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IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 22-0114

TAMARA BARNHART,

Petitioner and Appellee,

v.

MONTANA STATE FUND,

Respondent and Appellant.

APPELLEE TAMARA BARNHART'S ANSWER BRIEF

On Appeal from the Montana Workers' Compensation Court
Cause No. 2019-4816
The Honorable David Sandler Presiding

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STATEMENT OF THE ISSUES

Whether the Montana Workers' Compensation Court ("WCC") correctly interpreted M.C.A. §39-71-123(4)(c), determining that an injured worker's permanent partial disability ("PPD") benefit rate is calculated based on aggregate wages from concurrent employments *at the time of her injury*.

STATEMENT OF THE CASE

This matter is on appeal from the WCC's Order Granting in Part and Denying in Part Petitioner's Motion for Summary Judgment. (Workers' Comp. Ct. Dkt. ("Dkt.") 27).

In September 2017, Appellee, Tamara Barnhart ("Barnhart"), was badly injured in a motor vehicle crash, while in the course and scope of her employment with Youth Dynamics, Inc ("YDI"). Due to her injuries, Barnhart was unable to work at YDI or at the other, part-time job she held at the time of the accident. Appellant, Montana State Fund ("MSF"), accepted liability for Barnhart's claim and initially paid benefits based on an aggregate calculation of wages from both jobs. When Barnhart reached maximum medical improvement ("MMI"), she was medically restricted from returning to her part-time job but was released to return to her position with YDI. At that time, MSF calculated her PPD benefits using two (2) different PPD rates, effectively reducing Barnhart's PPD award by $18,032.

On October 18, 2019, Barnhart filed a Petition for Hearing with the WCC, disputing MSF's method of calculating her PPD award. The parties agreed to summary judgment briefing based on stipulated facts. On January 11, 2022, the WCC issued its Order Granting in Part and Denying in Part Petitioner's Motion for Summary Judgment (the "Order"). (Dkt. 27.) In pertinent part, the WCC held that, under M.C.A. § 39-71-123(4)(c), an injured worker's PPD benefit rate must be calculated based on aggregate wages from concurrent employments *at the time of her injury*. State Fund filed a motion for reconsideration, which the WCC denied. (Dkt. 36.) This appeal followed.

STATEMENT OF THE FACTS

Tamara Barnhart worked in the restaurant industry since she was 15 years old, working her way up to manager positions at several restaurants over the years. (Dkt. 20, ¶¶ 3-4). In 2003, Barnhart began working for Dairy Queen (DQ) in Billings, Montana, eventually working in various management positions. (Dkt. 20, ¶¶ 6-8). In 2009, Barnhart started college full-time and continued to work at DQ. (Dkt. 20, ¶¶ 8-9). After graduating in 2014, Barnhart accepted a full-time position as a youth case manager at YDI in Billings. (Dkt. 20, ¶¶ 10-11). In addition to working full-time at YDI, Barnhart continued working part-time at DQ. (Dkt. 20, ¶¶ 13-15). Between both jobs, Barnhart worked 45 to 60 hours per week. She planned to work part-time at DQ indefinitely. (Dkt. 20, ¶¶ 17, 21).

On September 6, 2017, while in the course and scope of her YDI employment, Barnhart was seriously injured in a high-speed, rear-end MVA. (Dkt. 17, ¶ 1). At the time, YDI's worker's compensation coverage was provided by MSF. (Dkt. 17, ¶ 2). MSF accepted liability for Barnhart's claim. (Dkt. 17, ¶ 3). Following her injury, Barnhart was physically unable to work at YDI or DQ. Over the following year and a half, Barnhart was periodically released to and taken off work at YDI. (Dkt. 17, ¶ 10).

On April 9, 2019, Barnhart's treating physician opined that she was at MMI, had permanent physical restrictions, and assigned a 10% impairment rating. (Dkt. 17, ¶¶ 13-14). Importantly, the treating physician medically released Barnhart to her YDI position but opined that she could not return to her DQ position due to her permanent, physical restrictions. (Dkt. 17, ¶¶ 10, 15, 16).

