

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 52

WCC No. 9602-7490

SONJA KING

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

SUPER 1 FOODS

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Sole issue submitted by parties involved claimant's wage rate for permanent partial disability benefits. Under section 39-71-123, MCA (1991), the employee's wages for purposes of benefits are based on "the average actual earnings for the four pay periods immediately preceding the injury." Claimant had worked at least four pay periods prior to the injury, but her wages in the last three pay periods were higher than those in the earliest of the four periods. She asked for an order that wages be based only on the last three pay periods.

Held: Section 39-71-123, MCA (1991) contains two exceptions to use of the four pay periods, but neither requires an insurer to use fewer than four pay periods when claimant worked a full four pay periods prior to injury. (Note, WCC affirmed in *King v. State Compensation Insurance Fund*, 282 Mont. 335, 938 P.2d 607 (1997) (No. 96-482).)

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-123(3), MCA (1991). Where claimant worked four pay periods prior to injury, the insurer was not required to base wages on fewer than four pay periods in order to increase her wage rate. Under section 39-71-123(3), MCA (1991), the insurer is directed to use the average actual earnings for the four pay periods preceding the injury, with two exceptions, neither of which supports claimant's request to use

fewer than four pay periods. (Note WCC affirmed in *King v. State Compensation Insurance Fund*, 282 Mont. 335, 938 P.2d 607 (1997) (No. 96-482).)

Wages: Average Weekly Wage. Where claimant worked four pay periods prior to injury, the insurer was not required to base wages on fewer than four pay periods in order to increase her wage rate. Under section 39-71-123(3), MCA (1991), the insurer is directed to use the average actual earnings for the four pay periods preceding the injury, with two exceptions, neither of which supports claimant's request to use fewer than four pay periods. (Note WCC affirmed in *King v. State Compensation Insurance Fund*, 282 Mont. 335, 938 P.2d 607 (1997) (No. 96-482).)

This case was scheduled for trial on April 22, 1996. At that time the parties advised the Court that all issues had been resolved except claimant's compensation rate. (Order Setting Briefing Schedule on Calculation of Wage Loss, April 25, 1996.) Counsel agreed to present that issue to the Court upon stipulated facts and briefs. No stipulated facts were filed with the Court other than those contained in the Pre-trial Order docketed on April 18, 1996. The parties also filed 14 agreed-to exhibits and have provided factual narrative in their briefs. Based on the exhibits and their narrative, there does not appear to be any dispute concerning the material facts, and in any event, the issue presented is essentially a legal one. Therefore, with the filing of Claimant's Reply Brief on May 29, 1996, the Court deemed this matter submitted for decision.

Issue presented: Whether the calculation of a claimant's average weekly wage can be based upon post-injury wages.

Since the issue presented is a legal one, and the factual background is not in dispute, this decision will be in narrative form.

Factual Background

The petitioner in this matter is Sonja King (claimant), who was injured on April 13, 1992, while working as a bakery salesperson at Super 1 Foods in Hamilton, Montana. She suffered a twisting injury of her neck. The State Compensation Insurance Fund (State Fund) insured Super 1 Foods and accepted liability for the injury. It has since paid both medical and disability benefits.

Following her injury, claimant continued working. However, her job changed to that of a cake decorator, a position which she held during the remainder of her employment with Super 1 Foods.

Although she continued working, claimant experienced neck pain. She was treated by a chiropractor until sometime in November 1993. The State Fund then referred her to Dr. Catherine Capps, an orthopedic surgeon, for evaluation. Claimant became pregnant in late 1993 and the evaluation by Dr. Capps was delayed.

Claimant continued to work up until the birth of her child on July 19, 1994. After the birth of her child, Dr. Capps examined her and determined that she should not return to work as a bakery salesperson or as a cake decorator on account of her continuing neck pain. Ultimately, on March 1, 1995, Dr. Capps concluded that the claimant had reached maximum medical improvement and rated her impairment at 6% of the whole person.

Prior to her industrial injury claimant worked 30.75 hours during the two weeks ending January 4, 1992. She did not work during the remainder of January. In February 1992 she worked 34.25 hours during the two weeks ending February 15, 1992, and 14.75 hours during the two weeks ending February 29, 1992. During the next three pay periods, encompassing the two week periods ending March 14, March 28, and April 11, 1992, claimant worked 63.75, 43.25 and 60.50 hours respectively, including seven hours of overtime.

