NASSER LAW OFFICES, P.C.

Jolene Nasser
jolene@nasserlaw.com

204 SOUTH MAIN AVENUE | SIOUX FALLS, SD 57104 | (605) 335-0001

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Workers' Compensation Advisory Council
c/o Marcia Hultman, Cabinet Secretary
South Dakota Department of Labor & Regulation
700 Governors Drive
Pierre, SD 57501-2291

Re: *Wheeler v. Cinna Bakers, LLC*, 2015 S.D. 25

Dear Lieutenant Governor Michels and the WC Advisory Council,

As you might know our law office handled a recent case, *Wheeler v. Cinna Bakers, LLC*, 2015 S.D. 25. In anticipation of discussions regarding codification or repeal of this decision legislatively, I wanted to present to you some important points supporting the practicality and beneficial application of the *Wheeler* decision in concurrent employment scenarios:

I. Background Facts & Legal Issue

II. The *Wheeler* decision does not represent any departure from South Dakota's established law;

III. The *Wheeler* decision construed South Dakota's long-standing workers' compensation statutes to authorize the aggregation of wages in concurrent employment, consistent with the strong majority of U.S. jurisdictions;

IV. *Wheeler* serves the over-arching purpose of workers' compensation, which is to compensate an employee or his/her family for the loss of his/her income-earning ability;

V. The *Wheeler* decision and the existing statutes are sound law which should remain undisturbed. Legislation proposed to abrogate *Wheeler* would destroy the long established public policy of this state to compensate an employee for the loss of income-earning ability.

I. Background Facts

In *Wheeler v. Cinna Bakers, LLC*, 2015 S. D. 25, Ms. Patricia Wheeler sought benefits for two work-related injuries, which arose out of her employment with Cinna Bakers, LLC. Ms. Wheeler, at age 67[1], was also concurrently employed at two other part-time jobs, and held all three jobs concurrently in order to support herself. At the time of her injury, she was making $575.00 per week from all three jobs, only $197.50 of which came from the Cinna Bakers job.

Ms. Wheeler's injuries involved broken bones requiring surgical repair and several weeks off work entirely, making her temporarily totally disabled from all three of her jobs during her period(s) of recovery.

Issue & Holding

The disputed legal question was whether Ms. Wheeler was entitled to aggregation of her wages in the calculation of her average weekly wage and compensation rate. The South Dakota Supreme Court held that South Dakota's workers' compensation statutes 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.

II. The *Wheeler* decision does not represent a departure from SD's established law.

Opponents to the *Wheeler* case incorrectly assert that *Wheeler* changed South Dakota law. They cite the line of cases following *Smith v. Utah-Idaho Sugar Co.,* 256 N.W. 261 (S.D. 1934) as authority that wages are not aggregated from multiple employments. However, *Utah-Idaho Sugar Co.*, is not applicable to concurrent employment; rather, claimant Smith was a seasonal employee; it is a successive (seasonal) employment case where the claimant held one job at a time, at different times of the year. *Id.* Seasonal employment is governed by a different statute, SDCL § 62-4-27.[2] Citation to SDCL 62-4-7 is conspicuously absent in *Wheeler*.

It is noteworthy in *Utah-Idaho Sugar* that the South Dakota Supreme Court did not condemn the combined earnings approach or the concept of determining the AWW in an equitable manner. It merely pointed out that one could not combine "earnings" from successive employments under the seasonal employment statute. *Id.*

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[1] Ms. Wheeler was born in 1943; she is currently 72 years old

[2] SDCL 62-4-27 Seasonal employment--Determination of AWW. As to employees in employments in which it is the custom to operate for a part of the whole number of working days in each year, the AWWs shall be ascertained by multiplying the employee's average day's earnings by number of days which it is customary in such employment to operate during a year, but not less than two hundred, and dividing by fifty-two.