Early in the claim, MSF determined Barnhart's wage loss benefit rates by first calculating her "average weekly wage" ("AWW") based on her earnings from both employments. Based on the four (4) full pay periods before the accident, those calculations were:

	Avg Wkly Wage (AWW)	**Hourly Rate**	**Hours per Week**
Youth Dynamics	$587.40	$14.47	40.6
Dairy Queen	$281.91	$18.55	15.2
Total	**$839.31**	-	-

(Dkt. 17, ¶¶ 4-5, 7-8.) In short, Barnhart's pre-injury, aggregated AWW was $869.31. Based on that calculation, it is not disputed that her temporary total

disability ("TTD") rate is $579.54 per week and her PPD rate is the statutory maximum of $384.00 per week.

On June 24, 2019, MSF advised Barnhart that, upon reaching MMI and receiving an impairment rating, she was entitled to PPD benefits under M.C.A. § 39-71-703. (Dkt. 17, ¶ 17). Under § 703, MSF acknowledged that Barnhart was entitled to 4 weeks of PPD benefits because she was over the age of 40, 8 weeks because of her lifting restrictions, 40 weeks for her impairment rating and, importantly, 80 weeks because she ***"[had] a wage loss of greater than $2/hour from your job at DQ."*** (Dkt. 17, ¶ 17) (emphasis added). To be clear, MSF did not (and does not) dispute that Barnhart sustained a wage loss of more than a $2 per hour due to her inability to return to the DQ position. In terms of number of *weeks,* MSF further acknowledged that Barnhart was entitled to 132 weeks of PPD benefits. (Dkt. 17, ¶ 17). Then, however, MSF advised Barnhart that her undisputed PPD award of 132 weeks would be calculated using 2 different rates. MSF wrote:

> 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.

(Dkt. 17, ¶ 17).

Essentially, MSF stated it would pay Barnhart's *impairment award* at an aggregate PPD rate of $384.00, considering both of Barnhart's employments at the

time of her injury. However, despite acknowledging that, Barnhart sustained over a $2/hour wage loss overall, MSF would only pay Barnhart's remaining PPD benefits for *wage loss*, *restrictions and age* at a weekly rate of $187.94, considering only her DQ wages in the calculation.

Barnhart appealed to the WCC, arguing M.C.A. § 39-71-123(4)(c) required her PPD benefit rate "be based on the aggregate of average actual monetary wages of all employments" and, thus, her undisputed PPD benefit of 132 weeks should have been paid with a single rate, the statutory maximum of $384.00 per week rate based on her aggregate AWW from both employments. The WCC granted summary judgment in Barnhart's favor.[1]

MSF then moved the WCC to reconsider its grant of summary judgment. The WCC characterized MSF's motion as: "For the first time in this case, Respondent cites § 39-71-739, MCA, and argues that it supports its position that it lawfully recalculated Petitioner's wages under § 39-71-123(4)(c), MCA[.]" (Dkt. 33, ¶ 7.) The WCC denied MSF's motion "because State Fund had ample opportunity to cite § 39- 71-739, MCA, during the summary judgment stage of this case, it cannot get a second bite at the apply by citing it for the first time in its Motion for

[1] Barnhart also sought attorney fees and a penalty, arguing MSF lacked any reasonable basis for its position. The WCC granted summary judgment in Barnhart's favor regarding the proper calculation of her benefit rate, but denied attorney fees and penalty.

Reconsideration." (Dkt. 33 ¶ 7.) The WCC's Order was certified as final on February 11, 2022. (Dkt. 36.) This appeal followed.

STANDARD OF REVIEW

In reviewing a WCC grant or denial of summary judgment, this Court determines whether there is an absence of genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Otteson v. Mont. State Fund*, 2005 MT 198, ¶ 8, 328 Mont. 174, 119 P.3d 1188. The Court reviews conclusions of law for correctness under a *de novo* standard. *Hensley v. Mont. State Fund*, 2020 MT 317, ¶6, 402 Mont. 277, 477 P.3d 1065.

