CIRCUIT COURT OF SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT

HUGHES COUNTY COURTHOUSE
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July 18, 2014

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Re: Hughes County Civ. No. 14-23: Patricia Wheeler v. Cinna Baker LLC, d/b/a Cinnabon (Empire Mall – Sioux Falls), and Hartford Casualty Insurance Co.

Patricia Wheeler ("Claimant"), Appellant, appeals Administrative Law Judge, Taya Runyan's ("ALJ Runyan") determination that Claimant not be permitted to aggregate her wages from three separate employments in the calculation of her Average Weekly Wage Rate Compensation. Cinna Baker and Hartford Casualty, ("Employer/Insurer"), Appellees, support the ruling of the ALJ.

BACKGROUND

Claimant was injured in two separate work-related injuries which arose out of and in the course of her employment with Employer. Employer/Insurer accepted compensability for the injuries and has made payments on past medical benefits as well as other workers' compensation benefits. However, the parties dispute the rate at which the benefits shall be paid.

At the same time Claimant was employed with Employer, she was also concurrently employed by Westside Casino and Get 'N' Go convenience store. Claimant held all jobs concurrently in order to reach the earning level of full time

employment, and had done so on a long-term basis with the intention to continue doing so indefinitely.

The parties dispute whether income from all three of Claimant's part time jobs should be used to calculate her average weekly wage. Claimant filed a Petition for Motion for Determination of Average Weekly Wage Rate Calculation with the Department of Labor on February 7, 2013. ALJ Runyan determined that Claimant was not allowed to aggregate her wages from the three jobs. Claimant filed her Notice of Appeal with this Court on January 24, 2014.

QUESTION PRESENTED

I. Whether the ALJ erred in holding that Claimant was not entitled to have her earnings from three employments in which she was concurrently engaged at the time of the injury included in the calculation of her average weekly wage?

LEGAL STANDARD

This Court's review of a decision from an administrative agency is governed by SDCL 1-26-36, which sets forth the standard of review as follows:

> The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;

(5) Clearly erroneous in light of the entire evidence in the record;

or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment. The circuit court may award costs in the amount and manner specified in chapter 15-17.

SDCL 1-26-36. Questions of fact are judged by the clearly erroneous standard while questions of law are fully reviewable [*i.e., de novo*]. *Orth v. Stoebner & Permann. Const., Inc.*, 2006 SD 99, ¶ 27, 724 NW2d 586, 592 (*quoting Tischler v. United Parcel Service*, 1996 SD 98, ¶ 23, 552 NW2d 597, 602). Moreover, "[m]ixed questions of fact and law are fully reviewable." *Orth*, 2006 SD 99, ¶ 27, 724 NW2d at 592 (*quoting Brown v. Douglas Sch. Dist.*, 2002 SD 92, ¶ 9, 650 NW2d 264, 268).

The parties agree that the sole issue is whether Claimant is entitled to an aggregation of her wages from three separate jobs based on relevant statutes. This is purely a legal question reviewed *de novo*.

ANALYSIS

I. Whether the ALJ erred in holding that Claimant was not entitled to have her earnings from three employments in which she was concurrently engaged at the time of the injury included in the calculation of her average weekly wage?

Claimant argues that the ALJ erred in not allowing an aggregation of her wages from all three of her part time jobs in calculating her average weekly wage. Claimant argues that South Dakota's Workers' Compensation scheme supports aggregation of wages, and that a majority of other jurisdictions allow it as well. In support of her argument, Claimant points to four different doctrines adopted by other jurisdictions, three of which do allow aggregation of wages in some form, and Larson's Worker's Compensation. However, as the ALJ stated, South Dakota statutes and cases are the primary sources to which this Court looks. Though it

may be contrary to the majority rule, nothing in South Dakota case law or statute permits the aggregation of wages from multiple concurrent employments.

The calculation of average weekly wages for worker's compensation purposes is found in statute. The three following statutes apply to such calculations:

> Employment for year preceding injury--Determination of average weekly wage. 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 62-2-24 (emphasis added).

