IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 23

WCC No. 2011-2871

DENNIS MARJAMAA

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORP.

Respondent.

DECISION AND JUDGMENT

Summary: Petitioner and Respondent disagree regarding the appropriate time period to use for determining Petitioner's average weekly wage. Respondent argues that Petitioner's average weekly wage is appropriately calculated using his previous year of employment, including approximately four months in which he was off work due to a previous industrial injury. Petitioner admits that his employment typically included some periods of idleness, but argues that the time in which he was off work due to his previous injury should be excluded from the average weekly wage calculation.

Held: Under § 39-71-105(1), MCA, an injured worker's wage-loss benefits must bear a reasonable relationship to his actual wages lost. Being off work for four months due to an industrial injury is an extraordinary event and does not reflect Petitioner's typical work history with his employer. Petitioner's average weekly wage shall be calculated using the time period he suggests, which Respondent does not dispute includes work hours and periods of idleness which is typical of Petitioner's work history with his employer.

Topics:

> **Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-123.** For calculating the average weekly wage under § 39-71-123(3)(b), MCA, the statute allows the use of any time period not to exceed one year prior to the date of injury.
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> **Wages: Average Weekly Wage.** Where Respondent did not dispute that the nine-month time period Petitioner asked the Court to use in calculating his average weekly wage was fairly typical of his work schedule, the Court

ordered that Respondent use this time period and calculate Petitioner's average weekly wage under § 39-71-123(3)(b), MCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-105. In order to bear a reasonable relationship to actual wages lost, an average weekly wage calculation cannot include extraordinary events such as a prolonged absence from work due to an industrial injury. In this instance, including four months of lost work due to an industrial injury would have artificially lowered Petitioner's average weekly wage.

Wages: Average Weekly Wage. In order to bear a reasonable relationship to actual wages lost, an average weekly wage calculation cannot include extraordinary events such as a prolonged absence from work due to an industrial injury. In this instance, including four months of lost work due to an industrial injury would have artificially lowered Petitioner's average weekly wage.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-123. While periods of idleness are correctly included in average weekly wage calculations under § 39-71-123(3), MCA, the resulting average weekly wage must nonetheless comport with the policy of § 39-71-105(1), MCA, and bear a reasonable relationship to the actual wages lost.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-105. While periods of idleness are correctly included in average weekly wage calculations under § 39-71-123(3), MCA, the resulting average weekly wage must nonetheless comport with the policy of § 39-71-105(1), MCA, and bear a reasonable relationship to the actual wages lost.

¶ 1 Petitioner Dennis Marjamaa petitioned this Court for a recalculation of his temporary total disability (TTD) benefits, contending that Respondent Liberty Northwest Insurance Corp. (Liberty) calculated his average weekly wage in a manner which resulted in a TTD rate which is much lower than his actual wages lost.[1] The parties agreed to submit this matter for decision based on stipulated facts which are set forth below.

[1] Petition for Hearing, Docket Item No. 1.

STIPULATED FACTS[2]

¶ 2 In 2002, Sullway Construction hired Marjamaa as a full-time carpenter. He has worked for Sullway Construction since that time as a carpenter and foreman. He has not worked for any other employer since 2002 nor has he collected unemployment insurance.

¶ 3 On July 2, 2010, Marjamaa sustained a hernia injury within the course and scope of his employment with Sullway Construction. At that time, Montana State Fund (State Fund) insured Sullway Construction. State Fund paid temporary total disability (TTD) benefits from July 30, 2010, until October 22, 2010 – a period of approximately four months – when Marjamaa returned to work full-time without restrictions.

¶ 4 Marjamaa worked for Sullway Construction from October 22, 2010, until July 21, 2011.

¶ 5 On July 21, 2011, Marjamaa suffered a low-back injury arising out of and in the course of his employment with Sullway Construction.

¶ 6 At the time of this injury, Liberty insured Sullway Construction.

¶ 7 Liberty accepted liability for Marjamaa's industrial injury and is paying TTD and medical benefits.

¶ 8 Liberty calculated Marjamaa's TTD rate for the low-back claim based upon Marjamaa's wages for the entire year prior to his date of injury. It is $293.21 per week.

¶ 9 Liberty included in its calculations the approximately four months during which Marjamaa received TTD benefits from his previous claim with State Fund. Liberty calculated these weeks as zero wages.

