South Dakota
CHAMBER OF COMMERCE & INDUSTRY

A Cinnabon That's Not So Sweet

South Dakota Supreme Court Ruling in Wheeler vs. Cinna Bakers

Establishing "aggregation of wages from multiple employers" when calculating average weekly wage for lost time wage claims in the Workers' Compensation system.

The South Dakota Supreme Court issued a decision that changes how benefits are determined for Workers' Compensation benefits involving "indemnity" payments, the payments employees receive for lost time wages resulting from being injured. The impact of this decision is limited to situations where injured workers have multiple jobs and the injury prohibits them from working at those other jobs**,** in addition to the lost time impact from the business where the injury actually occurred.

In the Wheeler vs. Cinna Bakers decision a unanimous court said when calculating the amount used to determine the "average weekly wage" (AWW) for an employee working part time, the law requires including all wages a workers earns, including wages from other employers. This is known as "aggregation" of wages.

In concluding that wages from other employers should be included in the AWW calculation for lost time payments, the Court contradicted the long established practice of determining AWW using only the wages lost at the job where the injury was sustained.

The workers' compensation system rests on a concept that is known as "exclusive remedy". The essence of exclusive remedy is that a person injured at work will get medical bills paid and receive a payment to mostly replace wages they have lost during recovery. These benefits are paid without regard to the employee's responsibility for their own injury (e.g., single vehicle accident with only the employee involved). In exchange for receiving medical costs and being mostly compensated for lost wages, the employee accepts the benefits from the Workers' Compensation System and foregoes the right to sue the employer.

The benefits paid by the Workers' Compensation system are set in state law and determined by the state legislature. The payments for medical and lost time benefits are not paid by the business directly but are paid by the insurance company that sold the business its work comp policy.

This of course is way too simple, like suggesting that making brownies just takes putting together flour, sugar, chocolate and using an oven in some fashion. If employers are negligent, the results of the case may be much different. In similar fashion, the exclusive remedy is not always applied when an employee breaks a dozen rules and violates workplace safety guidelines. However, for this case the basics described above are sufficient.

Details and excerpts from the Court's decision are printed below. This summary will focus on the main elements of the court's decision, how that decision will affect the Workers' Comp system and how those changes might impact employers and their Workers'~~s~~ Comp coverage.

What Happened.

Patricia Wheeler worked three jobs. She worked at a Cinnabon, a casino, and at a convenience store. She worked three jobs to earn the same amount as she would earn working full time for one employer. She had done this for a long time and it is noted in the court's ruling that she expected to continue multiple jobs as her earning lifestyle.

While working at Cinnabon, Ms. Wheeler sustained two injuries that kept her from working at Cinnabon or either of the other two jobs. Ms. Wheeler was out of work long enough to qualify for "indemnity" or lost time payments from the Work Comp carrier that covered Cinna Bakers.

Changing the Determination of the Average Weekly Wage Benefit.

When determining how much she should receive for lost wages, the Workers' Compensation system concluded that she was entitled to wage benefit as it applied to the Cinnabon job alone. Wheeler's attorney argued that since she had lost wages from all three of her jobs, the average weekly wage for the indemnity payment should include the wages from the other workplaces. That argument was rejected by the state. The case was appealed to a circuit court, which upheld the use of wages from Cinnabon only.

Next was an appeal to the South Dakota Supreme Court which was unanimous in reversing the district court and ruling that the wages from all three employers was the proper method to calculate Ms. Wheeler's average weekly wage for the purpose of setting lost time payments from Cinnabon's workers compensation insurer.

What Does This Mean?

The most significant impact will be on the insurance companies that provide workers' compensation insurance to businesses that have a significant number of part-time workers. These companies do not currently have to estimate wages earned by employees when they are working elsewhere.

After the Wheeler decision, Cinna Baker's insurance company will face indemnity payments that may be much higher than the costs used to calculate the premiums, since those premiums were calculated using only the wages paid by Cinnabon.

South Dakota has the highest percent in the nation of the workforce that work multiple jobs. The methods that will be used to calculate potential losses for part time workers will undoubtedly involve higher costs to accommodate the increased exposure of covering the aggregated wages. These increased costs will most certainly add upward pressure on the cost of work comp premiums. This is as foreseeable as adding a teenage son to a car insurance policy, and may prove to be as expensive.

