IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2022 MTWCC 1

WCC No. 2019-4816

TAMARA BARNHART

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

APPEALED TO SUPREME COURT – DA 22-0114 – 03/04/22
REVERSED 2022 MT 250 – 12/27/22

ORDER GRANTING IN PART AND DENYING IN PART PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Summary: As calculated under § 39-71-123(3) and (4), MCA, Petitioner's weekly wages at the time of her injury — which were calculated with the average aggregate wages from her concurrent employments — are $869.31. Based on this calculation of Petitioner's wages, Petitioner's rate for PPD benefits is $384. Upon reaching MMI, Petitioner's physician released her to work in the job in which she was injured but not to her other employment. Respondent then determined that her rate for PPD benefits, other than for her impairment award, is $187.94, based solely upon her wages from the job at which she could no longer work. Respondent argues that, for a claimant with concurrent employments, § 39-71-123(4)(c), MCA, provides that her PPD benefits are to be based on the wages from the employment from which she is disabled at MMI. Petitioner moved for summary judgment, asserting that, under § 39-71-123(3) and (4), MCA, her wages are to be calculated based upon the aggregate average wages from her concurrent employments at the time of her injury and that, under § 39-71-703(6), MCA, her PPD rate is to be calculated on "the wages received at the time of injury;" i.e., her wages as calculated under § 39-71-123, MCA. Thus, Petitioner argues that, as a matter of law, the rate for all of her PPD benefits is $384.

Held: This Court granted Petitioner's motion for summary judgment because, when the Workers' Compensation Act is read as a whole and when each provision is given effect, Petitioner's rate for all of her PPD benefits is $384. The sole purpose of § 39-71-123, MCA, is to calculate a claimant's wages at the time of her injury. For a claimant with concurrent employments, § 39-71-123(4)(c), MCA, states that her wages are to be "based on the aggregate of average actual wages of all employments . . . from which the employee is disabled by the injury incurred." Petitioner is correct that the phrase "from which the employee is disabled by the injury incurred" in § 39-71-123(4)(c), MCA, is assessed at the time of injury, and not when the claimant reaches MMI, and means that, for a claimant with concurrent employment, the earnings from the employments from which she is disabled at the time of injury are to be included in the calculation of her wages. A claimant's wages are then used throughout her claim to calculate the rates for each benefit to which she is entitled, the formula for which is set forth in the statute governing each benefit. For PPD benefits, § 39-71-703(6), MCA, states that the rate is to be calculated on "the wages received at the time of injury," i.e., the wages as calculated under § 39-71-123, MCA. Respondent's argument that it may recalculate the wages for a claimant with concurrent employment when she reaches MMI under § 39-71-123(4)(c), MCA, is without merit because it takes this subsection out of context, reads it in isolation, and fails to give effect to § 39-71-703(6), MCA.

¶ 1 Petitioner Tamara Barnhart moves for summary judgment, asserting that Respondent Montana State Fund (State Fund) did not lawfully calculate her wages under § 39-71-123(3) and (4), MCA, nor her rate for permanent partial disability (PPD) benefits under § 39-71-703(6), MCA. Barnhart also asserts that State Fund's statutory interpretation is unreasonable and seeks a penalty under § 39-71-2907(1)(b), MCA, and her attorney fees under § 39-71-611(1), MCA.

¶ 2 This Court held a hearing on January 12, 2021.

¶ 3 The parties have agreed to the material facts and that this case is appropriate for summary judgment. For the following reasons, this Court grants Barnhart summary judgment on the issue of her PPD benefits but denies her motion for summary judgment on her claim for a penalty and on her claim for her attorney fees.

FACTS

¶ 4 On September 6, 2017, Barnhart was in a motor vehicle accident in the course of her employment with Youth Dynamics, Inc. ("Youth Dynamics"). She suffered a left L5-S1 disc herniation. State Fund accepted liability for her injury.

¶ 5 For her job at Youth Dynamics, Barnhart worked an average of 40.6 hours per week and made $14.47 per hour. Her average weekly wage was $587.40. If considered alone, Barnhart's PPD rate for her work at Youth Dynamics is $384.