This case is governed by the 2015 version of the WCA because it was the law in effect at the time of Barnhart's industrial injury. *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687.

SUMMARY OF THE ARGUMENT

The plain meaning of M.C.A. § 39-71-123(4)(c), informed by statutory context, instructs that Barnhart's PPD rate should have been calculated based on wages she earned, *at the time of her industrial accident*, from her primary and concurrent employment. By definition, at MMI, Barnhart was permanently and partially disabled, and she suffered a wage loss of more than $2 per hour because she could not return to her concurrent employment. MSF incorrectly focuses on wage loss that Barnhart *did not* sustain from her post-MMI return to YDI. As a

result, MSF excluded Barnhart's concurrent employment wages, reducing her PPD benefit rate for a portion of the PPD award. MSF's interpretation of M.C.A. § 39-71-123(4)(c) is inconsistent with the plain and sensible meaning of that statute and the overall goal of the WCA to have wage loss benefits bear a reasonable relationship to the actual wages lost.

ARGUMENT

This appeal, at its core, presents an issue of statutory interpretation. This Court must determine whether M.C.A. § 39-71-123(4)(c) (2015) requires the calculation of a claimant's PPD benefit rate to include the wages from qualifying concurrent employment *at the time of injury*. Applying the well-established "plain meaning" analysis, the answer is plain and clear – M.C.A. § 39-71-123(4)(c) mandates that Barnhart's PPD rate should have been calculated based on wages she earned, *at the time of her industrial accident*, from her primary and concurrent employment.

I. The Plain Meaning of M.C.A. § 39-71-123(4)(c), Informed by Statutory Context, Requires The Calculation of a Claimant's PPD Benefit Rate to Include Wages from Qualifying Concurrent Employment *At the Time of Injury*.

Where this Court is presented with an issue of statutory interpretation, the Court's "objective is to implement the objectives the legislature sought to achieve." *Mont. Vending, Inc. v. Coca-Cola Bottling Co.*, 2003 MT 282, ¶ 21, 318 Mont. 1, 78 P.3d 499. "[W]here that can be determined from the plain meaning of the words

used, the plain meaning controls and a court need not go further or apply other means of interpretation." *State v. Madsen*, 317 P.3d 806, 807 (Mont. 2013). "The starting point for interpreting a statute is the language of the statute itself." *Bullock v. Fox*, 2019 MT 50, ¶ 52, 395 Mont. 35, 435 P.3d 1187.

To determine the "plain meaning," Montana courts use a four-step test. First, does the interpretation reflects the intent of the legislature considering the plain language of the statute? Second, does the interpretation comport with the statute as a whole? Third, is there a relevant agency interpretation that provides guidance? Fourth, does the interpretation avoid absurd results. *Bostwick Props. Inc. v. Mont. Dep't of Nat. Res. & Conserv.*, 2013 MT 48, ¶ 23, 369 Mont. 150, 296 P.3d 1154. In short, the three (3) steps relevant here are: (1) legislative intent/plain meaning, (2) reading the statute as a whole, and (3) avoiding absurd results.

A. The Plain Meaning of M.C.A. § 39-71-123 Should Decide this Appeal and this Court's *De Novo* Determination that the WCC Decision was Correct.

Looking at the pertinent parts of M.C.A. § 39-71-123, it is important to remember that this is the statute that defines "wages." Of course, what constitutes "wages" is important because a claimant's "average weekly wage" ("AWW") determines the claimant's benefit rates, including permanent total disability ("PTD"), temporary total disability ("TTD"), temporary partial disability ("TPD")

and, as involved here, permanent partial disability ("PPD") benefits. Importantly, this statute does not address the eligibility requirements, or duration of, any class of wage loss benefit. The statute at issue here simply deals with **wages** and how to calculate **wages** for further benefit **rate** calculation purposes.