Another possible issue is whether businesses that employ part time workers will be allowed or even required to record each employee's other jobs and track wages from those jobs. It would seem that this ruling would make offering these jobs more complicated and more expensive and may put a drag on the pace of job growth.

Finally, the Wheeler decision seems to be retroactive, which might spark appeals from settlements long closed. It's a safe assumption that the Wheeler decision will be applied to any workers' compensation cases that are in process and have not been settled at this time. Every case that is now settled using aggregated wages from multiple jobs adds to the costs of insurance policies that could not have reasonably included these costs when determining premiums.

It May Not Be Catastrophic – Peeking Out of the Bunker.

All is not lost. While it is a certainty that the Wheeler decision will increase the costs of claims for a select group of businesses and their insurance companies, there are factors that provide assurance that the increased costs are not unlimited and will not threaten to bankrupt anyone.

Here are some facts that may help readers avoid rushing to an airport and heading out to the Cayman Islands.

- **9% of South Dakota's workforce has multiple jobs**. The often noted fact that South Dakota has highest percent of its workforce working multiple jobs tends to inflate the perception of the actual number of people working multiple jobs. It is still a small percent of the total workforce. To keep perspective – South Dakota's workforce has approximately 456,000 people. This means the number of people working multiple jobs would be some 41,000 people (hard to feed all at once but still a portion of the total). A small percent of those will be injured at one of their jobs; and a smaller portion of the injured will require lost time benefits.
- **Lost time or indemnity payments are 26% of total work comp benefit costs**. The vast majority of money paid out in benefits by the workers' compensation system is for medical payments used to heal injuries. Those costs are not affected by the Wheeler decision.

- **Average Weekly Wage (AWW) is a portion of wages paid**. Injured workers that are out of work long enough to receive indemnity payments are awarded wages based on 2/3 (or 0.6667) of their wages, which are calculated for the past 52 weeks using enough adjustments and variables to make the IRS seem friendly.
- **There is a maximum weekly amount for indemnity payments**. The maximum limit for average weekly wage payment is $733/week. This is 2/3rds of an annual wage of approximately $57,000. The AWW maximum benefit works out to be 2/3rds of an hourly wage that exceeds $27.00 an hour if calculated on a 40 hour week. By definition, the Wheeler decision is aimed at part time employees that do not work 40 hours a week. That is a wage level that is not common in the industries where Ms. Wheeler was employed or others that use part time employees. Remember, these benefits are paid by the insurance company providing the work comp policy and these costs are reflected in future premiums.
    - It should also be noted that the benefits in statute for workers' compensation include a minimum weekly benefit of $367/wk. That is 2/3rds of a weekly wage that is $550 ($13.4 based on 40 hour week) or an annual wage of $28,000. This amount of indemnity does not change because of the Wheeler ruling, but the total cost of the wage portion will increase.
- **Most states do aggregate wages**. Thirty-nine other states aggregate wages of part time workers for workers' compensation indemnity benefits payments. This provides evidence that solutions exist for determining the costs of aggregated wages. It does not provide any assurance those solutions will be easy.

Conclusion. There will be increased costs ahead for the work comp system but those increased costs may not be as cataclysmic as businesses worst fears. The National Council on Compensation Insurance (NCCI) is a group that studies claims and recommends rates for WC coverage to state governments. NCCI said the impact of the Wheeler decision on rates could not be determined without actual claim data.

They did however offer some rudimentary calculations that put this issue in perspective. They assumed that lost time claims for employees working multiple jobs would increase 25-50%. If those wages impact 10% of the lost time claims (10% of the workforce is working at multiple jobs) and wage claim are 26% of all benefits (indemnity's share of total claims); then the impact on rates would range from +0.7% to +1.3%. IMPORTANT – the only thing one should conclude about those estimates is that they are NOT going to be the final numbers. There are too many assumptions and the assumptions use math that is simple enough for a chamber lobbyist to grasp. The actual losses will determine the impact on rates.

What Should be Done Now?