¶ 6 Barnhart also had concurrent employment at Dairy Queen. She worked an average of 15.2 hours per week and made $18.55 per hour. Her average weekly wage was $281.91. If considered alone, Barnhart's PPD rate for her work at Dairy Queen is $187.94.

¶ 7 The aggregate average weekly wage of Barnhart's concurrent employments was $869.31, which results in a PPD rate of $384.

¶ 8 Over the next year and a half, Barnhart was, at times, able to work at Youth Dynamics, but not at Dairy Queen and, at times, unable to work at both jobs, as a result of her injury.

¶ 9 On April 9, 2019, Barnhart's treating physician placed her at maximum medical improvement (MMI) and, thereafter, opined that she had a class 2, 10% whole person impairment rating under the AMA Guides.

¶ 10 Barnhart's treating physician restricted her from returning to her employment at Dairy Queen. However, he released her to return to work at Youth Dynamics, where she is capable of earning $14.47 per hour.

¶ 11 On June 24, 2019, State Fund sent Barnhart a letter stating that it would pay her impairment award at the aggregate PPD rate of $384. However, State Fund notified Barnhart that it would pay her remaining PPD benefits at the rate of $187.94, which it calculated based on what she earned from her job at Dairy Queen. State Fund's letter states that it calculated her PPD benefits as follows:

Age:	1% (you were over age 40 at the time of injury)
Education:	0% (you have 12 years of education)
Wage Loss:	20% (you have a wage loss of greater than $2/hour from your job at DQ)
Restrictions:	2% (you are restricted from medium to light lifting capacity)
Impairment:	10% (as rated by Dr. Roccisano on June 18, 2019)

Under Section 39-71-703, you are entitled to receive 23% (92 weeks) of 400 weeks of permanent partial disability (PPD) benefits, at the rate of $187.94 per week. In addition, you are entitled to receive 10% (40 weeks) of 400

> weeks of permanent partial disability benefits at the rate of $384.00 per week. The 23% is calculated at 92 weeks x $187.94 = $17,290.48. The 10% is calculated at 40 weeks x $384.00 = $15,360.

¶ 12 Barnhart asserts that State Fund must calculate her entire entitlement to PPD benefits using her aggregate PPD rate of $384. Thus, she has demanded an additional $18,032 from State Fund.

LAW AND ANALYSIS

¶ 13 This case is governed by the 2015 version of the Montana Workers' Compensation Act because that was the law in effect at the time of Barnhart's industrial injury.[1]

¶ 14 State Fund argues that it correctly excluded Barnhart's wages from Youth Dynamics when calculating her PPD rate for the age, wage-loss, and restriction components of her PPD benefits because, at MMI, she was released to return to work at that job. It relies on § 39-71-123(4)(c), MCA, which states, in relevant part:

> 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 . . . *from which the employee is disabled by the injury incurred*.[2]

Based on the emphasized phrase, State Fund argues that, when Barnhart reached MMI and was released to return to work at Youth Dynamics, it lawfully recalculated Barnhart's wages based only on her inability to work at Dairy Queen, as that was the only employment from which she was disabled at that time. State Fund concedes that Barnhart's PPD rate for her impairment award is $384, which is based on her aggregate average wages at the time of her injury. However, it argues that her PPD rate for the other components of her PPD benefits is $187.94, as that was 66 2/3% of her wages from Dairy Queen. It reasons: "The plain language of § 39-71-123(4)(c), MCA, unambiguously precludes the consideration of Petitioner's [Youth Dynamics] wages in calculating her PPD benefits. The governing principle here is simple: a claimant is entitled to <u>wage-loss</u> benefits for all employments from which she suffers a <u>wage loss</u>."[3]

¶ 15 Barnhart argues that State Fund's statutory interpretation is flawed because it reads § 39-71-123(4)(c), MCA, in isolation and out of context. Barnhart argues that the sole purpose of § 39-71-123, MCA, is to calculate the claimant's wages at the time of injury. Therefore, she argues that the phrase "from which the employee is disabled by

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

[2] Emphasis added.