> Employment for less than year preceding injury--Determination of average weekly wage. 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).

> Computation of average weekly wage when other methods not feasible. 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.

Claimant argues that, when read as a whole, the "average day's earnings" include all wages earned by the employee regardless of the source of earnings. SDCL 62-1-1(6) defines earnings as:

> "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.

(Emphasis added.) Claimant argues for a broad definition of "engaged" to include all the concurrent employment she had at the time she was injured. Claimant contends, in construing the statutes liberally in her favor, "engaged" must mean the status the worker has regarding work she is capable of performing, *i.e.* full time even if spread throughout three part time jobs[1].

When called upon to interpret statutes, courts first look to the plain meaning of the statute. "If the words and phrases in the statute have plain meaning and effect, [the court] should simply declare their meaning and not resort to statutory construction." *Sauder v. Parkview Care Center*, 2007 S.D. 103, ¶ 17, 740 N.W.2d 878, 883. "[I]f the language of a statute is clear, we must assume that the legislature meant what the statute says and we must, therefore, give its words and phrases a plain meaning and effect." *Caldwell v. John Morrell & Co.*, 489 N.W.2d 353, 364 (S.D. 1992.) Only where a statute is found to be ambiguous should it "be liberally construed in favor of injured employees." *Id.*

The statutes above are not ambiguous and no statutory construction is needed. Under a plain meaning analysis, the statutes listed above involving how an average weekly wage is calculated do not contemplate aggregation of wages from multiple employers. Though not applicable in this case as it relates to full-time employment, SDCL 62-4-24 uses the phrase "*and who was in the employment of the same employer in the same grade of employment as at the time of the injury continuously.*" Additionally, SDCL 62-4-25 states, "*for the employer by whom the employee was employed at the time of the employee's injury.*" And SDCL 62-4-26 uses the wording, "*As to an employee in an employment.*" All three of these statutes contain language limiting the calculation to a single employment – the employment in which the injury occurred. Read in context and as part of the overall scheme, and read in harmony with each other, these statutes for wage calculation clearly embrace the concept of using only the wages of the employer where the employee was injured. *See, Lewis & Clark Rural Water System, Inc. v. Seeba*, 2006 S.D. 7, ¶ 12, 709 N.W.2d 824, 831 (". . . statutes are governed by one spirit and policy, and [are] intended to be consistent and harmonious in their several parts and provision." (quoting *MB v. Konenkamp*, 523 N.W.2d 94, 97-98 (S.D. 1994)); *Expungement of Oliver*, 2012 S.D. 9,¶ 9, 810 N.W.2d 350, 352 ("'[i]t is a 'fundamental cannon of statutory construction that the words of a statute must be

[1] In the affirmative, Claimant's position is that the correct result would be to calculate her average weekly wage by adding her actual recorded earnings from her three concurrent employments. In the alternative, Claimant argues she is entitled to a calculation which reflects "the number of hours commonly regarded as a day's work" for the type of work in which she was engaged. She argues this would be full time/40 hours per week, at the rate she earned at Cinnabon.

read in their context and with a view to their place in the overall statutory scheme."" (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, (2000) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809, (1989))).

Claimant points to other language used in these statutes such as "*total*"; "*...is such method of computation produces a result that is manifestly unfair...;*" "*by a person in the same grade, employed at the same work...;*" "*a person in the same grade, employed in the same class of employment in the same general locality...;*" and "*employee's average day's earnings.*" Claimant states that these phrases intend to include ***all*** of employee's wages regardless of their source. Claimant argues the intention of the overall statutory scheme is to fairly compensate an injured employee for the total of their actual earning potential, which would necessarily permit aggregation of wages.

Claimant further relies on Larson's Worker's Compensation to support her argument that only compensating her for one employment is manifestly unfair. Larson states:

> . . . fairness to the employee and fairness to the employer-carrier are not symmetrical, and cannot be judged by the same standards. To this one employee, this one loss is everything – he or she has nothing against which to offset. . . Today this employer-carrier may be saddled with a slight extra cost; tomorrow positions may be reversed . . . Concurrent employment is by no means the only compensation situation in which employers and carries must console themselves with the reminder that these things will all "wash out" in the end. . . For the injured worker, however, there is no such consolation. That worker alone, bears the burden of being reduced to $20 a week when his or her actual earnings may have been five times that much. That is real unfairness.