Claimant's hours of work and her wages from the date of her hire to the date of her injury are summarized in the following chart taken from Exhibit 12⁽¹⁾:

Pay Period Ending	Reg Hrs	Reg Pay	Other Pay	Gross Pay
OT Hrs	OT Pay			
1-04-92	30.75	150.98	8.00	158.98
2-15-92	21.75	106.79		106.79
2-15-92	2.50	12.28		12.28
2-29-92	14.25	69.97		69.97
3-14-92	7.00	34.37		34.37
3-14-92	56.75	278.64	15.00	293.64
3-28-92	43.25	212.36		212.36
4-11-92	60.50	297.06	10.00	307.06

As mentioned earlier, claimant was injured on April 13, 1992. Based on that injury date, the State Fund calculated her average weekly wage utilizing the four pay periods prior to her injury, i.e. the pay periods ending February 29, March 14, March 28, and April 11, 1992. Based on the wages for those pay periods, the State Fund calculated claimant's average weekly wage as \$104.54, and her compensation rate for both total and partial disability as \$69.69 per week. (Reply Brief at 2.) (These calculations are not accurate by the above numbers.)

On December 5, 1995, the State Fund recalculated the claimant's disability rate by including all of the pay periods worked by the claimant prior to her April injury, **excepting**

the weeks she did not work and the last two weeks of February during which she worked only 14.75 hours. This recalculation resulted in an increase in the claimant's temporary total disability rate to \$76.26 per week based on an average weekly wage of \$114.38. (*Id.*)

Following her injury, claimant's hours of work increased. According to claimant's calculations, from January to December 19, 1992, she worked 1,531.75 regular hours and 25 overtime hours. (Claimant's Reply Brief at 2.) (She does not include the last two weeks of 1992 since her hours and pay for those weeks are not encompassed in the exhibit submitted to the Court.) She equates her overtime hours to 37.5 regular hours, resulting in a total of 1,569.25 hours for 1992. Dropping the month of January, during which she worked little, if at all, and ignoring the last two weeks of December, claimant calculates her average hours per week as 34.11. Ignoring a wage increase she received in September, she calculates her average weekly pay as \$167.48, yielding a benefit rate of \$111.65 ($\$167.48 \times 2/3$). (Supplement to 5/8/96 Brief of Petitioner.)

DISCUSSION

Claimant argues that her benefit rate should be based on her wages during the entire year of 1992 excluding January and the last two weeks of December.

Since her injury occurred in April 1992, claimant's benefits are governed by the 1991 version of the Workers' Compensation Act. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). With respect to permanent partial disability benefits, the 1991 law specified the permanent partial disability benefit rate as follows: "The weekly benefit rate for permanent partial disability is 66 2/3% of the wages **received at the time of injury**" § 39-71-703(4), MCA (1991)(Emphasis added). The computation of wages was governed by section 39-71-123(3), MCA (1991), which provides:

(3) For compensation benefit purposes, the average actual earnings for the four pay periods **immediately preceding the injury** are the employee's wages, **except** if:

(a) the term of employment for the same employer is less than four pay periods, in which case the employee's wages are the hourly rate times the number of hours in a week for which the employee was hired to work; or

(b) for good cause shown by the claimant, the use of the four pay periods does not accurately reflect the claimant's employment history with the employer, in which case the insurer may use additional pay periods. [Emphasis added.]

Claimant argues that the four pay periods rule should not be applied since "[s]he was not hired for a set number of hours per week, and her hours fluctuated" (Petitioner's Brief on Applicable Wage Rate at 4.) Her argument ignores the plain language of the quoted provisions. Section 39-71-703(4), MCA (1991), specifically provides that the wages to be used in computing permanent partial disability benefits are the wages "received **at the**

time of injury." (Emphasis added.) Section 39-71-123(3), MCA (1991), specifically requires that wages be calculated using the four pay periods prior to the injury *unless* one of two exceptions is met. The first exception, § 39-71-123(3)(a), MCA (1991), is inapplicable because the claimant had more than four pay periods prior to her injury. The second exception, § 39-71-123(3)(b), MCA (1991), does not aid claimant even though it allows the Court to disregard the four preceding pay periods because it requires a *retrospective* view of wages. The subsection permits inclusion of additional pay periods only if the four pay periods preceding the industrial accident do "not accurately reflect the claimant's employment **history** with the employer" (Emphasis added.) *History* is *past tense* and refers to the periods of employment *prior to claimant's injury*.

Case law cited by claimant cannot change the plain meaning of the statutes. Moreover, she misconstrues the holdings of the various cases cited in her brief.

