IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2010 MTWCC 37

WCC No. 2010-2447

GILBERT LEIGH

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND GRANTING RESPONDENT'S CROSS-MOTION FOR SUMMARY JUDGMENT

APPEALED TO MONTANA SUPREME COURT 01/21/11
APPEAL DISMISSED 03/24/11

Summary: Petitioner moved for summary judgment, alleging that the insurer incorrectly calculated his average weekly wage by using a twelve-month period under § 39-71-123(3)(b), MCA, which included weeks during which he was laid off from his job as part of the period used for calculating his average weekly wage. Respondent cross-motioned for summary judgment, arguing that it properly calculated Petitioner's average weekly wage under the Workers' Compensation Act and in accordance with applicable case law regarding seasonal employment.

Held: Given the seasonal nature of Petitioner's work and his employment history with his employer and the reasonable relationship requirement of § 39-71-105(1), MCA, Respondent correctly calculated Petitioner's average weekly wage by using a one-year period as permitted under § 39-71-123(3)(b), MCA.

Topics:

> **Summary Judgment: Disputed Facts.** Respondent argued that genuine issues of material fact preclude summary judgment because it believes its claims adjuster should testify so that the Court can make a credibility determination. However, Respondent sets forth no genuine issues of material fact which would necessitate such testimony. Since Respondent

has its adjuster at its disposal, it had the ability to bring any issues of material fact to the Court's attention. Since no genuine issues of material fact have been brought forth, this matter is appropriate for summary disposition.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-123. Where sporadic seasonal work is at issue, it is reasonable to calculate on a larger scale than four pay periods. Fairness demands that sporadic, seasonal employment be determined in a way which accurately reflects the claimant's employment history with the employer as dictated by § 39-71-123(3)(b), MCA. Relying on § 39-71-123(3)(a), MCA, for determining average weekly wage in a seasonal employment situation is unreasonable and unfair. *Gregory v. Michael Bailey & Sons Logging*, 255 Mont. 190, 194, 841 P.2d 525, 527-28 (1992). Notwithstanding this Court's bench ruling to the contrary in *Brodie v. Liberty Northwest Ins. Co.*, 2001 MTWCC 30, an ongoing, multi-year relationship in which a worker is periodically terminated and rehired is part of the "employment history with the employer."

Wages: Average Weekly Wage. Where sporadic seasonal work is at issue, it is reasonable to calculate on a larger scale than four pay periods. Fairness demands that sporadic, seasonal employment be determined in a way which accurately reflects the claimant's employment history with the employer as dictated by § 39-71-123(3)(b), MCA. Relying on § 39-71-123(3)(a), MCA, for determining average weekly wage in a seasonal employment situation is unreasonable and unfair. *Gregory v. Michael Bailey & Sons Logging*, 255 Mont. 190, 194, 841 P.2d 525, 527-28 (1992). Notwithstanding this Court's bench ruling to the contrary in *Brodie v. Liberty Northwest Ins. Co.*, 2001 MTWCC 30, an ongoing, multi-year relationship in which a worker is periodically terminated and rehired is part of the "employment history with the employer."

Employment: Seasonal Employment. Where sporadic seasonal work is at issue, it is reasonable to calculate on a larger scale than four pay periods. Fairness demands that sporadic, seasonal employment be determined in a way which accurately reflects the claimant's employment history with the employer as dictated by § 39-71-123(3)(b), MCA. Relying on § 39-71-123(3)(a), MCA, for determining average weekly wage in a seasonal employment situation is unreasonable and unfair. *Gregory v. Michael Bailey & Sons Logging*, 255 Mont. 190, 194, 841 P.2d 525, 527-

28 (1992). Notwithstanding this Court's bench ruling to the contrary in *Brodie v. Liberty Northwest Ins. Co.*, 2001 MTWCC 30, an ongoing, multi-year relationship in which a worker is periodically terminated and rehired is part of the "employment history with the employer."