Larson's Worker's Compensation, § 93.03, p. 93.

Though Larson's comments may be persuasive, "proceedings under the Workmen's [now, Workers'...edit] Compensation Law . . . are purely statutory, and the rights of the parties and the manner of procedure under the law must be

determined by its provisions." *Caldwell*, 489 N.W. 2d at 364. When reading the South Dakota statutes as a whole, there simply are no provisions to support Claimant's arguments. The statues do not explicitly state that wages from concurrent employments can be aggregated – rather, the language points to the opposite. Had the Legislature intended to allow such aggregation, they could easily have provided the same. It is safe to assume that the Legislature is well aware that many employees have several different jobs, yet the Legislature made no provision for extending coverage from one employer, over to another, or what would clearly be a shifting of risk. What is more, carriers would be forced to set higher premiums to cover unknown risks (wages earned at unknown other jobs.) This Court cannot pose as the Legislature by adding language to these statues to read what it plainly doesn't say. *See Salzer v. Barff*, 2010 S.D. 96, ¶ 5, 792 N.W.2d 177, 179. Nor can this Court "interpret" the statutes to arrive at a policy position not embraced by the Legislature. This Court may not add an outcome which is simply not in the statutes. *West v. Dooley*, 2010 S.D. 102, ¶ 14, 792 N.W.2d 925, 928 ("In interpreting legislation, this Court cannot add language that simply is not there.'" (quoting *City of Deadwood v. Gustafson Family Trust*, 2010 S.D. 5, ¶ 9, 777 N.W.2d 628, 632.)). We may not, under the guise of judicial construction, add modifying words to the statutes or change their terms. *State v Moss*, 2008 S.D. 64, ¶ 15, 754 N.W.2d 626, 631; *Petition of Famous Brands*, Inc., 347 N.W.2d 882, 885 (S.D. 1984).

Claimant argues that the Supreme Court demonstrated in *Caldwell* that the statutes regarding "earnings" do not preclude the aggregation of wages. 489 N.W.2d at 364. Caldwell was employed at two full-time employments when he injured his back. *Id.* at 356. Claimant's injury was found to have arisen out of and in the course of his work for *both employers*, and thus, both employers were held jointly and severally liable for workers' compensation benefits. *Id.* In calculating Claimant's average weekly earnings, the Department used the pre-injury job wages from both jobs. *Id.* at 364. The Court stated in dictum:

> We fail to see why temporary partial disability benefits should be considered any differently. Our statutory scheme does not differentiate between injuries an employee experiences the first day on his job or the last day on his job; nor does it differentiate between injuries incurred by full-time employees versus temporary employees.

Id.

First, *Caldwell* is clearly distinguishable from the case at hand. Unlike *Caldwell*, Claimant's injuries arose out of only *one* of her employments. There is no joint and several liability between Employer, Westside Casino, and Get "N" Go. Second, the *Caldwell* Court even stated, "While the facts of this case are unique since the Employee's injury is attributable to both of his fulltime jobs . . . ." *Id.* It is unknown how the *Caldwell* Court would have ruled absent an injury emanating from both jobs, thus any attempt to do so would be pure speculation. *Caldwell* did not shift risk; it merely recognized that both employers were on the risk because both jobs contributed to a back injury. Claimant here asks this Court to shift the risk of injury, and compensation, so that Employer/Insurer here is on the hook not only for known wages and injuries at Employer's work site, but for lost wages emanating from other jobs, which could exponentially increase a carrier's exposure with no method of setting rates to provide for same. Not only did the Legislature here fail or decline to express a desire for such an outcome, but there is a good "plain meaning" argument that the language used was expressly designed to limit the claim to the one employer where the injury occurred. Moss, id.

