

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2021 MTWCC 11

WCC No. 2020-5333

KELLY MARJAMAA

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner contends that Respondent did not correctly calculate her wages and her TTD benefit rate because it did not consider the hours that she worked but did not get paid. Alternatively, Petitioner argues that she actually received wages because she considers half of the amount that she accepted to settle her wage claim and her sexual harassment claim against her former employer to be for backpay.

Held: Petitioner did not present sufficient evidence for this Court to recalculate her wages under § 39-71-123(3)(a), MCA, and her TTD benefit rate under § 39-71-701(3), MCA. Because a claimant's wage is to be calculated based on "actual earnings," this Court cannot increase her wages and TTD benefit rate on the basis of hours she worked but did not get paid. Moreover, Petitioner presented only an approximation of the wages she earned in the first three of the four pay periods preceding her injury, which is insufficient evidence because § 39-71-123(3)(a), MCA, states that a claimant's wage is to be calculated based on "actual earnings." Finally, the amount of backpay awarded to a claimant in a wage claim is "wages" under the definition in § 39-71-123(1)(b), MCA, and this Court would use the amount of backpay a claimant received in a wage claim to calculate wages under § 39-71-123(3)(a), MCA, under established law. However, Petitioner did not receive backpay from her settlement with her former employer because the settlement agreement expressly provides that the settlement amount was for her "alleged emotional distress damages."

¶ 1 The trial in this matter was held on June 9, 2021, in Missoula, Montana. Petitioner Kelly Marjamaa was present and was represented by Thomas C. Bulman. Respondent Montana State Fund (State Fund) was represented by Charles G. Adams. Ashley Makowski, claims adjuster, was present on behalf of State Fund.

¶ 2 Exhibits: This Court admitted Exhibits 1 through 10 and 12 through 17.

¶ 3 Witnesses and Depositions: This Court admitted the deposition of Kelly Marjamma into evidence. Makowski, Marjamaa, Matthew Marjamaa, and Ciara Marjamaa were sworn and testified at trial.

¶ 4 Issues Presented: This Court restates the issues in the Pretrial Order as follows:

Issue One: Is Marjamaa entitled to recalculation of her average weekly wage and her temporary total disability (TTD) benefit rate?

Issue Two: Is Marjamaa entitled to a penalty under § 39-71-2907, MCA, and her attorney fees or costs under §§ 39-71-611 or -612, MCA?

FINDINGS OF FACT

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

¶ 6 Marjamaa started working as a ranch hand for Luthje Ranch, LLC (Luthje Ranch), on May 20, 2019.

¶ 7 Timothy Luthje ran the ranch. He initially agreed that Luthje Ranch would pay Marjamaa \$11 per hour. Luthje Ranch paid its employees semi-monthly.

¶ 8 Marjamaa and her husband, Matthew Marjamaa, rented a house from Luthje.

¶ 9 Marjamaa's working hours varied. She recorded her hours worked in a notebook. Before payday, Marjamaa tore her record of hours that she had worked out of her notebook and gave it to Luthje. On payday, Luthje Ranch's accountant initiated a direct deposit into Marjamaa's account.

¶ 10 In a recorded statement that Marjamaa's attorney gave to State Fund, Marjamaa stated that Luthje Ranch paid her "right around \$400" per pay period for the first three pay periods in which she worked, which were the May 16 – 31, 2019; June 1 – 15, 2019; and June 16 – 30, 2019, pay periods.

¶ 11 Marjamaa did not think that Luthje Ranch was paying her for all of the hours that she worked. However, she did not complain because she was afraid that Luthje would fire her and evict her and her husband and she did not think they could find another rental that would allow them to have their pets.

¶ 12 On July 25, 2019, Marjamaa suffered an injury to her right foot while working for Luthje Ranch. However, she continued working.

¶ 13 Luthje agreed to give Marjamaa a raise to \$12 per hour, starting with the pay period beginning August 1, 2019.

