



ANALYSIS OF SOUTH DAKOTA SUPREME COURT DECISION WHEELER VS. CINNA BAKERS LLC, AND HARTFORD CASUALTY INSURANCE COMPANY (2015)

NCCI estimates that the Supreme Court decision in *Wheeler vs. Cinna Bakers LLC, and Hartford Casualty Insurance Company (Wheeler)* may result in an increase in overall workers compensation (WC) costs in South Dakota. The magnitude of any such potential increase is uncertain as data necessary to evaluate the impact of the ruling is not available. The overall cost impact due to the *Wheeler* ruling will be realized in future loss experience and reflected in subsequent NCCI loss cost filings in South Dakota.

Additionally, the *Wheeler* ruling may result in a retroactive impact since it creates the potential for claims for benefits from injuries occurring prior to the ruling to obtain additional workers compensation benefits. Such a retroactive application results in an unfunded liability, as these additional benefits were not contemplated in the premiums charged for policies written prior to the ruling.

Summary

In *Wheeler*, an injured worker who held three part-time jobs was not able to work at any of her three employments due to an injury sustained at one of the jobs. Wheeler argued that her average weekly wage (AWW) calculation (and related indemnity benefits) should be based on the aggregate wages of her three concurrent employments. The district court denied her claim. On appeal, the Supreme Court of South Dakota ruled that the calculation of the AWW should include wages from concurrent employments. The Supreme Court held that the definition of "earnings" per SD Code 62-1-1(6) contained ambiguity and that it should be "liberally construed in favor of the employee".

Preliminary Analysis

- Historical precedent¹ and current practice (based on stakeholder feedback) indicate that the calculation of the injured worker's AWW in South Dakota does not include concurrent employment.
- The outcome of the *Wheeler* ruling is to increase the calculated AWW and indemnity benefits for those employees with multiple jobs, since wages from concurrent employments are to be included when determining the injured worker's AWW. The ruling does not appear to impact the calculation of the state average weekly wage² (SAWW) which is used to determine the maximum and minimum weekly indemnity benefits.
- Medical benefits are not directly affected by the ruling.

¹ Smith v. Utah-Idaho Sugar Co., 63 S.D. 45, 256 N.W. 261 (1934), and Humphreys v. Schuknecht Construction Co., 66 S.D. 112, 279 N.W. 246 (1938)

² S.D. Codified Laws Laws § 62-4-3



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Additional Considerations and Information

The following are factors unique to South Dakota that may impact the implementation of a new calculation of the AWW for employees with multiple jobs: 8.770

- South Dakota has the highest percentage³ of multiple job holders, when compared to other states.
- Indemnity benefits comprise approximately 26.8%⁴ of workers compensation benefits in South Dakota
- Data is unavailable that would allow a comparison of the total wages for multiple jobholders to their "primary" employment. Therefore, the impact on the AWW and related benefits for multiple jobholders is not quantifiable.
- For hypothetical purposes only, if the change in the AWW for multiple job holders resulted in a +25% to +50% cost impact on their indemnity benefits, and if those workers' wages currently represent 10% of all wages in South Dakota, and if indemnity benefits comprise 26.8% of total benefit costs, then the impact may be between +0.7% (=+25% x 10% x 26.8%) and +1.3% (=+50% x 10% x 26.8%) on South Dakota Workers compensation costs. To reiterate, this is a hypothetical example and is provided for illustrative purposes only as data necessary to determine the actual impact is not available.
- If multiple job holders are more likely to have injuries than their counterparts due to types of employment or fatigue from working relatively more hours per day/week, then the impact illustrated above may be greater. If the share of wages for multiple job holders is less than the share of employment, the cost impact illustrated above may be lower.
- Other administrative issues may arise, such as a change in the calculation of Temporary Partial Disability benefits, which is currently calculated as half of the difference between pre- and post-injury wages.
- There may be retroactive impacts, subject to the statute of limitations⁵, as the ruling does not appear to preclude benefits from pending or settled cases from being recalculated. Such a retroactive application would result in an unfunded liability, as these additional benefits were not contemplated in the premiums charged for policies written prior to the *Wheeler* ruling.
- Since the impact on the AWW cannot be estimated, the cost impact due to the *Wheeler* ruling would be realized in future loss experience and reflected in subsequent NCCI loss cost filings in South Dakota.

³ 8.9% in 2013, taken from the Bureau of Labor Statistics, *Multiple jobholding in states in 2013*, <http://www.bls.gov/opub/mlr/2014/article/multiple-jobholding-in-states-in-2013.htm> (June 1, 2015)

⁴ Based on South Dakota Financial Call data for policy years 2008-2012, trended to 7/1/2015

⁵ S.D. Codified Laws § 62-7-35