Likewise, *Meyer v. Rottele*, 264 N.W. 191 (SD 1935), *Humphreys v. Frank Schuknecht, Jr. Const. Co*., 279 N.W. 246 (SD 1938) and *Jacobson v. Strong & Waggoner*, 287 N.W. 41, 45 (SD 1939) are seasonal work cases where the court refused to combine successive employments under SDCL 62-4-7 to calculate AWW. This entire line of cases left open the inference that in cases involving employment not governed by the seasonal work statute (i.e., non-seasonal work under SDCL 62-4-24 through 26 inclusive), the combining of earnings from concurrent employments could be allowable.[3]

III. The *Wheeler* decision construed South Dakota's long-standing workers' compensation statutes to authorize the aggregation of wages in concurrent employment, consistent with the strong majority of U.S. jurisdictions. *Larson's Worker's Compensation* § 93.03, p. 93-32.[4] Specifically, a survey of U.S. jurisdictions reveals that only 5 jurisdictions of 50[5] have expressly stated that wages from concurrent employment should not be aggregated in

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[3] The harm the legislature sought to prevent by precluding the combining of income from successive employments was distortion of the claimant's earning capacity, as it existed at the time of injury, either upward or downward (over-compensating or under-compensating) by inclusion of a previous employment which was not held as of the time of injury (i.e. successive employments). The multiplication of an average day's earnings by 200 or 300, depending upon the seasonal or non-seasonal statute applied, is intended to approximate the yearly earning capacity based upon the earning capacity of the injured worker as it existed at the time of injury (rather than a few months prior to the injury, for example). Concurrent employments however, as noted in *Larson's Workers' Compensation* §93.03 is a different matter. Depriving the worker of his full weekly earnings is outside the goal of the statutes as written.

[4] There are four different doctrines or approaches to this question amongst U.S. jurisdictions. Three of these four approaches allow aggregation. *Larson's Worker's Compensation* § 93.03:

1. The majority rule (by a narrow margin) is that earnings may be combined if the employments are "related" or "similar" to one another;

2. A substantial and growing minority rule is that earnings may be combined whether or not the employments are related or similar. *Foreman v. Jackson Minute Markets, Inc.* 265 S.C. 164, 217 S.E.2d 214 (1975) (court held wages should be combined under catch-all method, finding that other statutory methods would be unfair and not realistically reflect decedents earning capacity);

3. A very small minority will not combine earnings from multiple employments even if similar or related;

4. The State of Michigan has expressly disavowed any test of similarity, and rather bases the "combinability" question upon whether the disability affects both employments. *Lahay v. Hastings Lodge No. 1965 BPOE*, 59 Mich. App. 145, 229 N.W.2d 348 (1975), *rev'd*, 398 Mich. 467, 247 N.W.2d 817 (1976).

[5] Several states have not ruled directly on the question, or the cases most closely related to the question are potentially factually distinguishable, so were excluded. These states include: Mississippi, Nebraska, Nevada, Oklahoma, Texas, Wisconsin.

calculation of injured employees' average earnings.[6] Thirty-nine (39) states have expressly stated that wages from multiple concurrent employments may be aggregated in calculation of the injured employee's average earnings. Of these jurisdictions, 23 have statutes directly authorizing aggregation, and 16 jurisdictions have interpreted statutes which do not expressly address concurrent employments, construing them to allow aggregation.[7]

[6] States ruling against aggregation of wages in concurrent employments include: North Carolina, *McAninch v. Buncombe Cty. Schools*; Tennessee, *Acklie v. Carrier*, 785 S.W.2d 335 (1990); Arkansas; Maryland (by statute); and Oregon, *Reed v. State Acc. Ins. Fund Corp.*, 63 Or. App. 1 (1983), 662 P.2d 776 (dissent in favor of aggregation).