¶ 14 Marjamaa quit working for Luthje Ranch on October 18, 2019.

¶ 15 On February 21, 2020, Marjamaa filed an injury claim against State Fund. In the First Report of Injury or Occupational Disease, Marjamaa estimated that in the four pay periods before her injury, she received \$400, \$400, \$468, and \$430, respectively.

¶ 16 State Fund accepted liability for Marjamaa's injury.

¶ 17 State Fund contacted Luthje Ranch and requested Marjamaa's payroll records. Luthje Ranch provided Marjamaa's paystubs from July 1, 2019, to October 15, 2019. The following chart summarizes the paystubs:

Pay Period	Hours Worked	Rate of Pay	Wages Paid
July 1 – 15, 2019	28	\$11	\$308
July 16 – 31, 2019	73	\$11	\$803
August 1 – 15, 2019	37.5	\$12	\$450
August 16 – 31, 2019	40.5	\$12	\$486
September 1 – 15, 2019	38	\$12	\$456
September 16 – 30, 2019	37	\$12	\$444
October 1 – 15, 2019	0	Not specified	\$0
TOTAL WAGES PAID			\$2947.00

¶ 18 Luthje Ranch issued a W-2 to Marjamaa for 2019, stating that it paid her \$2,947.00 in wages. Marjamaa and her husband filed tax returns for 2019. Marjamaa did not report any other wages from Luthje Ranch to the IRS or to the Montana Department of Revenue.

¶ 19 State Fund calculated Marjamaa's average weekly wage based solely on the payroll record for the July 1 – 15, 2019, pay period, the pay period immediately preceding

her injury. State Fund calculated Marjamaa's average weekly wage to be \$143.72, and her TTD benefit rate to be \$95.81.

¶ 20 On March 12, 2020, Marjamaa filed a claim against Luthje Ranch under the Wage Protection Act.¹ She alleged, "During the course of her employment with the Defendant, the Plaintiff was required to work in excess of 40 hours per week. However, the Defendant failed to pay the Plaintiff all wages due and owing to the Plaintiff, including both regular and overtime wages, in violation of Montana wage laws." She prayed for judgment in the amount of her unpaid wages, for a penalty under § 39-3-206, MCA, and for her attorney fees and costs under § 39-3-214, MCA.

¶ 21 Marjamma also brought a sexual harassment claim against Luthje Ranch.²

¶ 22 In July 2020, Marjamma settled her wage claim and her sexual harassment claim against Luthje Ranch. The settlement agreement states, in relevant part:

1. a. Respondent agrees to pay Charging Party the sum of Fifty-Five Thousand and No/100 Dollars (\$55,000.00) allocated as follows: Forty Thousand and No/100 Dollars (\$40,000.00) payable to Kelly Marjamaa **as alleged emotional distress damages**; and Fifteen Thousand and No/100 Dollars (\$15,000.00) payable to Tipp, Coburn & Associates, P.C., for Charging Party's legal fees and expenses.

. . .

2. This Agreement does not constitute an admission by Respondent of any violation of law and Respondent enters into this Agreement solely to resolve the matter without further proceedings.

3. Charging Party agrees that this Agreement serves as a withdrawal of Case Nos. HRB 0200215 and agrees not to initiate any new complaint under the Montana Human Rights Act or any federal discrimination laws based upon the facts underlying the present complaint subject to the performance by Respondents of the terms of this Agreement.

4. Charging Party also agrees that she will have her counsel dismiss with prejudice Cause No. DV-32-2020-0000333-WC filed in the Montana Fourth Judicial District Court, Missoula County.³

¹ *Marjamma v. Luthje Ranch, LLC*, Montana Fourth Jud. Dist. Court Cause No. DV-32-2020-0000333-WC.

² *Marjamma v. Luthje Ranch, LLC*, Montana Human Rights Bureau Case No. 0200215.