There are issues that the next legislature should consider and address. Among them are:

- **Retroactivity** – The Wheeler decision will most certainly be applied to all Worker Compensation claims that have just been filed or that are in the process of being settled or appealed. Several people have suggested that cases previously denied or being paid without aggregated wages might file for reconsideration. The legislature can limit the impact of the Wheeler decision on past cases.
- **Who pays the increased costs** – Companies that offer work comp policies now face two situations, both of which are bad. Cinna Bakers' insurance company must make lost time payments that include wages from businesses that are not customers, leaving all of the cost recovery to Cinna Bakers premiums. The other answer is no better. Future regulations might require the insurance companies covering the other businesses where Ms. Wheeler worked to contribute to the cost of the indemnity claim, meaning they would be forced to make payments for a case that has no claim. If you can find an abacus that can do that calculation you can also cure cancer.
- **Employer's awareness of potential risk** – Businesses that employ people on a part time basis will be at risk of higher premium costs because these employees are working elsewhere. There may need to be some clarification regarding an employer's right to ask employees about whether or not they are working for other businesses, and about their wages from those other businesses.
- **Impacts throughout the WC benefit system** – NCCI lists as one of the potential issues that may need to be addressed the impact on other injury categories such as Temporary Partial Disability.
- **Clarify which jobs/wages are included.** For a part time job to be included in the wage computation the employee must actually be employed in such job at the time of injury and must not be able to perform that job as a result of the injury.
- **Impact of partial employment on wage calculation.** If Ms. Wheeler had been able to continue to work at either of her other jobs, would those wages be included in determining her indemnity payments.
- **Abrogate –** because the ruling is based on interpretation of statues and is not a constitutional ruling the legislature can essentially overturn it through a process known as abrogation. This option would involve as many political considerations as procedural ones.

Wheeler vs. Cinna Bakers – Excepts From The Ruling:

The following was taken directly from the ruling and is offered to give readers access to the rationale used by the justices. <u>The key conclusions are highlighted</u>.

<u>The Decision</u> [¶1.] Patricia Wheeler appealed the administrative law judge's (ALJ's) determination that she not be allowed to aggregate her wages from three separate employments in the calculation of her Average Weekly Wage (AWW). The circuit court affirmed the ALJ's determination. Wheeler appeals to this Court. We reverse.

<u>The Core Reasoning</u> [¶7.] Our first step is to analyze the plain meaning of the statutes in question. Workers' compensation statutes prescribe the calculation for the AWW.

There are three statutes that apply to such calculations. The first statute provides:

As to an employee in an employment in which it is the custom to operate throughout the working days of the year, and who was in the employment of the same employer in the same grade of employment as at the time of the injury continuously for fifty-two weeks next preceding the injury, except for any temporary loss of time, the average weekly wage shall, where feasible, be computed by dividing by fifty-two the total earnings of the employee as defined in subdivision 62-1-1(6), during the period of fifty-two weeks. However, if the employee lost more than seven consecutive days during the period of fifty-two weeks, then the division shall be by the number of weeks and fractions thereof that the employee actually worked. SDCL 62-4-24 (emphasis added).

[¶8.] The second method prescribed by statute is not utilized unless SDCL 62-4-24 does not apply. The second statute provides:

As to an employee in an employment in which it is the custom to operate throughout the working days of the year, but who is not covered by § 62-4-24, the average weekly wages shall, where feasible, be ascertained by computing the total of the employee's earnings during the period the employee worked immediately preceding the employee's injury at the same grade of employment for the employer by whom the employee was employed at the time of the employee's injury, and dividing such total by the number of weeks and fractions thereof that the employee actually worked. However, if such method of computation produces a result that is manifestly unfair and inequitable or if by reason of the shortness of time during which the employee has been in such employment, or the casual nature or terms of the employment, it is impracticable to use such method, then regard shall be had to the average weekly amount which during fifty-two weeks previous to the injury was being earned by a person in the same grade, employed at the same work, by the same employer, or if there is no person so employed, by a person in the same grade, employed in the same class of employment in the same general locality.

SDCL 62-4-25 (emphasis added).

[¶9.] The third statute is used to calculate the AWW if neither SDCL 62-4-24 nor SDCL 62-2-25 apply. The third statute provides:

As to an employee in an employment in which it is the custom to operate throughout the working days of the year and where the situation is such that it is not reasonably feasible to determine the average weekly wages in the manner provided in § 62-4-24 or 62-4-25, the average weekly wages shall be determined by multiplying the employee's average day's earnings by three hundred, and dividing by fifty-two.

SDCL 62-4-26 (emphasis added).

[¶10.] All three AWW statutes utilize the definition of "earnings" as defined by SDCL 62-1-1(6) to calculate the AWW. See SDCL 62-4-24; SDCL 62-4-25; SDCL 62-4-26. The statute defining "earnings" provides:

"Earnings," the amount of compensation for the number of hours commonly regarded as a day's work for the employment in which the employee was engaged at the time of his injury. It includes payment for all hours worked, including overtime hours at straight-time pay, and does not include any sum which the employer has been accustomed to pay the employee to cover any special expense entailed by him by the nature of his employment; wherever allowances of any character made to an employee in lieu of wages are specified as a part of the wage contract, they shall be deemed a part of his earnings[.]