[7] Alabama, *G.A. West & Co. v. McGhee*, 58 So.3d 167 (Ala. 2010); Indiana, *Sprout & Davis, Inc. v. Toren*, 118 Ind. App. 384, 391, 78 N.E.2d 437, New Mexico, *Vinyard v. Palo Alto, Inc.*, 293 P. 3d 191 (2012), Virginia, *Mercy Tidewater Ambulance Serv. v. Carpenter*, 1999, 511 S.E.2d 418, 29 Va.App. 218, Michigan, *Lahay v. Hastings Lodge No. 1965 BPOE*, 59 Mich. App. 145, 229 N.W.2d 348 (1975), *rev'd*, 398 Mich. 467, 247 N.W.2d 817 (1976), South Carolina, *McCummings v. Anderson Theatre Co.*, 225 S.C. 187, 81 S.E.2d 348, Arizona, *Berryhill v. Industrial Com'n of Ariz.* (App. Div.1 2013) 232 Ariz. 603, 307 P.3d 1030, Colorado, *St. Mary's Church & Mission v. Industrial Com'n of Colo.,* App.1986, 735 P.2d 902, District of Columbia, *MCM Parking Co. v. District of Columbia Dept. Employment Services*, 510 A.2d 1041 (1986), Hawai'i, *Forrest v. Theo. H. Davies & Co.*, 1947, 37 Haw. 517, 1947 WL 7075, Unreported, Ohio, *State ex rel. FedEx Ground Pkg. Sys., Inc. v. Indus. Comm. 182 Ohio App.3d 152*, Utah, *Produce v. Ind'l Com'n of Utah*, 657 P.2d 1354 (1983), Wyoming, *In Re Wilson*, 75 P.3d 669 (2003).

Of the jurisdictions interpreting statutes which do not expressly authorize aggregation of wages, Alabama, Indiana, New Mexico, Virginia, and South Carolina's statutes utilize language substantially similar to South Dakota's statutes. All of these states held that an injured worker's AWW should be based on the aggregate weekly wages of concurrently held employment(s). Where courts are interpreting very similar statutory language, such authority is highly relevant.[8]

[8] See *Foreman v. Jackson Minit Markets, Inc.,* 265 S.C. 164 (1975)(construing statutes substantially similar to South Dakota's statutes, the South Carolina Supreme Court held the definition of "earnings" did not preclude aggregation of wages, and "[t]he fact alone that the method of combining the earnings from both employments is only one which will result in adequate compensation for lost earning capacity is sufficient 'exceptional reason' to apply that method"). See also, *Lawrence v. Toys R Us*, 453 Mich. 112, 551 N.W.2d 155 (1996)(wages claimant earned at dual employment job were includable in computing AWW); *Lahay v. Hastings Lodge No. 1965 BPOE*, 59 Mich. App. 145, 229 N.W.2d 348 (1975), *rev'd*, 398 Mich. 467, 247 N.W.2d 817 (1976) (Michigan expressly disavowed any test of similarity, basing "combinability" question upon whether disability affects both employments); *McCummings v. Anderson Theatre Co.*, 225 S.C. 187, 81 S.E.2d 348 (holding employee injured on part time job was entitled to compensation based on wages from both part time and regular jobs); *Boles v. Una Water Dist*. 353 S.E.2d 286, 287 (holding that volunteer fireman's salary could be combined with other wages to calculate AWW); *Brunson v. Wal-Mart Stores, Inc.* 542 S.E.2d 732,734; *Fidelity Union Casualty Co. v. Carey* (Tex. Com. App.) 55 S.W.(2d) 795; *Geneva-Pearl Oil & Gas Co. v. Hickman*, 147 Okl. 283, 296 P. 954 (considering all earnings from two separate employments as pumper in calculating average wages)

50 States' Summary:	Aggregation of Wages	in Concurrent	Employment
	YES (39)	Unclear (6)	NO (5)
STATUTORY **Statutes Explicitly Authorize Aggregation (23)**	Alaska California Connecticut Florida Georgia Idaho Illinois Kansas Kentucky Louisiana Maine Massachusetts Minnesota Missouri Montana New Hampshire North Dakota Pennsylvania Rhode Island Vermont Washington West Virginia New York		
CASELAW **(Statutory language dissimilar from SD statutes)**	Arizona Colorado District of Columbia Hawaii New Jersey Ohio Utah Wyoming Delaware ("rounds" up to FT employment)	Oklahoma Wisconsin Nevada Nebraska Texas	Arkansas Oregon (dissent argues "yes")
CASELAW **(Statutory language significantly similar to SD)**	Alabama Indiana Iowa New Mexico Michigan South Carolina South Dakota Virginia	Mississippi	Tennessee North Carolina
STATUTORY **Statute Explicitly Precludes Aggregation (1)**			Maryland

IV. *Wheeler* serves the over-arching purpose of workers' compensation, which is to compensate an employee or his family for the loss of his income-earning ability.