³ Emphasis added.

¶ 23 Marjamaa does not have any records of the hours that she worked for Luthje Ranch. She estimates that she worked 60 hours per week on average during her term of employment.

CONCLUSIONS OF LAW

¶ 24 This case is governed by the 2017 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Marjamaa's industrial accident.⁴

Issue One: Is Marjamaa entitled to recalculation of her average weekly wage and her TTD benefit rate?

¶ 25 Section 39-71-123(3), MCA, sets forth the law to calculate a claimant's wages. It states, in relevant part:

(a) . . . [F]or 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.

¶ 26 Section 39-71-701(3), provides that a claimant's TTD benefit rate is "66⅔% of the wages received at the time of the injury," with the maximum rate set at Montana's "average weekly wage at the time of injury."

¶ 27 Section 39-71-105(1), MCA, instructs that wage-loss benefits "should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease."

¶ 28 Marjamaa contends that State Fund did not correctly calculate her wages under § 39-71-123(3)(a), MCA, because it did not include the hours that she worked for Luthje Ranch without pay. She argues that equity demands that this Court find that her wages were \$720 per week, based on her testimony that she worked 60 hours per week on average and that Luthje agreed to pay her \$12 an hour. Using these figures, Marjamaa asserts that her TTD benefit rate under § 39-71-701(3), MCA, is \$480.02. Alternatively, Marjamaa argues that she received backpay because she considers half of the money that she received in her settlement with Luthje Ranch to be for her wage claim.

¶ 29 State Fund asserts that the plain language of the Workers' Compensation Act precludes this Court from calculating Marjamaa's wages based on the hours that she claims to have worked for Luthje Ranch without pay. State Fund points to the plain language of § 39-71-123(3)(a), MCA, which states that the employee's wages are to be

⁴ *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

calculated on “actual earnings.” State Fund also argues that this Court cannot rule that Marjamaa’s TTD benefit rate is \$480.02, because she would receive more in TTD benefits per week than she usually received in wages while working for Luthje Ranch, in violation of the policy of the Workers’ Compensation Act as set forth in § 39-71-105(a), MCA, which provides that wage-loss benefits should bear a reasonable relationship to “actual wages lost.” State Fund also argues that this Court cannot consider any amount she received from her settlement with Luthje Ranch as wages because the settlement agreement expressly provides that the \$40,000 payment to Marjamaa was for “alleged emotional distress damages.”

¶ 30 Here, no avenue exists for this Court to recalculate Marjamaa’s wages. The Montana Supreme Court has held that the plain language of § 39-71-123(3)(a), MCA, controls despite the equities of the case.⁵ The plain language of § 39-71-123(3)(a), MCA, states that wages are to be calculated on the claimant’s “average actual earnings” during the four pay periods before the claimant’s injury. Thus, this Court cannot calculate Marjamaa’s wages on the basis of hours that she worked for Luthje Ranch without pay. Moreover, Marjamaa had the burden of proof⁶ but did not introduce sufficient evidence for this Court to find the amount of her “actual earnings” during the first three of the four pay periods before her injury. The only evidence in the record as to the amount that Marjamaa received during the first three of the four pay periods before her injury is her estimates in her First Report of Injury and Occupational Disease and her statement to State Fund, in which she stated “I was basically paid right around \$400 every two weeks.” However, because § 39-71-123(3)(a), MCA, states that wages are to be calculated with the claimant’s “actual earnings,” an approximation of wages received is insufficient.⁷

¶ 31 Marjamaa is correct that the backpay awarded in a wage claim is “wages” under the definition in § 39-71-123(1)(b), MCA, and is to be included in the calculation of a claimant’s “average actual earnings” under § 39-71-123(3)(a), MCA.⁸ However, there is no merit to Marjamaa’s argument that she received \$20,000 in backpay from her settlement with Luthje Ranch. “In construing written contracts, courts must give effect to the mutual intent of the parties at the time of formation based first on the express language

⁵ See *King v. State Comp. Ins. Fund*, 282 Mont. 335, 938 P.2d 607 (1997) (rejecting claimant’s equitable argument that the three pay periods before her injury should be used to calculate her wages because she worked less hours than normal in the earliest of the four pay periods before her injury and holding that the plain language of § 39-71-123(3)(a), MCA, mandated that her wages be calculated on the basis of the four pay periods preceding her injury).