SDCL 62-1-1(6) (emphasis added).

[¶11.] The critical phrase in SDCL 62-1-1(6) is "for the employment in which the employee was engaged at the time of his injury." (Emphasis added.) The circuit court held the italicized phrase unambiguously referred to the specific employment in which an employee was engaged (i.e., engaged in the more narrow sense of "actively engaged") at the time of the injury. Wheeler contends the italicized phrase is subject to another reasonable interpretation. She argues "employment" and "engaged" have a broader connotation related to the status of the individual, i.e., being in the state of employment. Wheeler points out that she also "was engaged at the time of [her] injury" in her other concurrent employments and intended to remain concurrently employed indefinitely. Because, as Wheeler argues, her proposed interpretation is equally reasonable and we construe a statutory ambiguity in the employee's favor, Wheeler asks us to reverse the ALJ and the circuit court and hold the AWW statutes allow for aggregating an employee's wages from concurrent employments. We agree.

[¶12.] The phrase—"for the employment in which the employee was engaged at the time of his injury"—in SDCL 62-1-1(6) is ambiguous because it is "capable of being understood by reasonably well-informed persons in either of two or more senses." See Petition of Famous Brands, Inc., 347 N.W.2d at 886. "Earnings" uses the term "employment" in its definition. SDCL 62-1-1(6). "Employment" is not defined in the workers' compensation statutes relevant to

the calculation of the AWW. See SDCL 62-1-1. However, "employment" is defined in SDCL 61-1-10.4

"Employment" is "any service performed, including service in interstate commerce, by: . . . (2) Any individual who, under the usual common-law rules applicable in determining the employer-employee relationship has the status of an employee."

4. Pursuant to SDCL 2-14-4, "Whenever the meaning of a word or phrase is defined in any statute such definition is applicable to the same word or phrase wherever it occurs except where a contrary intention plainly appears." No contrary intention appears in either SDCL 61-1-10 or SDCL 61-1-1. Therefore, the definition of employment transfers. #27170.

SDCL 61-1-10 (emphasis added).

The definition of "employment" as promulgated by the Legislature is concerned with the status of the individual, i.e. the employee, rather than the specific or immediate activity. Wheeler maintained the status of employee at her other occupations at all times relevant to this case.

[¶13.] Moreover, "engaged" is not defined by our workers' compensation statutes. "Engaged" means "to put under pledge; to pledge; to place under obligations to do or forbear doing something." Webster's New International Dictionary 847 (2d ed. 1954). Wheeler was "engaged" in her other occupations at the time of her injury in the sense that she was under a pledge and a continuing set of obligations to those employments, i.e., she maintained the status of an employee with her other employments even though she was not actively and immediately doing work in those employments when she was injured at Cinnabon. It is undisputed that Wheeler was "concurrently employed" at Cinnabon, Westside Casino, and Get 'N' Go convenience store at all times relevant to this case. She was "engaged" in those employments to reach the earning level of full time employment and had done so on a long term basis with the intention of doing so indefinitely.

Thus, in one sense, Wheeler "was engaged at the time of her injury" in her other employments because she maintained the status of employee with her other employments. 5 In another sense, she "was engaged at the time of her injury" only

5. In addition, this broader definition of "engage" is consistent with other statutes in the workers' compensation title. For example, SDCL 62-4-5.1 provides, "[O]nce such employee is engaged in a program of rehabilitation . . . the employee shall receive compensation . . . during the entire period that the employee is engaged in such program[.]" (Emphasis added.) The word (continued . . .) with Cinnabon in that she was actively working for Cinnabon.

Therefore, there are two reasonable interpretations of the earnings statute, and it is ambiguous. Because the language used in SDCL 62-1-1(6) is ambiguous, we interpret the definition of "earnings" used to calculate Wheeler's AWW in her favor, and Wheeler is entitled to aggregate

her wages from her concurrently held employments to determine her "earnings" under any of the three AWW-computation statutes. See Hayes, 2014 S.D. 64, ¶ 28, 853 N.W.2d at 885 (quoting Caldwell, 489 N.W.2d at 364).