The South Dakota Supreme Court has recited the underlying purpose of the Act:

> Our act is 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. The act 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. *Stevenson v. Douros*, 58 S.D. 268, 236 N.W. 707 (1931). With the exception of certain items (…medical, hospital, and burial expenses), SDCL Chapter 62-4 provides that compensation shall be paid pursuant to definite schedules. See SDCL 62-4-3, 4, 5, 6, 7, and 12 et seq. All of the schedules are based upon the employee's loss of wage-earning power; that is, what would the employee have expected to earn if he had not been victimized by an employment-related accident, casualty, or disease.

Caldwell v. John Morrell, 489 N.W.2d 353, 362 (S.D. 1992)(underlining added). South Dakota's worker's compensation scheme clearly contemplates calculating the AWW based upon the entirety of a worker's earning capacity at full time (or greater) employment, even if that encompasses multiple concurrently held jobs. (See SDCL § 62-1-1(6) which defines "earnings" as "the amount of compensation for the number of hours commonly regarded as a day's work").

South Dakota AWW statutes taken together as a whole are intended to provide flexibility in calculating an injured employee's AWW to fairly reflect her actual loss of earning power[9] under widely varying sets of circumstances. Multiple alternative methods of calculation are set forth, with specific direction to use approximated figures, "if such method of computation produces a result that is manifestly unfair and inequitable," SDCL 62-4-25.

The legislature has done its best to allow for any and all scenarios by mandating flexibility in the statutes, and describing several acceptable methods of calculation directly in the text of the statutes. The statutes which are potentially applicable to full-time year round employees (SDCL §§ 62-4-24, 62-4-25, and 62-4-26) set forth a process by which to make the most simple calculation, followed by multiple alternatives for less straight forward scenarios.

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9 This holds true even where the calculation exceeds the employee's actual earnings from the employer for the injury-producing employment. This is the type of risk which workers' compensation systems are intended to spread. *Larson's Worker's Compensation* § 93.03 [1][c] 93-39.

Throughout these statutes are the phrases "where (reasonably) feasible," " (if) impracticable," and " (if such method) produces a result that is manifestly unfair and inequitable," allowing for alternative methods of calculation which do reach a reasonable, practicable, and equitable result which closely reflects the full actual earning capacity of the employee, working full-time, or at his particular "full" earning capacity.

"The ultimate consideration should be whether the worker's inherent relation to the labor market is full-time." *Larson's Worker's Compensation*, § 93.03[3], p. 93-47, citing *Larson's*, § 93.02 [1]-[3]. "When aggregation of wages from concurrent employments is disallowed, the effect . . . is often to relegate the claimant to a part-time wage basis, although his or her actual earnings have been that of a full-time worker." *Larson's* 93.03 [1][g] pg 93-44 to 93-45. Larson cites the Supreme Court of Florida with approval, where it abandoned the similar-employment requirement for aggregation of wages, stressing the issues of fairness and the purpose of the act:

> If the injury occurring on the part-time job has disabled the employee from working at his full-time job, his capacity as a wage earner is impaired beyond the limits of his part-time job and his compensation should be based on the combined wages. The purpose of the Act is to compensate for loss of wage earning capacity due to work-connected injury.[10] It is the capacity of the "whole man," not the capacity of the part-time or full-time worker, that is involved.

Larson's Worker's Compensation § 93.03 [1][c] p.93-38, citing *American Uniform & Rental Serv. v. Trainer,* 262 So. 2d 193, 194.

Where an injured employee is statutorily limited to an exclusive remedy under worker's compensation, it is particularly imperative that the remedy afforded be adequate compensation for the employee's actual losses. See SDCL 62-3-2.[11] See also *Caldwell* at 362 (S.D. 1992)(citing *Stevenson v. Douros*, 58 S.D. 268 (1931)).