[3] Emphasis in original.

the injury" in subsection (4)(c) is assessed at the time of injury to calculate a claimant's wages, which remain fixed for her claim. Barnhart argues that there is no merit to State Fund's argument that, for a claimant with a concurrent employment, her wages and PPD rate are reassessed when she reaches MMI because § 39-71-703(6), MCA, the statute which sets forth the formula to calculate a claimant's PPD rate, states, in relevant part, that the rate for PPD benefits is "66 2/3% of the wages received at the time of injury." Barnhart argues that her wages at the time of her injury, as calculated under § 39-71-123(3) and (4), MCA, are $869.31, which results in a rate of $384 for all of her PPD benefits.

¶ 16 This Court has explained, "[S]tatutes must be read and considered in their entirety and legislative intent may not be gained from the wording of one particular section or sentence, but only from consideration of the whole."[4] Thus, this Court "must look at the Workers' Compensation Act as a whole and give effect to all of its provisions and its purpose."[5]

¶ 17 When the Workers' Compensation Act is read as a whole, and when each provision is given effect, Barnhart's statutory construction is correct. Under the Workers' Compensation Act, the calculation of the claimant's rates — i.e., the amount the insurer will pay each week for the wage-loss benefits to which the claimant is entitled — is a two-step process, using different statutes for each step.

¶ 18 The first step is to calculate the claimant's "wages" at the time of her injury under § 39-71-123, MCA. Subsections (1) and (2) set forth the definition of "wages." Subsection (3) sets forth the methods for calculating the wages for a claimant with one job at the time of her injury and provides that, whether calculated under the general rule or under one of the exceptions, the results of the calculation "are the employee's wages." It states:

> (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.

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[4] *Schimmel v. Uninsured Employers' Fund*, 2000 MTWCC 41, ¶ 32 (alteration in original) (internal quotation marks omitted) (citation omitted), *rev'd on other grounds*, 2001 MT 280, 307 Mont. 344, 38 P.3d 788.

[5] *Kapor v. Liberty Mut. Fire Ins. Corp*., 2003 MTWCC 22, ¶ 24 (citation omitted). *See also State v. Meader*, 184 Mont. 32, 36–37, 601 P.2d 386, 389 (1979) ("In construing legislative intent, statutes must be read and considered in their entirety and legislative intent may not be gained from the wording of any one particular section or sentence, but only from a consideration of the whole. It is ou[r] duty to interpret individual sections of an act in such a manner as to insure coordination with the other sections of the act." (citations omitted)); *Hopkins v. Uninsured Employers' Fund*, 2009 MTWCC 12, ¶ 11 ("Whenever a statute addresses a subject in general and comprehensive terms, and another statute addresses a part of the same subject in a more minute and definite way, the two should be read together and harmonized, as much as possible, giving effect to each. [But if the statutes] cannot be harmonized to give effect to both, the specific statute controls over the general statute to the extent of the inconsistency." (alteration added) (internal quotation marks omitted) (citation omitted)).

> (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.

For a claimant working more than one job at the time of her injury, subsection (4) provides that the claimant's "wages" are to be calculated "on the aggregate of average actual wages of all employments . . . from which the employee is disabled by the injury incurred." It states, in relevant part, as follows:

> (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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> . . . .
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> (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 . . . from which the employee is disabled by the injury incurred.

¶ 19 The second step is to calculate the rates for the benefits to which the claimant is entitled, under the formulas set forth in §§ 39-71-701(3), -702(3), -703(6), and -712(2), MCA, each of which provides that the rate for the benefit at issue is to be calculated on the "wages received at the time of the injury."[6] For PPD benefits, the benefits at issue in this case, § 39-71-703(6), MCA, states that the claimant's rate is: "66 2/3% of the wages received at the time of injury, but the rate may not exceed one-half the state's average weekly wage."[7]