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-123. Where Petitioner had to be "rehired" after each lay off period and where he had no guarantee or rehire, his case is indistinguishable from the claimant in *Brodie v. Liberty Northwest Ins. Co.*, 2001 MTWCC 30, in which this Court's determination relied on the pivotal fact that the claimant was not guaranteed re-employment after her termination. However, this lack of guarantee was also present in *Gregory v. Michael Bailey & Sons Logging*, 255 Mont. 190, 194, 841 P.2d 525, 527-28 (1992), in which the Montana Supreme Court held that a seasonal employee's average weekly wage must be calculated under § 39-71-123(3)(b), MCA. The Court found no compelling distinction between Petitioner's case and *Gregory* which would allow it to deviate from the method endorsed in *Gregory*.

Wages: Average Weekly Wage. Where Petitioner had to be "rehired" after each lay off period and where he had no guarantee or rehire, his case is indistinguishable from the claimant in *Brodie v. Liberty Northwest Ins. Co.*, 2001 MTWCC 30, in which this Court's determination relied on the pivotal fact that the claimant was not guaranteed re-employment after her termination. However, this lack of guarantee was also present in *Gregory v. Michael Bailey & Sons Logging*, 255 Mont. 190, 194, 841 P.2d 525, 527-28 (1992), in which the Montana Supreme Court held that a seasonal employee's average weekly wage must be calculated under § 39-71-123(3)(b), MCA. The Court found no compelling distinction between Petitioner's case and *Gregory* which would allow it to deviate from the method endorsed in *Gregory*.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-123. Although in *Brodie v. Liberty Northwest Ins. Co.*, 2001 MTWCC 30, this Court interpreted § 39-71-123(3)(b), MCA, to preclude consideration of wages a claimant earned prior to a termination, the statute's language simply requires that the calculation accurately reflects the claimant's employment history with the employer. An ongoing, multi-year relationship in which the claimant is periodically terminated and rehired is certainly part of the "employment history," and *Brodie* fails to

take into account the Montana Supreme Court's decision in *Gregory v. Michael Bailey & Sons Logging*, 255 Mont. 190, 194, 841 P.2d 525, 527-28 (1992), in which the court concluded that the pre-termination history must be taken into account.

Employment: Seasonal Employment. Although in *Brodie v. Liberty Northwest Ins. Co.*, 2001 MTWCC 30, this Court interpreted § 39-71-123(3)(b), MCA, to preclude consideration of wages a claimant earned prior to a termination, the statute's language simply requires that the calculation accurately reflects the claimant's employment history with the employer. An ongoing, multi-year relationship in which the claimant is periodically terminated and rehired is certainly part of the "employment history," and *Brodie* fails to take into account the Montana Supreme Court's decision in *Gregory v. Michael Bailey & Sons Logging*, 255 Mont. 190, 194, 841 P.2d 525, 527-28 (1992), in which the court concluded that the pre-termination history must be taken into account.

Wages: Average Weekly Wage. The average weekly wage calculation must be a reasonable relationship to the actual wages lost as mandated by § 39-71-105(1), MCA. Where Respondent's chosen calculation method created an artificially low average weekly wage and Petitioner's suggested calculation method would have created a higher average weekly wage than his typical wages, the Court found that neither method met the reasonable relationship to wages lost required by § 39-71-105(1), MCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-105. The average weekly wage calculation must be a reasonable relationship to the actual wages lost as mandated by § 39-71-105(1), MCA. Where Respondent's chosen calculation method created an artificially low average weekly wage and Petitioner's suggested calculation method would have created a higher average weekly wage than his typical wages, the Court found that neither method met the reasonable relationship to wages lost required by § 39-71-105(1), MCA.

Employment: Seasonal Employment. An ongoing, multi-year relationship in which the claimant is periodically terminated and rehired is part of the "employment history with the employer" as set forth in § 39-71-123(3)(b), MCA. It therefore must be taken into account in determining a seasonal employee's average weekly wage.

¶ 1 Petitioner Gilbert Leigh moves this Court for summary judgment pursuant to ARM 24.5.329. Leigh alleges that Respondent Montana State Fund (State Fund) incorrectly calculated his average weekly wage by basing its calculation on a twelve-month period, even though Leigh received unemployment benefits during that time.[1] State Fund objects to Leigh's motion and has filed a cross-motion for summary judgment, arguing that it properly calculated Leigh's average weekly wage under the Montana Workers' Compensation Act.[2]

Undisputed Facts[3]

¶ 2 Leigh began working for Dave Roberts Line Logging (DRLL) in June 2003.