In the present case, Claimant admitted that her other employments did not contribute to the injury in any way. This is a material distinction from *Caldwell*. The primary question in any workers' compensation case is whether the injury "arose out of and in the course" of her employment. *Fair v. Nash Finch Co.*, 2007 SD 16, ¶ 9, 728 N.W.2d 623, 628 (In order to recover under South Dakota's Workers' Compensation Laws, a claimant "must prove by a preponderance of the evidence that [s]he sustained an injury '*arising out of employment' and 'in the course of employment.*'" (quoting *Bender v. Dakota Resorts Mgmt. Group, Inc.*, 2005 SD 81, ¶ 7, 700 N.W.2d 739, 742)). Her injury did not arise out of and in the course of her duties with Westside Casino or Get 'N' Go, and therefore, *Caldwell* is not helpful to our analysis of this case.

Employer/Insurer rely on *Smith v. Utah-Idaho Sugar Co.* in support of their argument that aggregation of wages is not allowed. 256 N.W. 261 (S.D. 1934.) Claimant is correct in arguing that this case is distinguishable because it doesn't involve "concurrent employment" but "seasonal employment." However, in not permitting the aggregation of wages, the Court stated:

> The injury he received while in the employ of the [employer] rendered him unable to perform this outside labor and caused the loss of the remuneration therefor; but in the absence of legislation allowing such recovery,

> he should not be allowed to recover against [employer], and more especially against the defendant insurance company, on the basis of his combined earnings.

Id. at 263.

Claimant, though not a seasonal employee, is in the same position as the claimant in *Utah-Idaho Sugar*. Claimant was injured in one employment which "rendered [her] unable to perform [the] outside labor and cause the remuneration therefor." *Utah-Idaho Sugar* is a 1934 case which relied on the following language for the "Basis of Computation":

> . . .
>
> 2. Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the employe [sic] was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause.
> 3. If the injured person has not been engaged in the employment of the same employer for the full year immediately preceding the accident, the compensation shall be computed according to the annual earnings which persons of the same class in the same employment and same location, or, if that be impracticable, of neighboring employments of the same kind have earned during such period.
>
> . . .
>
> 7. Earnings, for the purpose of this section, shall be based on the earnings for the number of hours commonly regarded as a day's work for that employment and shall exclude overtime earnings. The earnings shall not include any sum which the employer has been accustomed to pay the employe [sic] to cover an special expense entailed on him by the nature of his employment.

Rev. Code 1919 § 9461 (emphasis added). In comparing the statutes upon which *Utah-Idaho Sugar* was decided, the Court notes that they are quite similar to the statutes in effect today. Both use nearly identical language: "same employer in the grade in which the employe [sic] was employed at the time of the accident" (Id. at 2),

"the same employer in the same grade of employment as at the time of the injury" (SDCL 62-4-24), and "for the employment in which the employee was engaged at the time of his injury" (SDCL 62-1-1(6)). In the 80 years since *Utah-Idaho Sugar* was decided, the Legislature has failed to change the language of these statutes to allow for the aggregation of wages.

Further, the Department has considered this issue twice in the context of part time concurrent employment, and in relying on *Utah-Idaho Sugar* did not permit the aggregation of wages. In *Bahr v. Rapid Packaging and Wausau Ins. Co.*, HR No. 372, 1990/91, 1993 WL 331323 (S.D. Dept. Lab. June 2, 1993), Claimant was injured within the course of his full-time employment which also rendered him unable to perform his part time job. The Department did not permit claimant to aggregate his wages by stating:

> SDCL 62-4-24 makes it clear that the computation of the average weekly wage is a product of the employment of the same employer at the same grade of employment as at the time of the injury. . . . Whether the claimant is engaged in a dual employment situation or an alternate employment situation in the preceding year, the result is the same. The only employment considered for compensation purposes is the employment at which the injury was sustained. The high court in this state has indicated by their decisions that a different result must be legislated, and not the product of case law. The department will abide by that direction.

Id. at *2.