Claimant argues that *Deshner v. Town and Country Foods, Inc.*, 266 Mont. 352, 880 P.2d 1300 (1994), should be read as "a substantially prospective look at the wage rate." (*Id.*) Her reliance on *Deshner* is misplaced. In *Deshner* the insurer based its calculation of the average weekly wage upon the four pay periods prior to the injury. The claimant had received a salary increase two weeks prior to his injury and argued that wages should be based on the increase rather than the actual wages. The Supreme Court agreed:

According to Deshner's employment history with Town and Country, he was earning \$7.25 per hour *at the time of his injury*, albeit earning \$6.00 per hour for the preceding months. A calculation of his weekly compensation rate at an hourly wage of \$6.00 does not adequately reflect his employment history. The Workers' Compensation Court should have utilized a pay period which reflected his actual wage **at the time of his injury**, which was \$7.25 per hour. Deshner has demonstrated that there is good cause to use a pay period which accurately reflects his actual wages **at the time of the injury** to determine his weekly compensation benefit. [Emphasis added.]

Id. at 356. *Deshner* does not suggest that wages should be calculated on post-injury wages. To the contrary, it holds that wages must be determined **at the time of the injury**.

Claimant asserts that *Gregory v. Bailey and Sons Logging*, 255 Mont. 190, 841 P.2d 525 (1992), supports her position. *Gregory* involved a question of whether a claimant's entire work history, **which was all preinjury**, could be used as a basis for calculating the average weekly wage or whether the statute limited the calculation to the four pay periods immediately preceding the injury. The Supreme Court held "that where sporadic, seasonal work is at issue, it is reasonable when calculating 'usual' salary to calculate on a larger scale than four pay periods" 255 Mont. at 194, 841 P.2d at 527. *Gregory* was a logger and his work was seasonal. The decision in *Gregory* considered only **preinjury** wages.

Moreover, there is no evidence in the record of this case that claimant was a seasonal employee.

She further cites *Stuber v. Moodie Implement*, 236 Mont. 189, 769 P.2d 1205 (1989), as supporting her position. That case, however, contradicts her position since it rejected the very argument advanced in this case. In *Stuber* the insurer calculated wages by including post-injury periods. Quoting section 39-71-701, MCA (1983), which provided that temporary total disability benefits were two-thirds "of the wages received at the time of injury," the Supreme Court held that inclusion of post-injury wages was improper. 236 Mont. at 193, 769 P.2d at 1027.

Claimant further argues that section 39-71-105, MCA (1991), supports her position. That section provides in relevant part:

39-71-105. Declaration of public policy. For the purposes of interpreting and applying Title 39, chapters 71 and 72, the following is the public policy of this state:

(1) It is an objective of the Montana workers' compensation system to provide, without regard to fault, wage supplement and medical benefits to a worker suffering from a work-related injury or disease. Wage-loss benefits are not intended to make an injured worker whole; 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.]

The legislature's statement of purpose does not override operative statutory provisions. Moreover, the statement of purpose does not refer to post-injury wages. It refers only to "actual wages."

In Claimant's Reply Brief at 3, the claimant asks that "at a minimum" the wage rate be established by using the three pay periods prior to the injury, which would result in an average weekly wage of \$141.24 and a disability benefit rate of \$94.16. That method is contrary to section 39-71-123(3), MCA (1991). As already discussed, section 39-71-123(3)(a), MCA, is inapplicable since claimant worked more than four pay periods. Section 39-71-123(3)(b), MCA, is inapplicable since it permits the use of **additional** pay periods if the four pay periods do not accurately reflect the claimant's employment history.

Finally, the claimant has requested attorney fees and costs. Since all other issues were resolved prior to trial, and no evidence has been presented concerning the insurer's conduct regarding the resolved issues, the Court will only consider claimant's entitlement to attorney fees and costs with respect to the wage and rate issues. Assessment of costs is required if claimant prevails; she did not. Assessment of fees requires a determination that the insurer has acted unreasonably. § 39-71-612, MCA (1991). It should be clear from the foregoing discussion that the insurer's position in this case was reasonable.

JUDGMENT

1. Petitioner is not entitled to an increase in her permanent partial disability benefit rate.
2. Petitioner is not entitled to attorney fees and costs.
3. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.
4. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 16th day of July, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Howard Toole

Ms. Ann E. Clark

Submitted Date: May 29, 1996

1. The summary of hours worked and compensation paid as listed in Petitioner's Brief on Applicable Wage Rate and respondent's Reply Brief differ from each other and from those amounts listed in Exhibit 12. The figures listed are taken from the Fax from Super 1 Foods found in Exhibit 12 at 3 and claimant's pay stubs found in Exhibit 12 at 29-31.