that the moving party is not entitled to judgment as a matter of law.

¶ 13 This case is governed by the 2005 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Blaine's industrial accident.<sup>3</sup>

#### Analysis

¶ 14 Pertinent to Wombold's argument are two statutes: § 39-71-721, MCA, and § 39-71-123, MCA. Section 39-71-721, MCA, states in pertinent part:

(2) To beneficiaries as defined in 39-71-116(4)(a) through (4)(d), weekly compensation benefits for an injury causing death are 66 2/3% of the decedent's wages. The maximum weekly compensation benefit may not exceed the state's average weekly wage at the time of injury. The minimum weekly compensation benefit is 50% of the state's average weekly wage, but in no event may it exceed the decedent's actual wages at the time of death.

(3) To beneficiaries as defined in 39-71-116(4)(e) through (4)(f), weekly benefits must be paid to the extent of the dependency at the time of the injury, subject to a maximum of 66 2/3% of the decedent's wages. The maximum weekly compensation may not exceed the state's average weekly wage at the time of injury.

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

(1) "Wages" means all remuneration paid for services performed by an employee for an employer, or income provided for in subsection (1)(d). Wages include the cash value of all remuneration paid in any medium other than cash. The term includes but is not limited to:

(a) commissions, bonuses, and remuneration at the regular hourly rate for overtime work, holidays, vacations, and periods of sickness . . . .

¶ 15 Wombold argues that State Fund incorrectly calculated the benefits because it misinterprets § 39-71-123, MCA. Specifically, Wombold argues:

The Act defines "wages" as all remuneration. It then provides a non-exhaustive list of wages. The Act specifically prefaces the list with the phrase "[t]he term [wages] includes but is not limited to . . ." It then provides the list:

---

<sup>3</sup> *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

“commissions, bonuses, and remuneration at the regular hourly rate for overtime work, holidays, vacations, and periods of sickness . . .” With regard to overtime the Act provides: “remuneration at the regular hourly rate for overtime work.” The adjective “regular” modifies the noun “hourly rate,” which is followed by the prepositional phrase “for overtime work.” Thus, “hourly rate” for overtime work. In other words, overtime pay must be included at the rate it is “regularly” paid. Redrock regularly paid Mr. Wombold an overtime rate of \$15 for shop overtime and \$19.50 for rig overtime. . . .<sup>4</sup>

¶ 16 Wombold draws the Court’s attention to the principles of statutory construction as set forth by the Montana Supreme Court in *Montana Sports Shooting Ass’n, Inc. v. State*.<sup>5</sup>

We interpret a statute first by looking to its plain language. We construe a statute by reading and interpreting the statute as a whole, “without isolating specific terms from the context in which they are used by the Legislature.” We will not interpret the statute further if the language is clear and unambiguous. We look to legislative intent if the language is not clear and unambiguous, and give effect to the legislative will. Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it. We must harmonize statutes relating to the same subject, as much as possible, giving effect to each.<sup>6</sup>

¶ 17 Wombold argues that State Fund disregards the plain language of the statute and does not read the statute as a whole. Wombold further argues that the legislative intent of this statute is apparent from the language found in § 39-71-105(1), MCA, and therefore the Court need look no further. That statute states:

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 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.

---

<sup>4</sup> Brief in Support of Motion for Summary Judgment at 5-6.

<sup>5</sup> *Montana Sports Shooting Ass’n, Inc v. State.*, 2008 MT 190, 344 Mont. 1, 185 P.3d 1003.

<sup>6</sup> *Id.*, ¶ 11. (Citations omitted.)

Wombold argues that this statute, read in harmony with the other statutes applicable to this case, further demonstrates that State Fund erroneously reduced the claimant's wages prior to multiplying them by 66 2/3%, resulting in an incorrect, lower average weekly wage calculation.

¶ 18 State Fund responds that the definition of wages found in § 39-71-123(1), MCA, is clear on its face regarding the inclusion of overtime in average weekly wage calculations. State Fund argues that the statute clearly states that overtime hours are included, not at the overtime rate, but rather at the worker's "regular hourly rate" – which State Fund interprets to be the rate at which the employee is paid for non-overtime work hours. State Fund argues that if the legislature had intended overtime hours to be paid at the overtime rate, it would not have inserted the phrase "at the regular hourly rate" as that language would be superfluous.<sup>7</sup>

¶ 19 In support of its arguments, State Fund provided the Court with minutes taken January 27, 2005, in the Montana Senate's Committee on Business, Labor, and Economic Affairs.<sup>8</sup> On that date, the committee conducted a hearing on Senate Bill 280, which was a bill for an act entitled, "An act revising the definition of 'wages' to remove reference to the regular hourly rate as it applies to wages paid for commissions, bonuses, and remuneration for overtime work, holidays, vacations, and periods of sickness; amending section 39-71-123, MCA; and providing an effective date and an applicability date."<sup>9</sup> Relevant to the dispute in this case, SB 280 would have stricken the words, "at the regular hourly rate" from the definition of "wages" found at § 39-71-123, MCA. Had SB 280 passed, the pertinent definition of "wages" would have read, "commissions, bonuses, and remuneration for overtime work, holidays, vacations, and periods of sickness."