The statute provides, in relevant part:

> **39-71-123. Wages defined.** (1) "Wages" means all remuneration paid for services performed by an employee for an employer, or income provided for in subsection (1)(d). [The remainder of subsections 1 and 2 are deleted – both address what does and does not constitute "wages."]
>
> (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.
>
> (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.
>
> (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.
>
> (b) [deleted – addresses volunteer firefighter employment]

> (c) The compensation benefits for an employee working at two or more concurrent remunerated employments must be based on the aggregate of average actual monetary wages of **all employments . . . from which the employee is disabled by the injury incurred**.

(emphasis added.) Based on a single word – disability – in this entire statute, MSF broadly states that the Legislature used *disability* here to evince its intent to require a recalculation of benefit rates, not at the time of injury, but at various times throughout the life of the claim.

A commonsense reading, however, interprets the term as simply a qualification for which concurrent employments to include in the aggregation of wages. That is, if a claimant has 3 concurrent employments but her claim-related injury only prevents her from working at 2 of the jobs, then only those 2 jobs are considered in the aggregation/wage calculation. MSF suggests that such a fixed approach fails to account for different timing and duration of a claimant's disability. Not so. It is not uncommon for a worker to be injured, have a claim filed and accepted, and not initially miss any work. Sometimes the light duty nature of the employment allows the injured worker to continue working while they receive conservative medical treatment. Then, after some time passes, the injured worker is taken off work because of a surgical procedure. In that situation, the aggregation of any concurrent employment wages is measured by the *time of injury* wages, not later when the worker is actually taken off work. This also happens in a common scenario

where the employer initially accommodates the worker's claim-related restrictions with modified duty but later decides it can no longer offer the modified position, at which point the injured worker is unable to work and eligible for wage loss benefits because she is "disabled" (by meeting the definition of "temporary total **disability**"). There, too, her TTD benefit rate is based on her wages, including concurrent employment wages, *at the time of injury*.

Breaking down § 39-71-123(4) also helps with its interpretation. Again, this statute addresses the issue of "wages." First, § 123(1)-(3) provide the definition and calculation methods to arrive at an AWW, based on the historical earnings *at the time of injury.* Second, § 123(4)(a) provides instruction when to include the historical earnings from concurrent employment in this important calculation – from "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." Finally, § 123(4)(c) qualifies what wages from all concurrent employments should be included – "wages of all employments . . . from which the employee is disabled by the injury incurred." Read together, the plain meaning of this statute supports the calculation of an injured worker's PPD benefit rate to include wages from qualifying concurrent employment *at the time of injury*.

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B. When Related Statues are Read as a Whole, the WCC's Interpretation of § 123(4)(c) is Correct.

"Indeed, statutes do not exist in a vacuum, [but] must be read in relationship to one another to effectuate the intent of the statutes as a whole." *Maier v. State*, 2003 MT 144, ¶ 16, 316 Mont. 181, 69 P.3d 1194. Thus, considering the WCA, particularly in the context of benefit rate calculation, provides further support for the WCC's decision. *City of Missoula v. Shumway*, 2019 MT 39, ¶ 9, 394 Mont. 301, ("[W]hen interpreting statutes within an act, we interpret individual sections of the act in a manner that ensures coordination with the other sections of the act.").

1. Looking at the Statute Addressing PPD Benefits Supports Barnhart's Interpretation of M.C.A. § 39-71-123(4)(c).

When considering the WCA as a whole, individual statutes within the Act are not to be interpreted by "isolating specific terms from the context in which they are used by the Legislature" and instead must be "harmonized [to] statutes ***relating to the same subject***, as much as possible, giving effect to each." *Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003 (emphasis added).

Here, where the issue is Barnhart's **PPD rate**, § 123(4)(c) must be read in conjunction with the other subsections of § 39-71-123 and with the statute that specifically addresses **PPD benefits**, which is M.C.A. § 39-71-703. Generally, PPD benefits under § 703 are triggered when, at MMI, an injured worker has a ratable impairment and wage loss of at least $1 per hour. The frame of reference for § 703

wage loss is whether the worker "has an actual wage loss as a result of the injury." § 703(1)(a). Here, it is undisputed that Barnhart had "an actual wage loss" of more than $2 per hour "as a result of the injury" because her physical restrictions prevented from returning to the DQ employment. MSF acknowledged this in its June 29, 2019, award letter to Barnhart – "you have a wage loss of greater than $2/hour from your job at DQ." (Dkt. 17, ¶17.)