Again, in 2001, the Department held that the only employment to be considered for compensation purposes is the employment at which the injury was sustained. *Martins v. Britton Livestock Sales, Inc. and Meadowlark Ins. Group*, HF No. 275, 1999/00, 2001 WL 1681715 (S.D. Dept. Lab. November 14, 2001). The claimant in *Martins* was injured during his part time employment which rendered him unable to work any job, and he sought to aggregate his wages from his full time employment. The Department did not allow claimant to combine his wages from his full time and part time employments:

> At the time Claimant was injured, he was rendering services strictly for Employer. It is not permissible to combine earnings in one occupation with earnings in another to determine annual earnings.

Id. at *3.

Though the Department's decisions are not binding authority on this Court, they are illustrative of a long standing "reading" of the statutes. While this case is not one where the Department construed its own rules on a technical or ambiguous issue, and is not a case where "construction" is called for given the plain language, nonetheless this long standing position of the Supreme Court, the Legislature, and the Department is persuasive. The Department has twice taken the same position, and the Legislature has declined to intervene with "clarifying" enactments. Additionally, if the Legislature wished to follow the advice in Larson's writings, they have had ample time to do so. Further, the Legislature is well aware that many employees have multiple employments – some even having two full time jobs – but they have never embraced the policy to aggregate an employee's wages.

The South Dakota Supreme Court held wages could not be aggregated in 1934, and the Department followed this ruling in 1993 and 2001. The Legislatures' inaction in the wake of these decisions shows the Legislature does not embrace Claimant's position. The Legislature is presumed to act with the knowledge of judicial decisions. *Sanford v. Sanford*, 2005 S.D. 34, ¶ 19, 694 NW.2d 283, 289 ("We presume the Legislature acts with knowledge of our judicial decisions.") (citing *In re State Highway Comm'n v. Wieczorek*, 248 N.W.2d 369, 372 (S.D. 1976)). Further, "[t]he Legislature knows how to include and exclude specific items in its statutes." *Id.* (citations omitted). Here, the Legislature did not include provisions to aggregate wages, and has not intervened to require "multi-job" aggregation.

While reasonable minds (and state Legislatures) can differ on what is "fair" in the case of injured workers who held other jobs unrelated to the injury, fairness in this situation is a policy concern within the exclusive ambit of the Legislature; its clear language confining the compensation to the wages earned at the site of the injury, is a policy call beyond the reach of this Court.

CONCLUSION

For the foregoing reasons, the Department's decision is AFFIRMED.

Sincerely,

Mark Barnett

The Honorable Mark Barnett
Circuit Court Judge

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO.
FILED
JUL 18 2014
Clerk
By Deputy

STATE OF SOUTH DAKOTA	)	**IN CIRCUIT COURT**
	) SS	
COUNTY OF HUGHES	)	**SIXTH JUDICIAL CIRCUIT**

PATRICIA WHEELER	)	**CIV NO. 14- 23**
Appellant,	)	
v.	)	**ORDER**
CINNA BAKERS LLC, an Iowa Limited Liability Company, d/b/a CINNABON (EMPIRE MALL),	)	
and	)	
HARTFORD CASUALTY INSURANCE COMPANY,	)	
Appellee.	)	

WHEREAS, the Court having entered its Memorandum Decision on the 18th day of July 2014, and expressly incorporating the same herein, now, therefore, it shall be and hereby is

ORDERED that the decision of the Administrative Law Judge is AFFIRMED.

Dated this 18th day of July, 2014.

BY THE COURT:

Mark Barnett
Circuit Court Judge

ATTEST:
Clerk of Courts

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO.
FILED
JUL 18 2014
Clerk
By Deputy

CIV14-23

#27170-r-DG
2015 S.D. 25

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

PATRICIA WHEELER, Claimant and Appellant,

v.

CINNA BAKERS LLC, an Iowa
Limited Liability Company,
d/b/a CINNABON (EMPIRE MALL), Employer and Appellee,

and

HARTFORD CASUALTY
INSURANCE COMPANY, Insurer and Appellee.