¶ 3 Leigh generally worked from the end of May or early June to approximately the end of February of the following year and then was laid off for approximately three months.

¶ 4 During the times he was laid off, Leigh did not receive any wages from DRLL, nor was he placed on a work schedule by DRLL.

¶ 5 Leigh was laid off each year due to lack of work.

¶ 6 Leigh earned $24 per hour when working as a sawyer, plus $8 per hour for saw rental. Leigh earned $18 per hour when he was working setting corridors or setting chokers.

¶ 7 Leigh received unemployment benefits as a "job attached" worker when he was laid off. According to the Unemployment Insurance Handbook, "job attached" is defined as, "[t]he status of a claimant when an employer has verified a scheduled date of hire/rehire for at least 30 hours per week. A claimant is not required to look for work while job attached, but must remain available for any offer of suitable work."

¶ 8 In 2008, Leigh worked for Charles Decker Logging (a.k.a. CRD Timber) during the time he was a "job attached" laid off worker. He earned wages of $3,254.99 from Charles Decker Logging in 2008.

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[1] Petitioner's Motion for Summary Judgment and Supporting Brief (Opening Brief, Docket Item No. 15.

[2] Respondent State Fund's Response Brief to Petitioner's Motion for Summary Judgment and Cross-Motion for Summary Judgment with Supporting Brief (Response Brief), Docket Item No. 17.

[3] As set forth in Opening Brief at 2-4, and endorsed in Response Brief at 2, except for ¶ 17, which is taken from Opening Brief at 5.

¶ 9 DRLL never told Leigh to decline other work if it came up while he was a "job attached" laid off worker. According to Leigh, DRLL encouraged employees to find other work during layoffs.

¶ 10 According to Leigh, DRLL did not always hire back all "job attached" employees from the previous season. From the date of his initial hire until the date of injury for this claim, however, Leigh was always hired back by DRLL.

¶ 11 According to Leigh, over the years, several of his co-workers who were "job attached" DRLL employees found other work while laid off from DRLL and did not come back.

¶ 12 In 2005, Leigh earned $28,003.50 from DRLL for pay periods January 15 through March 31 and May 15 through December 30, and Leigh received $3,570 in unemployment benefits.

¶ 13 In 2006, Leigh earned $25,388.25 from DRLL for pay periods January 15 through March 15 and May 15 through December 30, and Leigh received $5,656 in unemployment benefits.

¶ 14 In 2007, Leigh earned $18,613.50 from DRLL for pay periods January 1 through March 15 and May 15 through December 31. Leigh also earned $9,005 from self-employment in August and September, and received $3,528 in unemployment benefits.

¶ 15 In 2008, Leigh earned $16,888.24 from DRLL for pay periods January 1 through February 29 and May 15 through December 31. Leigh also earned $3,254.99 for employment with Charles Decker Logging in March and April, and received $1,920 in unemployment benefits.

¶ 16 In 2009, Leigh earned $1,200 from DRLL for pay periods January 1 through January 15 and July 1 through July 15, and Leigh received $3,667 in unemployment benefits.

¶ 17 DRLL rehired Leigh on July 7, 2009. He suffered an industrial injury on July 10, 2009.

¶ 18 According to Leigh, in July 2009, DRLL hired him to work 40 hours per week, provided 40 hours of work were available. This is consistent with representations made by the employer to the Unemployment Insurance Division regarding prior layoffs.

¶ 19 State Fund calculated Leigh's average weekly wage using wages from July 1, 2008, through June 30, 2009, based upon a twelve-month period of employment. The

calculation resulted in an average weekly wage of $226.80, and a temporary total disability (TTD) rate of $151.20.

¶ 20 Claims examiner Kevin Bartsch noted that when he was initially considering the calculation of Leigh's TTD rate, Bartsch believed the average weekly wage calculation would differ depending upon "whether or not this will be considered 'new employment' if the claimant was fired then rehired vs. being laid off." Since Bartsch did not have Leigh's actual wages before him at that time, Bartsch considered creating "dummy wages" and commented, "I don't believe it makes sense to penalize him by adding 6+ mos of 0 wages when he was laid off, so my incl[i]nation would be to use the wages for the 4 periods before layoff. I'll s/w Candi Roberts and assess that further Monday."