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[10] Note the similarity of the language used here and the language in *Caldwell,* "loss of wage earning power," 489 N.W.2d at 362.

SDCL 62-3-2. Rights and remedies of employees limited. The rights and remedies granted to an employee subject to this title, on account of personal injury or death arising out of and in the course of employment, shall exclude all other rights and remedies of the employee, the employee's personal representatives, dependents, or next of kin, on account of such injury or death against the employer or any employee, partner, officer, or director of the employer, except rights and remedies arising from intentional tort.

Reducing a full-time employee to the income level of a part-time worker, at the rate of one-half or one-third what she was previously earning, undeniably fails the elementary principles of the system. In the case of an injured worker who becomes permanently and totally disabled, such a grossly inadequate benefit award could leave her financially destitute and ultimately a charge of the state, forcing the worker to rely upon Social Social Security Disability, Medicare, Medicaid, County Welfare, and private health insurance and disability plans[12] to bear the burden of loss for a workers' compensation compensable injury. See *Thomas v. Custer State Hosp.,* 511 N.W. 2d 576, 582 (1994) (stating in context of preserving lump sum PTD award: "[c]ertainly the Department and circuit court owe a duty to preserve the principal so that [claimant] will not become a charge of this state"). It is not solely the claimant's or the employer/insurer's rights which are at issue. *Id.*

A recognized purpose of Workmen's Compensation Law is to transfer from the worker to the employer, and ultimately to the public, a greater portion of the economic loss due to industrial accidents and injuries, is remedial in character and entitled to liberal construction *Oviatt v. Oviatt Dairy, Inc.,* 80 S.D. 83, 85, 119 N.W.2d 649, 650 (1963) (citing *Schwan v. Premack*, 70 S.D. 371, 17 N.W.2d 911; *Bergren v. S. E. Gustafson Construction Co.*, 75 S.D. 497, 68 N.W.2d 477). Laws intended to accomplish such a goal should be analyzed in that context, as Larson discusses:

> To this one employee, this one loss is everything - he or she has nothing against which to offset it. 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 the positions may be reversed, and the employer-carrier will be completely relieved of the cost of an injury… in a concurrent employment situation, when it happens to be the other employment in which the injury occurs. <u>This is the essence of the concept of spreading the risk in a system like workers' compensation.</u> Concurrent employment is by no means the only compensation situation in which employers and carriers must console themselves with the reminder that these rings will all "wash out" in the end. For example, the rule that the last employer in whose employ injurious exposure occurred must bear the entire liability for the occupational disease, without apportionment, is a far more extreme case of disproportion between premium and liability, yet it is accepted as a defensible compromise on the theory that employers and carriers will on the whole come out even in time. For the injured worker, however, there is no such consolation. That worker, alone, bears the

[12] Practically speaking, few injured workers can afford to maintain premiums on private health or disability plans while disabled from work; this burden falls disproportionately on the government-funded welfare-benefit options.

> 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.

Larsons 93.03 [1][c] 93-39. (underlining supplied).

V. The *Wheeler* decision, and the statutory scheme upon which it is based, are sound law which should remain undisturbed. Legislation to abrogate *Wheeler* would destroy the long established public policy of South Dakota to compensate an employee for his/her loss of income-earning ability.

Injured workers' lost earning capacity can only be fairly reflected by inclusion of the entirety of his or her wages from all concurrently held employments as "earnings" in calculating the worker's AWW. The principle of aggregating wages from concurrently held employments for purposes of arriving at a true average weekly wage creates a just result for the worker and avoids an absurd application of our Workers' Compensation laws simply by spreading the risk across the industry, as it is supposed to be. The *Wheeler* decision appropriately addresses all of these principles in a way that makes sense legally and practically, without displacing the burden of workplace injuries onto our public welfare programs and taxpayer dollars.

Thank you for you time and thoughtful consideration of this matter. I have tried to condense this information for sake of brevity, but would be glad to discuss further with anyone who has questions. Please feel free to contact either Dean Nasser or myself with questions or concerns. Kindest regards.

Very truly yours,

NASSER LAW OFFICES, P.C.

Jolene Nasser