In addition, as to the wage loss assessment, which determines benefit eligibility, not benefit rate, the PPD statute provides:

> if a worker has no actual wage loss as a result of the industrial injury, 0%; if a worker has an actual wage loss of $2 or less an hour as a result of the industrial injury, 10%; if a worker has an actual wage loss of more than $2 an hour as a result of the industrial injury, 20%. Wage loss benefits must be based on the difference between the actual wages received **at the time of injury** and the wages that the worker earns or is qualified to earn after the worker reaches maximum healing.

M.C.A. § 39-71-703(5)(c) (emphasis added). Thus, the PPD rate is not based on the amount on the worker's wage loss, but rather "is determined in relation to the wages the claimant was earning *at the time of the injury*." *Dunnington v. State Comp. Ins. Fund*, 2000 MT 349, ¶ 8, 303 Mont. 252, 15 P.3d 475, (emphasis added).

There is no basis in the **PPD benefit** statute itself to support MSF's dual-rate approach. Moreover, MSF's dual-rate PPD interpretation of § 123(4)(c) renders the mandatory "must be determined by adding" language of § 703(5) meaningless. *State v. Heath*, 2004 MT 126, ¶ 31, 321 Mont. 280, 90 P.3d 426 (this Court "seek[s]

to avoid any statutory interpretation that would render meaningless any statute, or section thereof, and not give effect to the statute.")

Indeed, MSF's interpretation of § 123(4)(c) is irreconcilable with the plain language of § 703(5). M.C.A. § 14, requires the age, education, wage-loss, and restriction percentages calculated for a PPD claimant to be *added* to the worker's whole person impairment rating before applying the formula provided in §§ 703(3), (4). Specifically, § 703(5) instructs: "The percentage to be used in subsection (4) *must be determined by adding all of the following applicable percentages to the whole person impairment rating.*" (Emphasis added.) It follows, then, that the impairment rating component of an injured worker's PPD award cannot be divorced from the other applicable components for wage loss, restrictions, etc.

By definition, under the WCA, a worker who has a wage loss as a result of an injury and a ratable impairment is permanently and partially disabled. MSF concedes Barnhart sustained wage loss of greater than $2/hour due to her inability to continue working at DQ, yet argues that she suffered no wage loss related to her YDI employment. This is interpretation of § 123(4)(c) is not supported by the purpose and intent of the WCA since wage loss and disability are defined in terms of a worker, not in terms of an employment.

Under the WCA, "Permanent partial disability" is defined as:

> [A] physical condition in which a worker, after reaching maximum medical healing:

(a) has a permanent impairment, * * *

(b) is able to return to work in some capacity but the permanent impairment impairs the worker's ability to work; and

(c) has an actual wage loss as a result of the injury.

M.C.A, § 39-71-116(27). The focus of the PPD definition is the individual worker, not any specific employment she holds – if a *worker* is able to work in some capacity but has a permanent impairment that impairs the *worker's* ability to work and results in an "actual wage loss," the worker is permanently and partially disabled.

The definition of "actual wage loss" further shows the WCA's holistic, worker-centric focus with respect to the wage loss benefit provisions: "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." M.C.A. § 39-71-116(1) (emphasis added). This definition is not restricted to any employment or position as MSF suggests but instead looks at the individual worker as a whole and whether the worker is earning less at MMI than the worker earned *at the time of injury*.

Section 123(4)(c) is consistent with the WCA's goal – expressed specifically in other statutes, as discussed – to provide the same benefits to injured workers whether they have a single job or multiple jobs. If an injury affects an injured worker's ability to earn a paycheck in any of her time-of-injury jobs, the time-of-

injury wages from those jobs must be included in calculating her **benefit rates**. As this Court has previously observed in this context: "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.'" *Sturchio v. Wausau Underwriters Ins. Co.*, 2007 MT 311, ¶ 14, 340 Mont. 141, 172 P.3d 1260.