* * * *

APPEAL FROM THE CIRCUIT COURT OF
THE SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

* * * *

THE HONORABLE MARK BARNETT
Judge

* * * *

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* * * *

CONSIDERED ON BRIEFS
ON FEBRUARY 17, 2015
OPINION FILED **05/06/15**

#27170

GILBERTSON, Chief Justice

[¶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.

Facts and Procedural History

[¶2.] Wheeler worked at the Cinnabon Store in the Empire Mall in Sioux Falls, South Dakota. Cinna Bakers, LLC, owns Cinnabon, which made Wheeler an employee of Cinna Bakers. Wheeler was also employed by Westside Casino and Get 'N' Go convenience store in Sioux Falls. Wheeler held all jobs concurrently in order to reach the earning level of full-time employment and had done so on a long-term basis with the intent of continuing indefinitely. While working at Cinnabon, Wheeler sustained two separate work-related injuries, which arose out of and in the course of her employment with Cinna Bakers. As a result of her injuries at Cinnabon, Wheeler was unable to work at Cinnabon and her two other concurrently held jobs.[1] After initially denying Wheeler's claim, Cinna Bakers and its insurance company, Hartford Casualty Insurance Co., accepted Wheeler's injuries as compensable. However, the parties disputed whether income from all three of

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1. The ALJ found:

> Both injuries additionally required treatment for dental injuries, twenty-four sessions of occupational therapy, seven weeks off from all three of [Wheeler's] concurrently held jobs, and several weeks of reduced hours and restrictions while transitioning to full-time work (each injury).

Wheeler's concurrent employments should be used to calculate her AWW. Wheeler filed a petition and asserted that all three of her concurrent employments should be aggregated to calculate her AWW. The ALJ determined that only Wheeler's wage from Cinna Bakers could be utilized to calculate her AWW. Wheeler appealed to the circuit court, and it affirmed. Wheeler now appeals to this Court.

[¶3.] Wheeler raises one issue:

> Whether the ALJ and the circuit court erred in holding that Wheeler could not aggregate her earnings from three separate employments to calculate her AWW after she was injured on the job at one employment.

Standard of Review

[¶4.] While our standard of review of an agency decision is set forth in SDCL 1-26-37,[2] the parties agree the question before the Court is one of statutory interpretation. Statutory interpretation is a question of law reviewed de novo. *Whitesell v. Rapid Soft Water & Spas, Inc.*, 2014 S.D. 41, ¶ 6, 850 N.W.2d 840, 842 (citing *Fair v. Nash Finch Co.*, 2007 S.D. 16, ¶ 7, 728 N.W.2d 623, 628).

Decision

[¶5.] Wheeler asserts on appeal that the ALJ and the circuit court erred when they only used her wage from Cinna Bakers to determine her AWW. Wheeler argues her wages from all three of her concurrent employments should have been

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2. SDCL 1-26-37 provides:

> An aggrieved party or the agency may obtain a review of any final judgment of the circuit court under this chapter by appeal to the Supreme Court. The appeal shall be taken as in other civil cases. The Supreme Court shall give the same deference to the findings of fact, conclusions of law, and final judgment of the circuit court as it does to other appeals from the circuit court. Such appeal may not be considered de novo.

aggregated to calculate her AWW. In support of her argument, Wheeler points out that a majority of jurisdictions allow for the aggregation of wages from concurrent employments. Arthur Larson, *Larson's Workers' Compensation Law*, § 93.03[1][a] (2014). Only a small number of states do not permit the aggregation of wages from concurrent employments. *Id.* Of the jurisdictions that allow for the aggregation of wages, most only permit aggregation when the employments are "similar" or "related." *Id.* Most of the remaining jurisdictions that permit aggregation allow earnings to "be combined whether or not the employments were related or similar." *Id.* Professor Larson calls this last position the "growing minority rule." *Id.* Professor Larson endorses the "growing minority rule" when calculating the AWW.[3]