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[6] *See* § 39-71-701(3), MCA, (stating, "Weekly compensation benefits for injury producing temporary total disability are 66 2/3% of the ***wages received at the time of the injury***. The maximum weekly compensation benefits may not exceed the state's average weekly wage at the time of injury." (emphasis added)); § 39-71-702(3), MCA, (stating, "Weekly compensation benefits for an injury resulting in permanent total disability are 66 2/3% of the ***wages received at the time of the injury***. The maximum weekly compensation benefits may not exceed the state's average weekly wage at the time of injury." (emphasis added)); § 39-71-712(2), MCA, (stating, "An insurer's liability for temporary partial disability must be the difference between the injured ***worker's average weekly wage received at the time of the injury***, subject to a maximum of 40 hours a week, and the actual weekly wages earned during the period that the claimant is temporarily partially disabled, not to exceed the injured worker's temporary total disability benefit rate." (emphasis added)). *See also Dunnington v. State Comp. Ins. Fund*, 2000 MT 349, ¶ 8, 303 Mont. 252, 15 P.3d 475 (explaining, "The amount of disability benefits paid to a claimant as a result of a work-related injury under the Workers' Compensation Act (the Act) is determined in relation to the wages the claimant was earning at the time of the injury.").

[7] For the maximum TTD and PPD rates for each Fiscal Year, which are based on Montana's average weekly wage, *see*: https://erd.dli.mt.gov/_docs/work-comp-claims/2021-Compensation-Rates.pdf.

¶ 20 As Barnhart points out, the Montana Supreme Court has already recognized that, for a claimant with concurrent employments, her wages are first calculated under § 39-71-123, MCA, and that her benefit rates are thereafter based on that calculation. In *Sturchio v. Wausau Underwriters Ins. Co*., the court held that when a claimant has multiple concurrent employments, each concurrent employment should be considered individually when calculating her wages under § 39-71-123(3), MCA; i.e., the wages for one concurrent employment can be calculated under one of the methods in subsection (3)(a) while the wages for a different concurrent employment can be calculated under the method in subsection (3)(b).[8] In reaching its decision, the court read the Workers' Compensation Act as a whole and explained that § 39-71-123, MCA, "focuses on determining an injured employee's proper wages" and that its purpose is to "set[] forth the methods for calculating an injured employee's wages."[9] The court also recognized that, for a claimant with concurrent employments, the first step is to calculate her wages under § 39-71-123, MCA, which, under subsection (4), is based on her aggregate average wages at the time of her injury, and that the second step is to use her wages to calculate her benefit rates. The Court stated:

> As with injured workers employed by a single employer, § 39-71-123(4)(c), MCA (2003), provides that employees working for multiple employers also receive a wage-loss benefit based on their average actual wages. The only calculation difference between injured employees with single employment and those with concurrent employments is that the latter are entitled to benefits based on "the aggregate of average actual wages of all employments[.]"[10]

¶ 21 Because the sole purpose of § 39-71-123, MCA, is to calculate the claimant's wages at the time of her injury, Barnhart is correct that the phrase "from which the employee is disabled by the injury incurred" in § 39-71-123(4)(c), MCA, is assessed at the time of injury and means that, for a claimant with concurrent employment, the earnings from the employments from which the claimant is disabled at the time of injury are to be included in the calculation of her "wages."[11] Under § 39-71-123(4)(a), MCA, and *Sturchio*,

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[8] 2007 MT 311, ¶ 15, 340 Mont. 141, 172 P.3d 1260.

[9] *Sturchio*, ¶¶ 11, 13.

[10] *Sturchio*, ¶ 14 (alteration in original). *See also Nelson v. Mont. Sch. Grp. Ins. Auth*., 2014 MTWCC 1, ¶ 41 (stating, in dicta, in case in which this Court ruled that the claimant did not have concurrent employment:

> Even if I considered Nelson's teaching and coaching positions as concurrent employments, as Nelson urges, the result would be the same. Section 39-71-123(4)(c), MCA, provides that "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." (Emphasis added). Nelson does not dispute that her current wages are greater than the aggregate of her wages at the time of her injury. Therefore, she has not suffered a wage loss due to the loss of her coaching position and is not entitled to TPD benefits under § 39-71-712, MCA.)