The WCC recognized that Barnhart was disabled from both of her concurrent jobs by the injury she incurred "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."[2] (Dkt. 27, ¶¶ 14, 25). That disability triggered § 123(4)(c), requiring MSF to consider the time-of-injury wages from both positions to calculate Barnhart's **benefit rates**. The statute provides no basis to recalculate the average weekly wage after the worker reaches MMI.

A worker is either partially disabled or she is not. She either has a wage-loss or she does not. It will always be true that a partially disabled claimant has "no wage loss" with respect to the portion of her wages that she is still able to earn. That is

[2] Notably, the WCA's PPD definition does not even go as far as requiring an impairment in the worker's ability to "earn wages" at any particular job as the WCC might suggest. It simply requires an impairment in "the worker's ability to work" (full stop) and an "actual wage loss." § 39-71-116(27). This distinction importantly highlights how disability is evaluated with respect to the worker, not each separate employment.

not the question. According to the WCA's PPD definition, a worker is disabled when the worker is unable to fully work as before suffering a work-related injury and, as such, has an actual wage loss. An actual wage loss occurs when, because of a work-related injury, a worker makes less money at MMI than they did before the injury. At the end of the day, Barnhart sustained greater than a $2 per hour wage loss because of this injury. Any interpretation of § 123(4)(c) that suggests wage loss is tied to a certain position or employment and not the individual worker inserts additional terms into the WCA that are not there. The WCA requires the insurer to compare the wages the claimant is still able to earn with the wages she was able to earn prior to the injury.

Finally, one of the objectives of the WCA is to "provide, without regard to fault, wage-loss and medical benefits to a worker suffering from a work-related injury or disease [and the] wage-loss benefit should bear a *reasonable relationship* to actual wages lost as a result of a work-related injury or disease." M.C.A. § 39-71-105(1).

MSF argues that its interpretation of § 123(4)(c) is consistent with the goal of having a "reasonable relationship" between wage loss benefits and the actual wages lost. Really? By whose measure? There is no dispute that, because of this injury and resulting permanent restrictions, Barnhart lost a job where she earned nearly $18,000 per year. Even if she had only worked at DQ another 7 years, this injury

cost her over $100,000 from a job she had held for over 15 years. MSF's interpretation resulted in Barnhart receiving about $18,000 less for her PPD award. How is that result consistent with the goal of having a "reasonable relationship" between wage loss benefits and the actual wages lost? It isn't.

2. MSF's § 123(4)(c) interpretation contravenes the 2 step process for calculating disability benefits as established by case law.

Of course, germane case law can be considered when interpreting a Montana statute. *Grenz v. Dep't of Nat. Res. & Conserv.*, 2011 MT 17, ¶ 28, 359 Mont. 154, 248 P.3d 785 (citation omitted) ("We also may consider prior [Montana] case law . . . to aid in our interpretation of a statute.").

The WCC, looking to the WCA statutory scheme as a whole and this Court's interpretive holding in *Sturchio*, acknowledged that calculation of a claimant's disability rate is a two-step process. First, the insurer must calculate the claimant's wages of employment pursuant to the method prescribed in § 39-71-123. (Dkt. 27, ¶ 18). Then, the calculated wages are carried over into the second step, which is to calculate the benefit rate to which the claimant is entitled under the formulas set forth in the relevant disability statute. (Dkt. 27, ¶ 19).