¶ 21 After Bartsch spoke with Roberts, Bartsch concluded that "it seems the most appropriate method of wage calc will be to get 1 yr wages to include the periods of forced idleness due to seasonality," because Leigh did not have to reapply for rehire, did not fill out new hire paperwork, did not work anywhere between January and July 2009, and drew unemployment benefits for that entire time period as a "job attached" worker.

¶ 22 Since State Fund's computer system will not accept a zero pay period in order to calculate a TTD rate, Bartsch input $.01 for the period from mid-January through July 2009, when Leigh did not receive any wages from DRLL.

DISCUSSION

¶ 23 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.[4]

Issue 1. Whether genuine issues of material fact exist.

¶ 24 State Fund alleges that genuine issues of material fact exist which preclude summary judgment in this matter. State Fund argues that the facts Leigh sets forth concerning the claims notes and decisions made by Bartsch are misleading. State Fund asserts that Leigh's recitation of the facts "impl[ies] that the State Fund claim examiner unreasonably rejected his initial thoughts on calculating Petitioner's [average weekly wage]" and that Bartsch's notes actually "reflect the reasoned approach of an

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

experienced and thoughtful examiner."[5] State Fund further asserts that while Leigh correctly asserts that State Fund's computer system could not accept a $0 pay period, this does not mean State Fund adjusted Leigh's claim unreasonably.

¶ 25 Nowhere does State Fund set forth a disputed fact. Rather, State Fund argues that the facts Leigh has set forth should not be found by the Court to constitute unreasonable adjusting. State Fund urges the Court to allow Bartsch to testify "so that his credibility can be considered prior to determining whether there are any genuine issues of material fact with respect to the issue of a penalty."[6] However, State Fund has not set forth any genuine issues of material fact which would necessitate testimony from Bartsch. State Fund has Bartsch at its disposal; if any genuine issues of material fact exist concerning Bartsch's actions, State Fund should have drawn them to the Court's attention. Since the parties have not set forth any genuine issues of material fact, I conclude that this matter is appropriate for summary disposition.

Issue 2. Whether State Fund correctly calculated Leigh's average weekly wage.

¶ 26 Section 39-71-123(3), MCA, 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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> (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.[7]

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[5] Response Brief at 9.

[6] Response Brief at 10.

[7] Since Leigh suffered his industrial injury on July 10, 2009, the 2009 statutes apply because that was the law in effect on the date of his industrial injury. *Buckman v. Montana Deaconess Hosp*., 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶ 27 Leigh argues that his average weekly wage cannot be calculated using the statutorily-preferred method found in § 39-71-123(3)(a), MCA, since he did not have four pay periods immediately preceding the day of his industrial injury. However, Leigh further argues that State Fund unreasonably chose to calculate his average weekly wage under § 39-71-123(3)(b), MCA, by using a full calendar year, including the period in which he was laid off. Leigh alleges that while § 39-71-123(3)(b), MCA, allows the use of "an additional period of time, not to exceed 1 year prior to the date of injury," it does not specify *which* additional period of time must be used, and he believes the Court should use July 1, 2008, through January 15, 2009, as the "additional period of time" from which to calculate his average weekly wage.[8]

¶ 28 Leigh argues that he does not have four previous pay periods because he was "rehired" on July 7, 2009. However, he further asserts that, since he previously worked for the same employer, the Court should look back to a previous period of employment with that employer in order to calculate his average weekly wage. Leigh's approach does not square with this Court's previous ruling in *Brodie v. Liberty Northwest Ins. Corp.*,[9] in which the Court held that wages from a previous block of employment from an employee who had been terminated and rehired from a seasonal housekeeping job at a resort could not be used because her previous employment had been terminated. Pertinent to the present case, in *Brodie*, this Court held, "[The claimant] was not guaranteed re-employment upon her termination, thus, only the wages she was paid after she was rehired should have been considered."[10]

¶ 29 In *Brodie*, the Court found that at the end of each season, the claimant's housekeeping employment was terminated and she was laid off for a couple of months. The claimant was required to re-apply for employment the following season, with no guarantee that she would be rehired, although the claimant reasonably expected that she would be rehired because she was a good employee.[11] In the present case, Leigh apparently did not have to apply for rehire each season, and expected that he would be called back to work by DRLL; however, Leigh admits that DRLL did not always hire back all the "job attached" employees from the previous season, and he further admits that,

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[8] Opening Brief at 8.

