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ISSUE BRIEF:

Workers' Comp Ruling – Wheeler Case
September 2015

Background

In May 2015, the South Dakota Supreme Court issued a ruling in the *Wheeler v. Cinna Bakers, LLC* that changed the way wages are calculated for injured employees with multiple jobs. The facts of the case are not in dispute. The appellant, Wheeler, held three different part-time jobs to increase her income and accumulate hours into basically full-time employment. She was injured while working at a Cinnabon and the injury effectively prohibited her work at the other jobs as well. Cinnabon and its insurer, Hartford, accepted Wheeler's injury claim as compensable, but argued that only her Cinnabon wages should be used to determine her average weekly wage for purposes of their workers' compensation liability. An administrative law judge agreed as did circuit court. She appealed to the State Supreme Court and they reversed the lower court's ruling.

Adopting the "growing minority view" identified in *Larson's Workers' Compensation Law*, the Supreme Court of South Dakota held that the wages an injured employee earned at three, unrelated employments should be aggregated for purposes of computing her average weekly wage and, therefore, her compensation rate under the state's Workers' Compensation Law. The employer at the time of the employee's injury had argued that the wages from the employments should not be aggregated because they were not similar or related. Observing that the case was one of first impression for the state and quoting *Larson* extensively, the Court disagreed, saying it could see no reason why the employments must be similar or related since the overall theory of workers' compensation law was "designed to compensate an employee or his family for the loss of his income-earning ability." With its holding, the Court reversed a decision by an administrative law judge and a circuit court that used only the employee's wages from the employer at whose job she was injured to compute her AWW.⁽¹⁾

Following this ruling, the National Council on Compensation Insurance (NCCI), estimated that this court decision will result in comprehensively higher workers compensation premiums in South Dakota. ⁽³⁾

This ruling applies prospectively to workers' comp cases in South Dakota. Since that time, there have been a couple conference calls amongst concerned industry groups regarding this matter. Some of the things that were discussed include the following:

- About 10% of South Dakota workers are employed in 2nd or 3rd jobs, the highest rate in the nation
- Many states already allow aggregation of wages, but only if the person is working in similar jobs. For example, if someone is a doctor full-time, but works part-time at a rib shack and is injured at the rib shack, the work is dissimilar so that the physician wages would not be counted against the workers' comp claim and insurance for the rib shack
- As for surrounding states, they reported the following:
 - Wyoming and North Dakota – "Wheeler-like laws"
 - Iowa – Does not allow aggregation
 - Nebraska – Wages from a second job can be counted only if the second job is seasonal
 - Minnesota – no report made

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- The employee is burdened with the responsibility of proving concurrent employment and applicable wages at the time of injury

There is a possibility that this issue could surface during the 2016 session if legislation to reverse the Court's ruling is introduced.

Supreme Court Reasoning:

- Statute (SDCL 62-1-1(6)) is ambiguous in defining what average weekly wage and total earnings are and thus the court chose to interpret in Wheeler's favor.
- Similarly, the phrase "for the employment in which the employee was engaged at the time of his injury" is ambiguous and the appellant's status of employee in her other jobs goes to the status of the individual and not the particular job.
- The jobs do not have to be related since the purpose of workers' compensation is to compensate the employee for the loss of income earning capability.

Opponent Arguments:

- The interpretation of SDCL 62-1-1(6) the court used was not consistent with what the statute intends. It intends to represent earnings from only the employer for which the employee was working at the time of injury.
- No express statutory provision for aggregation exists.
- Aggregation may put an undue financial burden on business and insurers as they attempt to manage workers' comp risks.

Sources:

- (1) Taken verbatim from a LexisNexis Legal Newsroom summary
- (2) 62-1-1(6) "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; (underscore added)
- (3) "Analysis of South Dakota Supreme Court Decision Wheeler vs. Cinna Bakers, LLC and Hartford Casualty Company." National Council on Compensation Insurance, Inc. 2015.