For a PPD claimant who held multiple employments at the time of her workplace injury, the two-step process benefit calculation required by the WCA is

best illustrated by further breaking each step down into sub-steps. According to the WCA, the process should play out as follows:

Step One: Calculating Wages – Measured at the Time of Injury

i. An insurer must first determine whether each employment held by the claimant qualifies as a concurrent employment within the meaning of § 39-71-123(4)(a). § 39-71-123(4)(a) defines "concurrent employment" as any "employment in which the employee was actually employed *at the time of injury* and would have continued to be employed without a break in the term of employment if not for the injury" (emphasis added).

ii. Then, for each concurrent employment held by the claimant, an insurer must perform a wage calculation pursuant to the formula prescribed in § 39-71-123(3): "for compensation benefit purposes, the average actual earnings for the four pay periods immediately preceding the injury are the employee's wages." § 39-71-123(3)(a).

iii. Finally, to determine the overall "compensation benefits for an employee working at two or more concurrent remunerated employments," an insurer must aggregate the "average actual wages [as calculated in Step 1(ii)] of all employments" to calculate the worker's overall *time-of-injury* wages. § 123(4)(c).

Step Two: Calculating PPD Benefits

i. An insurer must then carry over the aggregate wages amount calculated from Step One into a PPD weekly benefit rate calculation based on the formula prescribed in § 39-71-703(6): "66 2/3% of the [Step One] wages received *at the time of injury*, but the rate may not exceed one-half the state's average weekly wage" (emphasis added).[3]

ii. Finally, the insurer must calculate the number of weeks the claimant will receive the PPD benefits at the weekly benefit rate from sub-step 4 pursuant to §§ 39-71-703(3), (5). The process for determining this

[3] For, Barnhart, this PPD benefit rate is $384.00 based on her aggregated time-of-injury wages.

number of weeks calculation is best illustrated by breaking Step 2(i) down even further into two sub-steps:

a. First, pursuant to § 39-71-703(5), an insurer must calculate a percentage based on a number of factors contributing to the claimant's particular circumstances. These factors are age, education, wage loss, work restrictions, and impairment rating and are to be considered together to come up with a single percentage. *See* § 39-71-703(5) ("The percentage . . . must be determined by adding all of the following applicable percentages [(a) age, (b) education, (c) wage loss, and (d) restrictions] to the [claimant's] whole person impairment rating"). In particular, the wage-loss factor is to be "based on the difference between the actual wages received *at the time of injury* and the wages that the worker earns or is qualified to earn after the worker reaches maximum healing." § 39-71-703(5)(c) (emphasis added).

b. Then, an insurer is to multiply the percentage calculated in sub-sub-step 5a by "400 weeks" to arrive at the number of weeks that PPD benefits will paid at the sub-step 4 weekly benefit rate. § 39-71-703(3).

This two-step process follows *Sturchio*'s holding. The *Sturchio* Court, upon considering the WCA as a whole, explained that § 39-71-123 "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" to be subsequently used in disability benefit calculations. The Court held:

> As with injured workers employed by a single employer, [§ 123(4)(c)] 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."

Id. ¶ 14 (emphasis added). The WCC's interpretation of § 123(4)(c) is consistent with *Sturchio*.

The process MSF utilized in calculating Barnhart's PPD benefit award deviated from the WCA's two-step process. However, conveniently enough for MSF, this deviation resulted in a reduction of Barnhart's PPD benefit award by $18,032. Upon reaching Step 2(ii)(a) in the WCA's PPD benefit calculation process as outlined above, MSF improperly calculated two separate percentages—one based on Barnhart's age, education, wage loss, and restrictions and one based solely on her impairment rating. MSF then multiplied each separate percentage by 400 weeks, reaching two separate amounts for the number of weeks that PPD benefits will be paid out. Finally, MSF assessed these two separate numbers of weeks at different benefit rates. The number of weeks calculated from Barnhart's impairment rating percentage was properly assessed at the PPD benefit rate based upon her time-of-injury wages. However, the number of weeks calculated from Barnhart's age, education, wage loss, and restrictions factors was improperly assessed at a PPD rate reflecting only the wages she earned from her DQ job.

C. The WCC's Interpretation of M.C.A. § 39-71-123(4)(c) Does Not Lead to Absurd Results.

The final step statutory interpretation factor is determining whether the plain meaning avoids absurd results. *Bostwick Props., Inc. v. Dep't Nat. Res. & Conserv.*, 2013 MT 48, ¶ 23, 369 Mont. 150, 296 P.3d 1154.