[¶6.] Although a majority of jurisdictions aggregate the AWW in some manner, we have not yet addressed whether South Dakota's workers' compensation scheme permits the aggregation of wages from concurrent employments when, as here, the injuries arose out of and in the course of only one of those employments. While other jurisdictions and Professor Larson may provide persuasive authority on the matter, the issue before the Court is one of statutory interpretation. The

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3. After criticizing nonaggregation and aggregation of wages in similar or related employments, Professor Larson endorses the "growing minority rule":

> From the point of view of achieving a result that makes sense in relation to the claimant's real earning capacity in the past and future, . . . the only satisfactory calculation, particularly when the hourly rate of pay in the concurrent jobs is sharply different, is to combine the earnings in the [concurrent] jobs, rather than to round out to a full-time basis the hourly rate in the employment in which claimant was engaged at the time of injury.

Larson, *supra* ¶ 5, at § 93.03[3].

primary purpose of statutory interpretation is to discover legislative intent. *Bostick v. Weber*, 2005 S.D. 12, ¶ 7, 692 N.W.2d 517, 519 (citing *State v. Myrl & Roy's Paving, Inc.*, 2004 S.D. 98, ¶ 6, 686 N.W.2d 651, 653). Our first step in determining legislative intent is to look at the plain language of the statute. *See City of Rapid City v. Anderson*, 2000 S.D. 77, ¶ 7, 612 N.W.2d 289, 291 (quoting *Dahn v. Trownsell*, 1998 S.D. 36, ¶ 14, 576 N.W.2d 535, 539). "Words and phrases in a statute must be given their plain meaning and effect. When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed." *Id.* "A statute or portion thereof is ambiguous when it is capable of being understood by reasonably well-informed persons in either of two or more senses." *Petition of Famous Brands, Inc.*, 347 N.W.2d 882, 886 (S.D. 1984) (quoting *Nat'l Amusement Co. v. Wis. Dep't of Taxation*, 163 N.W.2d 625, 628 (Wis. 1969)). If statutes are ambiguous or lead to absurd and unreasonable results, we will utilize the rules of statutory construction to discover the true legislative intent. *See id.* at 885; *Anderson*, 2000 S.D. 77, ¶ 7, 612 N.W.2d at 291 (quoting *Dahn*, 1998 S.D. 36, ¶ 14, 576 N.W.2d at 539); *State v. Davis*, 1999 S.D. 98, ¶ 7, 598 N.W.2d 535, 537-38. Additionally, if we conclude the language of the statutes is ambiguous or leads to an absurd and unreasonable result, we "liberally construe[the statutes] in favor of [the] injured employee[]" because this is a workers' compensation case. *Hayes v. Rosenbaum Signs & Outdoor Adver., Inc.*, 2014 S.D. 64, ¶ 28, 853 N.W.2d 878, 885 (quoting *Caldwell v. John Morrell & Co.*, 489 N.W.2d 353, 364 (S.D. 1992)); *Mills v. Spink Elec. Co-op*, 442 N.W.2d 243, 246 (S.D. 1989) (holding workers' compensation

is "remedial" in nature and should though be "liberally construed in favor of injured employee[]").

[¶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.

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

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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).

[¶14.] Our interpretation is further buttressed by our rules of statutory construction. First, the AWW statutes indicate a worker's *total* earnings should be used to calculate the AWW. *See* SDCL 62-4-24; SDCL 62-4-25; SDCL 62-4-26. Wheeler's total earnings include the wages she received from all of her concurrently held jobs, not just her wages from Cinnabon. Second, the broader construction of earnings is more consistent with the other workers' compensation statutes. "[I]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Expungement of Oliver*, 2012 S.D. 9, ¶ 9, 810 N.W.2d 350, 352 (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S. Ct. 1291, 1301, 146 L. Ed. 2d 121 (2000)) (internal quotation marks omitted). We said in *Caldwell* that the primary purpose of workers' compensation is to fairly compensate the employee for his or her loss of income-earning ability:

(. . . continued)

"engaged" refers to a *status* of being enrolled or committed to participate, not actually and immediately performing program requirements.