¶ 20 In her opening remarks to the Committee, SB 280's sponsor, Senator Carolyn Squires, explained:

Senate Bill 280 . . . only strikes five words in line 16. These five words are key however because they discount an injured worker's pay for calculation of their workers' compensation benefit. Under current law, if a worker gets paid time-and-a-half for overtime work, it only gets counted at the hourly rate in determining his average pay for work comp calculations.<sup>10</sup>

---

<sup>7</sup> Respondent's Brief in Response to Petitioner's Motion for Summary Judgment at 3-4.

<sup>8</sup> Ex. 14 to Respondent's Brief in Response to Petitioner's Motion for Summary Judgment.

<sup>9</sup> *Id.* at 11.

<sup>10</sup> *Id.*

It is indisputable from the minutes that the legislators, proponents, opponents, and other interested parties who testified at this hearing, all considered the language “at the regular hourly rate” to mandate the reduction of overtime wages to a worker’s non-overtime hourly wage in calculating benefits. In fact, Senator Squires and other proponents of her bill put forth many of the same arguments of fairness which Wombold argues to this Court.

¶ 21 Although from the legislative history provided, the legislative intent of § 39-71-123(1)(a), MCA, is clear regarding the reduction of overtime rates to regular wage rates, Wombold argues that this Court should disregard the legislative history provided because under the rules of statutory interpretation, this Court should not look to the legislative history if the language of the statute is clear and unambiguous. However, this statute has consistently been interpreted to mean that a worker’s overtime wages are reduced to the worker’s regular-time rate-of-pay for purposes of calculating the average weekly wage.<sup>11</sup> To the extent that Wombold offers a plausible contrary interpretation of the statute is precisely the reason that the statute may be construed as unclear or ambiguous.

¶ 22 Under the principles of statutory construction set forth by the Montana Supreme Court in *Montana Sports Shooting Ass’n, Inc. v. State*, the Court first looks to the plain language of the statute to determine if it is clear and unambiguous. In the present case, since I have determined the language of the statute to be ambiguous, I look to the legislative intent in order to give effect to the legislative will. Reviewing the legislative history provided, I conclude that the legislature intended the language of § 39-71-123(1)(a), MCA, to mandate that a worker’s overtime rate-of-pay be reduced to the workers’ regular-time rate-of-pay for purposes of calculating the worker’s average weekly wage. While Wombold argues that the result of this provision is inequitable, the opportunity to rectify this inequity was placed squarely before the legislature with SB 280. The legislature elected not to pass SB 280, and it is not this Court’s prerogative to disregard the legislative intent.

¶ 23 I conclude that State Fund’s calculation of the decedent’s average weekly wage using his regular-time wage instead of his overtime rate-of-pay is correct. Wombold’s motion for summary judgment is therefore denied.

¶ 24 State Fund has not filed a cross-motion for summary judgment. Since this issue is purely an issue of law and no issues of material fact remain, it may be appropriate to grant summary judgment in favor of State Fund. Generally, no formal cross-motion is necessary for a court to enter summary judgment in favor of the nonmoving party.<sup>12</sup> However,

---

<sup>11</sup> See, e.g., *Flink v. American Alternative Ins. Co.*, 2000 MTWCC 73, ¶ 2; *Lindskog v. State Compen. Ins. Fund*, 2000 MTWCC 61, n. 1.

<sup>12</sup> *In Re Estate of Marson*, 2005 MT 222, ¶ 9, 328 Mont. 348, 120 P.3d 382.



Wombold must be afforded notice and an opportunity to be heard before the Court determines that this case warrants judgment in favor of State Fund.<sup>13</sup> Therefore, the Court will reserve entering judgment in this matter until such time as Wombold has had the opportunity to be heard regarding entry of summary judgment in favor of State Fund. Wombold shall be granted until January 19, 2010, to be heard on this matter.

### JUDGMENT

¶ 25 Petitioner's motion for summary judgment is **DENIED**.

¶ 26 Judgment in this matter is reserved until such time as Petitioner may be heard regarding entry of summary judgment in favor of Respondent.

¶ 27 Petitioner shall be granted until January 19, 2010, to be heard as to why summary judgment should not be granted in favor of Respondent.

DATED in Helena, Montana, this 29<sup>th</sup> day of December, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: Sydney E. McKenna  
Thomas E. Martello  
Submitted: July 22, 2009

---

<sup>13</sup> *Id.*