[11] This Court notes that this interpretation is consistent with how Montana law has historically treated claimants with concurrent employment at the time of their injury. In *Lovell v. State Comp. Mut. Ins. Fund*, 260 Mont. 279, 284-

for a claimant with concurrent employments, her wages from each employment are to be calculated via the methods in subsections (3)(a) or (b) and then, under subsection (4)(c), "the resulting figures [are used] to calculate the employee's aggregate average actual wage."[12] As set forth in subsection (3), "for compensation benefit purposes" the results of the calculation "are the employee's wages." Thus, there is no merit to State Fund's argument that, for a claimant with concurrent employment, subsection (4)(c) allows an insurer to recalculate her wages when she reaches MMI for purposes of calculating her PPD rate, as the plain language of subsection (3) provides that, once calculated, the claimant's wages are fixed. The claimant's wages are then used throughout her claim to calculate the rates for the benefits to which she is entitled, the formulas for which are set forth in §§ 39-71-701(3), -702(3), -703(6), and -712(2), MCA, each of which states that the rate is to be based on the "wages received at the time of the injury." Barnhart is correct that when the Workers' Compensation Act is read as a whole and when each statute is given effect, the phrase "wages received at the time of injury" means the wages as calculated under § 39-71-123, MCA, which, for a claimant with concurrent employments, is the aggregate average wages from all of her concurrent employments.

¶ 22 Applying § 39-71-123(3), (4)(a) and (c), MCA, and § 39-71-703(6), MCA, Barnhart's rate for all of her PPD benefits is $384. When Barnhart suffered her industrial injury, she had concurrent employment at Youth Dynamics and at Dairy Queen. Thus, under § 39-71-123(3), (4)(a) and (c), MCA, Barnhart's "wages" are the aggregate of her average actual wages from these employments, as she was disabled from each employment because of her injury.[13] The parties agree that the aggregate of Barnhart's actual wages from her jobs at Youth Dynamics and Dairy Queen at the time of her injury is $869.31. Thus, under § 39-71-123(3), MCA, "for compensation benefit purposes," $869.31 "are" Barnhart's wages for her claim. Then, Barnhart's PPD rate is to be determined under § 39-71-703(6), MCA, which states, in relevant part: "The weekly benefit rate for permanent partial disability is 66 2/3% of the wages received at the time of injury, but the rate may not exceed one-half the state's average weekly wage." Because $579.54 — which is 66 2/3% of the wages Barnhart received at the time of her injury — exceeds one-half of Montana's average weekly wage for Fiscal Year 2018, Barnhart's rate for all of her PPD benefits is $384.

85, 860 P.2d 95, 99 (1993) (citations omitted), in which the Supreme Court interpreted the 1987 version of § 39-71-123, MCA, which did not contain subsection (4), the court stated:

> [W]e allowed aggregation of earnings from separate, concurrent employments in the determination of disability benefits. This Court consistently held that: "The general rule is that earnings from concurrent employments may be combined if the employments are sufficiently similar so that a disabling injury at one employment would necessarily disable the employee in respect to the other employment."

[12] *Sturchio*, ¶ 16 (citing § 39-71-105(1), MCA (2003).

[13] *See Sturchio*, ¶ 14.

¶ 23 State Fund makes three additional arguments in support of its position that it lawfully recalculated Barnhart's wages under § 39-71-123(4)(c), MCA, when she reached MMI. However, none have merit.

¶ 24 First, State Fund argues that the Supreme Court's definition of "disability" in *Tinker v. Montana State Fund*[14] supports its position. In *Tinker*, a statute of limitations case, the Supreme Court stated:

> The plain language of the Act clearly demonstrates that the term "disability" is tied to a wage loss or impairment in the ability to earn wages through employment. Thus, until a claimant knows that he or she is suffering some form of wage loss as a result of an injury, condition, or impairment, then he or she lacks knowledge of their "disability" within the meaning of the Act.[15]

State Fund argues that because, at MMI, Barnhart was released to return to work at Youth Dynamics, she did not suffer an actual wage loss from that employment and was therefore not disabled from her work at Youth Dynamics. Thus, State Fund reasons that it is not obligated to use her wages from Youth Dynamics when calculating her PPD rate.

¶ 25 However, it is evident that Barnhart was "disabled" from her concurrent employments under the definition in *Tinker* at the time of her injury, when her wages are calculated under § 39-71-123, MCA, because she suffered an injury that impaired her ability to earn wages at Youth Dynamics and at Dairy Queen, as evidenced by the fact that, at times, she was unable to work these jobs as a result of her injury. Thus, to calculate Barnhart's wages under § 39-71-123(3) and (4)(a) and (c), MCA, State Fund was required to use the aggregate of average actual wages from her employments at Youth Dynamics and at Dairy Queen. Despite State Fund's claim, Barnhart is not ignoring the "disability requirement of § 39-71-123(4)(c), MCA." Instead, she correctly interprets § 39-71-123(4)(c), MCA, as assessing disability at the time of injury for purposes of calculating her wages.