> Our [workers' compensation laws are] designed to compensate an employee or his family for the loss of his *income-earning ability* which loss is occasioned by an injury, disablement, or death because of an employment related accident, casualty, or disease. [Workers' compensation] guarantees employees compensation irrespective of tort law considerations and in return employees forego the right to a one hundred percent recovery. Employers, on the other hand, accept responsibility for injuries they might not otherwise be responsible for at common law and in return their liability is fixed and limited.

489 N.W.2d at 362 (emphasis added). "[S]tatutes [are] governed by one spirit and policy, and [are] intended to be consistent and harmonious in their several parts and provision." *Lewis & Clark Rural Water Sys., Inc. v. Seeba*, 2006 S.D. 7, ¶ 12, 709 N.W.2d 824, 831 (quoting *M.B. v. Konenkamp*, 523 N.W.2d 94, 98 (S.D. 1994)) (alterations in *Lewis & Clark Rural Water Sys., Inc.*).

[¶15.] Third, when the circuit court affirmed the ALJ and reasoned that the workers' compensation statutory scheme did not permit aggregation of wages, the circuit court noted, "[C]arriers would be forced to set higher premiums to cover unknown risks," (i.e., wages earned at unknown other jobs). The circuit court also noted that requiring the employer to pay higher rates to cover an employee's other jobs or lost income-earning ability would be "manifestly unfair." While it is true higher rates are undesirable, Professor Larson responds:

> [F]airness to the employee and fairness to the employer/carrier are not symmetrical, and cannot be judged by the same standards. To this one employee, this one loss is everything–he or she has nothing against which to offset. To the employer, and even more to the carrier, this is just one case among many. . . . Today this employer-carrier may be saddled with a slight extra cost; tomorrow positions may be reversed. . . .
>
> Concurrent employment is by no means the only compensation situation in which employers and carriers must console

> themselves with the reminder that these things will all "wash out" in the end. . . .
>
> For the injured worker, however, there is no such consolation. That worker, alone, bears the burden of being reduced to $20 a week when his or her actual earnings may have been five times that much. That is real unfairness. By comparison, the "unfairness" to the employer, in the form perhaps of a slight premium increase, eventually offset by the times he or she will benefit by the same rule, is an artificial construct with no genuine content.

Larson, *supra* ¶ 5, at § 93.03[1][c]; *see also Foreman v. Jackson Minit Markets, Inc.*, 217 S.E.2d 214, 216-17 (S.C. 1975) (interpreting substantially similar statutes to those of South Dakota and holding the definition of "earnings" did not preclude aggregation of wages because aggregation of wages was the only fair way to compensate employees for lost earning capacity).

[¶16.] Lastly, we are persuaded to adopt the "growing minority rule," as Professor Larson calls it, and allow for aggregation of wages from all concurrently held employments, not just similar or related employments. We see no reason why the employments must be similar or related if workers' compensation "is designed to compensate an employee or his family for the loss of his *income-earning ability*." *Caldwell*, 489 N.W.2d at 362 (emphasis added). Professor Larson states:

> The rule refusing to combine earnings from concurrent employments unless they are "similar" or "related" is unnecessary from the point of view of statutory construction, unsound as a matter of accomplishing the purposes of the legislation, inhumane from the point of view of the claimant, and logically absurd as to the distinctions on which it is based.

Larson, *supra* ¶ 5, at § 93.03[1][c].

Conclusion

[¶17.] The definition of "earnings" in SDCL 62-1-1(6) is ambiguous. We, therefore, interpret "earnings" in Wheeler's favor. Because "earnings" is utilized to calculate a worker's AWW, we hold that SDCL 62-4-24, SDCL 62-4-25, and SDCL 62-4-26 allow for the aggregation of wages when an injury at one employment renders the worker incapable of performing that employee's other concurrently held employments. We also adopt the "growing minority rule" concerning aggregation. Consequently, we reverse the ALJ and the circuit court.

[¶18.] ZINTER, SEVERSON, WILBUR, and KERN, Justices, concur.