Starting at page 17 of its brief, MSF uses hypotheticals to illustrate absurd results. This is straw-man argument at its best and it should be rejected. For instance, MSF provides this hypothetical:

> **Claimant A** is employed at two concurrent positions. He is disabled from both jobs on the date of injury. At MMI, Claimant A returns to one position without a wage loss and remains disabled from the other position.
>
> **Claimant B** is employed at two concurrent positions. She is immediately disabled from one position but continues to work at the other position until her condition deteriorates several months later. At MMI, Claimant B returns to one position without a wage loss and remains disabled from the other position.

MSF's analysis of this hypothetical is flawed. Under the WCC's holding, the wages from concurrent employments for both of these claimants would be aggregated because "at times, [each] was unable to work these jobs as a result of [his/her] injury". (Dkt. 27, ¶ 25). All other things being equal, the PPD benefit for both claimants would be the same.

On page 18, MSF pitches this hypothetical:

> **Claimant X** is employed at two concurrent positions. He is disabled from both jobs on the date of injury. At MMI, Claimant X returns to one position without a wage loss and remains disabled from the other position.
>
> **Claimant Y** is employed at two concurrent positions. She is immediately disabled from one position but continues to work at the other position until her condition deteriorates several months later. At MMI, Claimant Y remains disabled from both positions.

MSF's analysis of this hypothetical is flawed for the same reasons as the previous example. Under the WCC's holding, the AWW for both claimants would be based on an aggregate of their time of injury wages from concurrent employments, and wage loss benefits would be calculated accordingly. The only difference, absent more information, Claimant Y is entitled to permanent total disability benefits, not PPD benefits. *Kellegher v. Maco Workers' Comp. Trust*¸ 2015 MTWCC 16.

II. Neither M.C.A. §39-71-739 nor § 39-71-2909 Support MSF's Interpretation of § 39-71-123(4)(c).

Finally, MSF's efforts to rely on M.C.A. §§ 39-71-739 and -2909 to support its interpretation of M.C.A. § 39-71-123(4)(c) should be rejected. Indeed, M.C.A. § 39-71-739 allows adjustments to disability compensation when there is a qualifying change in disability. Likewise, M.C.A. § 39-71-2909 vests authority with the WCC to modify an existing benefit award upon a change in disability status. Critically, however, the change in disability status that triggers application of both statutes impacts benefit *eligibility* and not benefit *rate*.

PPD benefit eligibility is determined at MMI and, at that time, the analysis is whether the injured worker has a ratable impairment and qualifying wage loss due to the injury. At that time, there is no change in permanent partial disability status that would trigger application of M.C.A. § 39-71-739 or – 2909. Perhaps, at some point after MMI, a PPD recipient might aggravate a workplace injury or medically improve, and either of those situations might warrant revisiting *disability eligibility*

under § 739 or § 2909. But, neither statute supports in any way MSF's argument that aggregated wages of concurrent employment must be recalculated when disability status changes.

CONCLUSION

The WCC's correctly interpreted M.C.A. §39-71-123(4)(c) and it is respectfully submitted that this Court should affirm the order granting Barnhart's motion for summary judgment.

RESPECTFULLY SUBMITTED this 10th day of August, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that the Appellee's Answer Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced expect for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word is 6,215 excluding Table of Contents, Table of Authorities, Certificate of Compliance, Appendix and Certificate of Service.

Dated this 10th day of August, 2022.

ODEGAARD KOVACICH SNIPES, PC

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CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing ***APPELLEE TAMARA BARNHART'S ANSWER BRIEF*** with the Clerk of the Montana Supreme Court; and that I have also served true and correct copies of the foregoing upon the following via U.S. Mail, postage-paid and addressed as follows:

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Dated this 10th day of August, 2022.

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CERTIFICATE OF SERVICE

I, Paul D. Odegaard, hereby certify that I have served true and accurate copies of the foregoing Brief – Appellee Tamara Barnhart's Answer Brief to the following on 08-10-2022.

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