¶ 26 Second, State Fund argues that the Supreme Court's decision in *Wilkes v. Montana State Fund*[16] supports its position that it lawfully excluded Barnhart's wages from her job at Youth Dynamics when determining her PPD rate. Wilkes worked primarily as a farmer but worked part-time as a school bus driver.[17] He operated his farm as a sole proprietorship and had elected not to be covered by workers' compensation insurance.[18]

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[14] 2009 MT 218, 351 Mont. 305, 211 P.3d 194.

[15] *Tinker*, ¶ 32.

[16] 2008 MT 29, 341 Mont. 292, 177 P.3d 483.

[17] *Wilkes*, ¶ 4.

[18] *Wilkes*, ¶ 4.

Upon reaching MMI for an injury in the course of his employment as a bus driver,[19] Wilkes was able to return to work as a bus driver but was unable to return to farming.[20] State Fund denied Wilkes' demand for PPD benefits, arguing that he did not suffer an actual wage loss from his bus driving job.[21] Wilkes challenged § 39-71-703, MCA, arguing that the sole reliance on actual wage loss to determine his eligibility for PPD benefits violated his constitutional right to equal protection.[22] The Supreme Court held that, because a policy of the Workers' Compensation Act is to provide wage-loss benefits that "bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease,"[23] it was permissible to use wage-loss as the sole factor to determine if he was entitled to PPD benefits.[24]

¶ 27 State Fund argues that *Wilkes* stands for the proposition that the Workers' Compensation Act allows jobs to be excluded when determining a claimant's entitlement to PPD benefits. Thus, State Fund reasons that it may exclude Barnhart's wages from her job at Youth Dynamics when determining her PPD rate.

¶ 28 However, State Fund's reliance on *Wilkes* is misplaced because Wilkes had elected not to be covered by workers' compensation insurance for his farming job[25] and, therefore, his farming job did not qualify as concurrent employment under the 2001 Workers' Compensation Act.[26] Because Wilkes' farming job was not concurrent employment, State Fund lawfully excluded his earnings from farming when calculating his wages under § 39-71-123, MCA (2001), and when determining whether he had an actual wage loss under § 39-71-703(5), MCA (2001).[27] Barnhart's case is obviously different, as it is undisputed that she had concurrent employments at the time of her injury; therefore, her wages from these employments must be included when calculating her wages under § 39-71-123(3) and (4), MCA. There is nothing in *Wilkes* that supports State Fund's argument that, for a claimant with concurrent employments, § 39-71-123(4)(c), MCA, allows the insurer to recalculate her wages when she reaches MMI.

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[19] *Wilkes*, ¶¶ 4, 5.

[20] *Wilkes*, ¶ 5.

[21] *Wilkes*, ¶ 6.

[22] *Wilkes*, ¶ 6.

[23] § 39-71-105(1), MCA.

[24] *Wilkes*, ¶¶ 20, 22, 23, 26.

[25] *Wilkes*, ¶ 4.

[26] *Compare* § 39-71-123(4)(c), MCA (2001) (stating, in relevant part, "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 . . . .") *with* § 39-71-401(3)(a), MCA (2001) (stating that a sole proprietor could apply to the department for an exemption from the Workers' Compensation Act.).

[27] *Wilkes*, ¶¶ 4, 6.