[9] *Brodie*, 2001 MTWCC 30.

[10] *Brodie*, ¶ 6.

[11] *Brodie*, ¶ 5B.

as a "job attached" worker, he was unemployed and would have to be hired or rehired if and when DRLL wanted him to return to his former employment.[12]

¶ 30 State Fund argues that Leigh's employment situation is distinguishable from Brodie's because he was not "terminated" from his employment, but rather was "temporarily laid off due to weather conditions." State Fund asserts that Leigh's status as "job attached" for unemployment insurance purposes demonstrates that his employer intended to rehire him. State Fund further asserts that Leigh's situation is distinguishable from Brodie's because he did not have to re-apply for his position each year.[13] However, the undisputed facts before the Court are that Leigh had to be "rehired" each time; not all of Leigh's former co-workers were rehired; and Leigh had no guarantee that DRLL would rehire him when work became available. In *Brodie*, the pivotal fact relied on by the Court – that the claimant was not guaranteed re-employment after her termination – is identical in Leigh's case and is not as readily distinguishable as State Fund suggests.

¶ 31 State Fund relies on *Gregory v. Michael Bailey & Sons Logging*, in which the Montana Supreme Court affirmed this Court's decision to calculate the average weekly wage of an injured worker using § 39-71-123(3)(b), MCA, because the worker had a history of being a seasonal employee.[14] In *Gregory*, the claimant worked as part of a crew of approximately 40 employees who usually were laid off in the spring and fall each year, and most of whom returned after each layoff.[15] Gregory was paid monthly and had worked from July 1989 until mid-February 1990, and then returned to work on June 1, 1990. He suffered an industrial injury on August 10, 1990.[16] After Gregory disputed the insurer's calculation of his average weekly wage, this Court calculated it by using all of Gregory's earnings from his initial hiring with his employer, including periods of layoff.[17]

¶ 32 Both Gregory and the insurer disagreed with this Court's calculation method. Gregory argued that the Court should have relied on the hourly calculations of § 39-71-123(3)(a), MCA, since his industrial accident had occurred fewer than four pay periods

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[12] Opening Brief at 6.

[13] Response Brief at 7.

[14] *Gregory*, 255 Mont. 190, 841 P.2d 525 (1992).

[15] *Gregory*, 255 Mont. at 191, 841 P.2d at 526.

[16] *Gregory*, 255 Mont. at 191, 841 P.2d at 526.

[17] *Gregory*, 255 Mont. at 192, 841 P.2d at 526. The 1989 version of § 39-71-123(3)(b), MCA, did not have the one-year limitation which is present in the current version of the statute.

after his return to work on June 1, 1990. The insurer argued that the Court should have calculated Gregory's wages using the last-four-pay-period method in § 39-71-123(3)(a), MCA, including the time in which Gregory had no work because Gregory's employment had not ended but Gregory had instead suffered a period of forced idleness due to weather conditions.[18]

¶ 33 The Montana Supreme Court recognized that neither of the parties' respective calculation methods truly reflected Gregory's wage loss. It summarized this Court's analysis and decision as follows:

> The Workers' Compensation Court concluded that using Gregory's suggested interpretation and formula would provide him with an average monthly amount of money higher than the total sum of money earned in any of the four preceding months before his injury except one. The court found this to be unfair. Likewise, the Workers' Compensation Court determined that use of the State Fund's calculations failed to accurately take into account the seasonal nature of the logging business by including off time. Therefore, for the sake of total fairness, the court considered Gregory's entire employment history with Bailey which constituted 59 weeks of employment. Of those 59 weeks, Gregory worked 31. The court used the total number of work hours (967) stipulated to by the parties and then divided this number by the actual number of weeks worked (31). . . . The court determined that this calculation gave consideration to periods when Gregory worked little, offset by periods when he worked a disproportionately high number of hours.[19]

¶ 34 The Supreme Court further noted that this Court "took into account the seasonal nature of the logging business while still basing its calculations on 'actual' hours worked within the employee's total actual work history."[20] The Supreme Court ultimately concluded:

> [W]here sporadic, seasonal work is at issue, it is reasonable when calculating "usual" salary to calculate on a larger scale than four pay periods; therefore, reliance on subsection (b) of Sec. 39-71-123(3), MCA, is appropriate. Fairness demands that sporadic, seasonal employment be determined in such a way as to "accurately reflect the claimant's

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[18] *Gregory*, 255 Mont. at 192, 841 P.2d at 526.