¶ 10 This case does not involve a seasonal employee. Marjamaa's work historically included periods of idleness (i.e., work weeks of fewer than 40 hours per week) depending on the amount of work the employer had for Marjamaa to do and because of periods Marjamaa voluntarily took off without pay (such as the week ending 7/16/11).

¶ 11 Marjamaa agrees that Liberty has acted reasonably in this matter and he has no factual or legal basis to claim attorney fees or a penalty.

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[2] Issue and Statement of Agreed Upon Facts and Exhibits (Issue and Agreed Facts), Docket Item No. 8.

ISSUE[3]

¶ 12 Whether Liberty's calculation of the TTD rate which included approximately four months when Marjamaa did not work while he received TTD benefits from State Fund, based on his earlier hernia injury covered by State Fund, correctly included those four months as "periods of idleness" under § 39-71-123(3)(b), MCA.

DISCUSSION

¶ 13 This case is governed by the 2011 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Marjamaa's industrial accident.[4]

¶ 14 Section 39-71-123(3), MCA, states:

> (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.

¶ 15 This dispute centers around Liberty's decision to calculate Marjamaa's average weekly wage using a one-year period under § 39-71-123(3)(b), MCA. Marjamaa and Liberty apparently agree that good cause exists to calculate the average weekly wage under § 39-71-123(3)(b), MCA, rather than use the previous four pay periods as set forth in § 39-71-123(3)(a), MCA.[5] Marjamaa argues that by deciding to use a full year's wages, Liberty has unfairly included in its calculation the approximately four months when Marjamaa was off work due to a previous industrial injury. Since Marjamaa did not receive wages during that time, but rather received TTD benefits, Liberty credited Marjamaa with $0.00 in wages during those four months and determined that his TTD

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[3] Issue and Agreed Facts at 1.

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

[5] Petitioner's Motion for Summary Judgment With Supporting Brief (Opening Brief) at 4, Docket Item No. 7.

rate would be $293.21 for the July 21, 2011, industrial injury.[6] Marjamaa argues that a more appropriate calculation would be to use a time period of nine months prior to his July 21, 2011, industrial injury. Marjamaa acknowledges that his job included some periods of idleness, and he contends that this nine-month window accurately reflects his employment history.[7] Marjamaa contends that if a nine-month period were used for calculating his average weekly wage, he would be entitled to a TTD rate of $397.57.[8]

¶ 16 Liberty argues that a "period of idleness" is any period in which the employee is not working, and that § 39-71-123, MCA, makes no exceptions for specific types of idleness. Liberty argues that Marjamaa's argument that idleness which occurs while a worker receives TTD benefits is somehow idleness which is not to be included under § 39-71-123(3)(b), MCA, would mean that insurers would be unable to include periods of idleness for any non-seasonal employee in their average weekly wage calculations, thereby rendering the provision "including periods of idleness" meaningless.[9] Marjamaa contends that a worker may be considered idle if no work is available and he stays home, or if he voluntarily takes time off work. However, he disagrees that a worker is idle when "sidelined by a work-related injury."[10]

¶ 17 Both parties devote much of their arguments to what constitutes "idleness." However, whether the time Marjamaa was off work due to his previous injury misses the point. As Marjamaa also points out, this Court has previously looked to the public policy of § 39-71-105, MCA, when determining how best to calculate an injured worker's average weekly wage. In *Sturchio v. Wausau Underwriters Ins. Co.*, the Court explained:

> Pursuant to § 39-71-105(1), MCA, an objective of Montana's workers' compensation system is to provide wage-loss benefits to a worker suffering from a work-related injury. Specifically, the statute states:
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> > Wage-loss benefits are not intended to make an injured worker whole; they are intended to assist a worker at a reasonable cost to the employer. Within that limitation, ***the wage-loss benefit should bear a reasonable relationship to actual wages lost*** as a result of a work-related injury or disease. (Emphasis added.)

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[6] Opening Brief at 3-5.

[7] Opening Brief at 5.

[8] *Id*.

[9] Liberty's Brief on Agreed Facts at 1, 6, Docket Item No. 9.

[10] Petitioner's Reply Brief on Agreed Facts at 2-3, Docket Item No. 11.