¶ 29 *Third*, State Fund argues that setting Barnhart's PPD rate based on her aggregate average wages at the time of her injury violates the policy of the Workers' Compensation Act that "the wage-loss benefits should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease."[28] However, this Court disagrees, as Barnhart has a permanent disability, the result of which is that she has an "actual wage loss" — which, under the Workers' Compensation Act, "means that the wages that a worker earns or is qualified to earn after the worker reaches maximum healing are less than the actual wages the worker received at the time of the injury"[29] — of nearly $15,000 per year. Thus, using her aggregate average wages from her time of injury to calculate her PPD rate advances the policy by providing a wage-loss benefit that bears a more reasonable relationship to the actual wages she has lost. Furthermore, in *Sturchio*, the court reaffirmed that the policy of the Workers' Compensation Act cannot "be used to ignore the Legislature's express statutory language."[30] As set forth above, State Fund's statutory interpretation is flawed because it does not read the Workers' Compensation Act as a whole nor give effect to § 39-71-123(3)(a), MCA, nor to § 39-71-703(6), MCA. Instead, it reads § 39-71-123(4)(c), MCA, in isolation and out of context and ignores the language in § 39-71-123(3)(a), MCA, stating that "for compensation benefit purposes" the results of the calculation of the claimant's wages "are the employee's wages" and the language in § 39-71-703(6), MCA, stating that a claimant's PPD rate is to be based on the "wages received at the time of injury."

¶ 30 As a final point, although Barnhart has prevailed on the issue of her PPD rate, she is not entitled to a penalty under § 39-71-2907(1)(b), MCA — which provides that this Court "may increase by 20% the full amount of benefits due a claimant" if the insurer's denial of liability for the benefits was unreasonable — nor her attorney fees under § 39-71-611(1), MCA — which provides that this Court may award attorney fees to a claimant if the insurer's denial of liability for the benefits was unreasonable. The Montana Supreme Court has stated:

> [A]s a general rule, where a court of competent jurisdiction has clearly decided an issue regarding compensability in advance of an insurer's decision to contest compensability, the clear applicability of the earlier decision constitutes substantial evidence supporting a finding by the Workers' Compensation Court that the contest over compensability is unreasonable. Conversely, where the issue upon which an insurer bases its legal interpretation has not been clearly decided, the lack of clear decision may constitute substantial evidence supporting a finding by the

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[28] § 39-71-105(1), MCA.

[29] § 39-71-116(1), MCA.

[30] *Sturchio*, ¶ 17 (citing *King v. State Comp. Ins. Fund*, 282 Mont. 335, 339, 938 P.2d 607, 609-10 (1997)).

Workers' Compensation Court that the insurer's legal interpretation is not unreasonable.[31]

¶ 31 Here, although State Fund's arguments were not ultimately persuasive, they were reasonable under this standard. Barnhart is correct that, in *Sturchio*, the Montana Supreme Court explained that, for a claimant with concurrent employments, her wages are to be calculated under § 39-71-123(3) and (4)(a) and (c), MCA, and that her wages are to be used to calculate her benefit rates under §§ 39-71-701(3), -702(3), -703(6), and -712(2), MCA.[32] However, State Fund is correct that the court did not address the phrase "from which the employee is disabled by the injury incurred" in § 39-71-123(4)(c), MCA, nor decide the exact legal issue that exists in this case. Thus, State Fund's argument that *Sturchio* is not controlling precedent, and its other legal arguments, are within the bounds of legitimate legal advocacy.

¶ 32 Accordingly, this Court enters the following:

ORDER

¶ 33 Barnhart's summary judgment motion on the issue of her PPD rate is **granted**. Her PPD rate for all PPD benefits to which she is entitled is $384. State Fund shall pay the additional PPD benefits to which Barnhart is entitled within two weeks of the date of this Order. Because Barnhart has prevailed on this issue, she is entitled to her costs under § 39-71-611, MCA.

¶ 34 Barnhart's summary judgment motion on the issue of a penalty under § 39-71-2907, MCA, and on the issue of attorney fees under § 39-71-611, MCA, is **denied**.

¶ 35 After awarding Barnhart her costs, this Court will enter final judgment.

DATED this 11th day of January, 2022.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Paul D. Odegaard and Lucas A. Wallace
Nick Mazanec

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[31] *Marcott v. La. Pac. Corp*., 275 Mont. 197, 205, 911 P.2d 1129, 1134 (1996). *See also Wommack v. Nat'l Farmers Union Prop. & Cas. Co*., 2017 MTWCC 8, ¶ 89 (citation omitted) ("An insurer's legal interpretation may be incorrect without being unreasonable, and the existence of a genuine doubt, from a legal standpoint, that liability exists constitutes a legitimate excuse for denial of a claim.").

[32] *See Sturchio*, ¶ 14.