⁶ *Hanks v. Liberty Nw. Ins. Corp.*, 2002 MT 334, ¶ 11, 313 Mont. 263, 62 P.3d 710 (citation omitted).

⁷ *Allum v. Mont. State Fund*, 2020 MTWCC 1, ¶ 79. In a claim brought under the Wage Protection Act, §§ 39-3-101 et seq., MCA, the employee can meet her burden of proving that wages have been earned but have not been paid with evidence that reasonably approximates the amount of work performed. *America’s Best Contractors, Inc. v. Singh*, 2014 MT 70, ¶¶ 25-29, 374 Mont. 254, 321 P.3d 95 (citations omitted). However, this standard of proof does not apply in this case because, again, § 39-71-123(3)(a), MCA, states that a claimant’s wages are to be based on “actual earnings.”

⁸ See *Greene v. Uninsured Employers’ Fund*, 2003 MTWCC 27, ¶ 99 (ruling that if claimant was entitled to backpay, “that backpay must be included in computing the claimant’s wages and benefits.”).

of the agreement.”⁹ The express language of Marjamaa’s settlement agreement with Luthje Ranch provides that the \$40,000 paid to her was for “alleged emotional distress damages.” Marjamaa is bound by this express term.¹⁰ Marjamaa agreed to voluntarily dismiss her wage claim with prejudice, which “constitutes a final judgment on the merits.”¹¹ Thus, she did not receive any backpay as a result of her wage claim.

¶ 32 Under the circumstances of this case, State Fund correctly calculated Marjamaa’s wage under § 39-71-123(3)(a), MCA, to be \$380 and her TTD benefit rate under § 39-71-701(3), MCA, to be \$95.81.

Issue Two: Is Marjamaa entitled to a penalty under § 39-71-2907, MCA, and her attorney fees or costs under §§ 39-71-611 or -612, MCA?

¶ 33 Because Marjamaa has not prevailed, she is not entitled to a penalty under § 39-71-2907, MCA, or to her attorney fees or costs under §§ 39-71-611 or -612, MCA.

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⁹ *VanBuskirk v. Gehlen*, 2021 MT 87, ¶ 24, ___ Mont. ___, 484 P.3d 924 (citation omitted).

¹⁰ *See Rich v. Ellingson*, 2007 MT 346, ¶ 19, 340 Mont. 285, 174 P.3d 491 (rejecting a plaintiff’s claim that she intended to reserve a claim at the time of a settlement despite language in the settlement agreement stating that she was settling all claims because, “Rich’s present allegation of her past intent, without more, cannot change the unambiguous intent of the Release, as indicated through its express terms. The District Court correctly concluded that the terms of the agreement and Release were clear and unambiguous and that Rich was bound by those terms.”).

¹¹ *Adams v. Two Rivers Apartments, LLLP*, 2019 MT 157, ¶ 11, 396 Mont. 315, 444 P.3d 415 (citation omitted).

JUDGMENT

¶ 34 Marjamaa is not entitled to a recalculation of her average weekly wage or her TTD benefit rate.

¶ 35 Marjamaa is not entitled to a penalty under § 39-71-2907, MCA.

¶ 36 Marjamaa is not entitled to her attorney fees or costs under §§ 39-71-611 or -612, MCA.

¶ 37 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 this 2nd day of July, 2021.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Thomas C. Bulman
Charles G. Adams

Submitted: June 23, 2021