> 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. The difficulty with the approach Respondent urges is that it would sacrifice the ability to calculate wage-loss benefits so that they bear a reasonable relationship to actual wages lost by limiting the ability of the parties to use statutorily-approved calculation methods on a case-by-case basis.[11]

¶ 18 In the present situation, Liberty approaches § 39-71-123(3), MCA, as if it presented only two options: four pay periods under § 39-71-123(3)(a), MCA, or one year under § 39-71-123(3)(b), MCA. Section 39-71-123(3)(b), MCA, however, allows the use of any time period not to exceed one year prior to the date of injury.

¶ 19 The question then becomes how to select the time period, and its length, under § 39-71-123(3)(b), MCA. Obviously, the injured worker may argue that the time period chosen is the time period in which his wages were the highest, while the insurer may argue that the correct time period to choose is the time period when the injured worker's wages were the lowest. The Court was faced with such a situation in *Leigh v. Montana State Fund*, in which State Fund used an entire year, including time during which the worker was laid off, in calculating the claimant's average weekly wage. Leigh, the claimant, argued that the Court should order State Fund to use a specific six-month window of time during his previous year of employment which did not include the time he was laid off.[12] The Court found that using the time period Leigh chose would result in a higher average weekly wage than Leigh's typical wages and would not bear a reasonable relationship to actual wages lost as required by § 39-71-105(1), MCA.[13] Furthermore, the parties acknowledged that Leigh was laid off each year[14] and the Court ultimately concluded that, given the seasonal nature of Leigh's employment, using a

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[11] *Sturchio*, 2007 MTWCC 4, ¶¶ 22-23 (*aff'd* 2007 MT 311, 340 Mont. 141, 172 P.3d 1260. (Internal citation omitted.)

[12] *Leigh*, 2010 MTWCC 37, ¶ 27.

[13] *Leigh*, ¶ 36.

[14] *Leigh*, ¶ 5.

one-year time period for calculating his average weekly wage would allow for the resultant figure to bear a reasonable relationship to his actual wages lost.[15]

¶ 20 Marjamaa, however, is not a seasonal employee although as noted above, his work regularly included periods of idleness. Therefore, just as with Leigh's situation, were the Court to selectively choose a small window of Marjamaa's work history in which he had no periods of idleness, the resultant average weekly wage calculation would not bear a reasonable relationship to actual wages lost. Marjamaa does not ask the Court to do so; rather he urges the Court to use a nine-month period in which he was not off work due to an industrial injury, but was working hours which he represents to the Court as being fairly typical of his work schedule, including some periods of idleness. Liberty does not dispute Marjamaa's characterization of this time period as being representative of his typical work schedule.

¶ 21 What is, however, atypical of Marjamaa's work schedule is being off work for approximately four months due to a previous industrial injury. In order to bear a reasonable relationship to actual wages lost, an average weekly wage calculation cannot include extraordinary events such as a prolonged period out of work due to an industrial injury. While Leigh urged this Court to select a time period which would have artificially inflated his average weekly wage, Liberty's inclusion of Marjamaa's approximate four months of lost work due to an industrial injury would artificially lower Marjamaa's average weekly wage.

¶ 22 While periods of idleness are correctly included in average weekly wage calculations under § 39-71-123(3), MCA, the resulting average weekly wage must nonetheless comport with the policy of § 39-71-105(1), MCA. In the present case, including the months during which Marjamaa was off work due to a previous industrial injury would result in an average weekly wage which is too low to bear the reasonable relationship required by § 39-71-105(1), MCA. However, using the time period Marjamaa proposes, including the periods of idleness contained within that time period, would both satisfy the requirements of § 39-71-123(3)(b), MCA, and § 39-71-105(1), MCA. I therefore conclude Liberty should calculate Marjamaa's average weekly wage in that manner.

ORDER AND JUDGMENT

¶ 23 Liberty's calculation of the TTD rate which included approximately four months when Marjamaa did not work while he received TTD benefits from State Fund, based on his earlier hernia injury covered by State Fund, did not correctly include those four months as "periods of idleness" under § 39-71-123(3)(b), MCA.

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[15] *Leigh*, ¶ 40.

¶ 24 Liberty shall calculate Marjamaa's average weekly wage using a time period of nine months prior to his July 21, 2011, industrial injury.

DATED in Helena, Montana, this 3rd day of July, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Leslae J.E. Dalpiaz
Larry W. Jones
Submitted: April 17, 2012