[19] *Gregory*, 255 Mont. at 193, 841 P.2d at 527.

[20] *Gregory*, 255 Mont. at 193-94, 841 P.2d at 527.

> employment history with the employer" as subsection (b) dictates. Further, it is inappropriate when determining compensation for a sporadic, seasonal job, to rely on subsection (a) of Sec. 39-71-123(3), MCA, as such calculations will be unreasonable and unfair.[21]

¶ 35 In *Sturchio v. Wausau Underwriters Ins. Co.*, I stated:

> 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.[22]

¶ 36 Relying on *Sturchio*, Leigh argues that State Fund's decision to use the entire calendar year – including periods of unemployment – in calculating his average weekly wage was unreasonable because the resultant calculation does not bear a reasonable relationship to actual wages lost as mandated by § 39-71-105(1), MCA. However, Leigh urges the Court to calculate his average weekly wage based on a time period of employment which he selectively chose. Employing Leigh's method results in a higher average weekly wage than Leigh's typical wages and would not bear a reasonable relationship to actual wages lost as § 39-71-105(1), MCA, requires.

¶ 37 During the Court's bench rule in *Brodie*, the Court found it significant that the claimant had no guarantee of re-employment and the lack of any requirement of good cause for the employer to refuse to rehire the claimant. That same lack of guarantee for rehire was present in *Gregory* and it is likewise present in Leigh's case. Although State Fund argues that *Brodie* is both distinguishable from the present case and from *Gregory* because Brodie had to "re-apply" for her position each year while Leigh did not, I do not find this to be much of a distinction given that neither Brodie nor Leigh were guaranteed re-employment, but rather expected to be rehired based on their respective histories as good employees. Brodie, Gregory, and Leigh all expected to and did, in fact, return to their respective seasonal employments each year when work was available.

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[21] *Gregory*, 255 Mont. at 194, 841 P.2d at 527-28. (Internal citation omitted.)

[22] *Sturchio*, 2007 MTWCC 4, ¶ 23.

¶ 38 When this Court decided *Brodie*, it made no mention of *Gregory* in its decision, and the parties did not appeal the *Brodie* decision. Although in *Brodie*, this Court interpreted § 39-71-123(3)(b), MCA, to preclude consideration of wages a claimant earned prior to a termination of employment, the language of the statute simply requires that the wage calculation should "accurately reflect the claimant's employment history with the employer." An ongoing, multi-year relationship in which the claimant is periodically terminated and rehired is certainly part of the "employment history with the employer."

¶ 39 In both *Brodie* and *Gregory*, the injured worker was a seasonal employee who was not guaranteed re-employment. In *Brodie*, this Court used the hourly calculation method found in § 39-71-123(3)(a), MCA, since Brodie's industrial accident occurred fewer than four pay periods after her rehire to her seasonal employment. This approach for calculating the average weekly wage of a seasonal employee returning to a previous employer was specifically considered and rejected by the Montana Supreme Court in *Gregory*. I see no compelling distinction between *Gregory* and the present case which would allow me to deviate from the method endorsed by the Supreme Court in *Gregory*. I therefore conclude that the method by which this Court calculated the average weekly wage in *Gregory* is the method which must be used for the calculation of Leigh's wages, taking into account that § 39-71-123(3)(b), MCA, now allows for a time period not to exceed one year prior to the date of injury.

¶ 40 Given the seasonal nature of Leigh's employment, using a one-year time period for calculating his average weekly wage allows for the resultant figure to bear a reasonable relationship to his actual wages lost, in accordance with § 39-71-105(1), MCA. I conclude State Fund correctly calculated Leigh's average weekly wage for the purposes of his workers' compensation benefits. State Fund is therefore entitled to summary judgment in this matter.

ORDER

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

¶ 42 Respondent's cross-motion for summary judgment is **GRANTED**.

¶ 43 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 21st day of December, 2010.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Laurie Wallace
Daniel B. McGregor
Submitted: July 20, 2010, and July 23, 2010