SOUTH DAKOTA DEPT. OF LABOR & REGULATION

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RE: HF No. 56, 2019/20 – Tonya Schoenfelder v. Power Wellness Management, LLC and Zurich American Insurance Company

Greetings:

This letter addresses Tonya Schoenfelder's (Schoenfelder) Pre-Hearing Motions for Determination of Average Weekly Wage (AWW), Power Wellness Management, LLC and Zurich American Insurance Company's (Employer and Insurer) Response to Claimant's Pre-Hearing Motion for Determination of Average Weekly Wage to Include Aggregation of Wages, and Schoenfelder's Reply Brief in Support of Claimant's Pre-Hearing Motion for Determination of Average Weekly Wage (AWW). Schoenfelder moves the Department of Labor & Regulation (Department) for summary judgment as to the issue of her average weekly wage (AWW) calculation and certain factual issues supporting the basis for aggregation of wages under *Wheeler v. Cinna Bakers*, 2015 S.D. 25, 864 N.W.2d 17 and SDCL 62-1-25. Schoenfelder asserts she was concurrently employed by both Employer and Southeast Technical College (STC). She seeks a determination from the Department that pursuant to SDCL 62-1-25 she was "actively

working" in her employment at STC and that the injury prevented her from performing her duties there.

The Department's authority to grant summary judgment is established in ARSD 47:03:01:08 which provides:

> A claimant or an employer or its insurer may, any time after expiration of 30 days from the filing of a petition, move with supporting affidavits for a summary judgment. The division shall grant the summary judgment immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In matters of summary judgment, the moving party bears the burden of demonstrating the lack of any genuine issue of material fact, and all reasonable inferences from the facts are viewed in the light most favorable to the non-moving party. *Stromberger Farms, Inc. v. Johnson*, 2020 S.D. 22, ¶ 31, 942 N.W.2d 249, 258-59 (citations omitted). The non-moving party must present specific facts showing that a genuine issue of material facts exists. *Id.* at ¶ 34. "A fact is material when it is one that would impact the outcome of the case 'under the governing substantive law' applicable to a claim or defense at issue in the case." *A-G-E Corp. v. State*, 2006 SD 66, ¶ 14, 719 N.W.2d 780, 785.

The Department will briefly summarize the applicable judicial and legislative history relevant to the subject of aggregation of wages from concurrent employment. In May of 2015, the South Dakota Supreme Court held in *Wheeler* that a claimant is allowed to aggregate the wages of concurrently held employments to determine earnings.

> 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.

Wheeler at 25.

Following the decision in *Wheeler*, the South Dakota Legislature enacted SDCL 62-1-23 which legislatively abrogated the decision. The Legislature also enacted SDCL 62-1-24 (precluding aggregation for claims arising before May 6, 2015) and SDCL 62-1-25 which provides,

> For a workers' compensation claim arising after May 5, 2015, if an employee was working for more than one employer, the employee's earnings used to calculate the employee's average weekly wage in §§ 62-4-24, 62-4-25, or 62-4-26 shall include the amount of compensation for the number of hours commonly regarded as a day's work for each employer in which the person was concurrently employed at the time of the person's injury; however, an employee's earnings from concurrent employment are aggregated only if the injury occurred when the employee was actively working in the concurrent employment and when the injury prevents the employee from performing the employee's duties at the employee's other concurrent employment.

First, the Department will assess whether Schoenfelder was actively employed in concurrent employment at the time of her injury.

Concurrent Employment

Schoenfelder contends that she meets all of the criteria under SDCL 62-1-25 for aggregation of her wages from both of her concurrent employments. Both of her employments were year-round and had been continuous for several years prior to the date of injury, and her injuries prevented, and continue to interfere with her ability to perform her duties at both concurrent employments. Schoenfelder was injured on June 15, 2015, while working as an aquatic therapist for Employer and thus her date of injury is after the May 5, 2015, date required by SDCL 62-1-25. She contends that her

teaching position at STC and her employment duties were continuous throughout the year. Schoenfelder does not teach during the summer months, but she testified at deposition that she engaged in other responsibilities as an adjunct professor.

Dr. Benjamin Valdez, Vice President of Academic Affairs at STC, testified by deposition as to the nature of Schoenfelder's employment. In his position, he oversees all the faculty and academic programming related to students and then overall student graduation requirements. He testified that an adjunct faculty is hired by STC then each semester, once full-time faculty fill courses, the adjunct professors are assigned to the courses that remain. The employment as an adjunct professor is ongoing and does not require renewal or continuation letters. He testified that Schoenfelder teaches specific courses each semester, and he was not aware of her having taught any summer courses in the years 2019-2023. Adjunct professors at STC are paid based on the courses they teach and are only paid in the summer if they teach courses in the summer months. Dr. Valdez was asked at his deposition whether Schoenfelder had turned down a teaching opportunity and he answered that he was not aware of her having turned down any teaching assignment. She continues to teach the same courseload that did not include teaching in the summer months. Therefore, Employer and Insurer assert that Schoenfelder would not have received income in the months of June, July, or August from STC as she was an adjunct professor, and thus was not earning an income from STC at the time of her injury while working for Employer.

The Department concludes from the testimony of Schoenfelder and Dr. Valdez that she was concurrently employed by STC at the time of her injury. Earnings are defined in SDCL 62-1-1(6) as,

> the amount of compensation for the number of hours commonly regarded as a day's work for the employment in which the employee was working at the time of the employee's 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 the employee by the nature of the employment; wherever allowances of any character made to an employee in lieu of wages are specified as a part of the wage contract, the allowances shall be deemed a part of the employee's earnings

SDCL 62-1-1(6) does not require that payment correspond with actual duties performed as an indication of employment. That Schoenfelder was not currently assigned a class does not change the fact that at the time of her injury, she was considered by STC to be an employee eligible to teach available classes and required to take part in training or other school-mandated obligations. Thus, she was "actively working" under SDCL 62-1-25. Further, she was not a seasonal employee pursuant to SDCL 62-4-27 which provides;

> 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 average weekly wages 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.

The Court has stated, "[s]easonal occupations logically are those vocations which cannot, from their very nature, be continuous or carried on throughout the year, but only during fixed portions of it. On the other hand, labor or occupation possible of performance and being carried on at any time of the year, or through the entire twelve months, is certainly not seasonal." *Nilson v. Clay County*, 534 N.W.2d 598 (S.D. 1995) (citing *American Mut. Ins. Co. v. W.C.A.B.*, 108, Pa.Cmwlth. 345, 530 A.2d 121 (1987)). As an adjunct professor, Schoenfelder's job as a teacher is one that can be performed throughout the year. While the classes she is responsible for do not occur in the

summer, she is still eligible as an employee of STC to take class assignments if they are available.

Additionally, the Court has held that, “if the statute has an ambiguity, it should be liberally construed in favor of the injured employees.” Caldwell v. John Morrell & Co. 489 N.W 2d 353,364 (S.D. 1992). Further, the Court has drawn attention to the intent of the Workers’ Compensation Act to compensate an injured employee for her income-earning ability and not merely the earnings from an employment she was actively engaged in at the time of injury.

> 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.

Wheeler v. Cinna Bakers LLC, 2015 S.D. 25, ¶ 14, 864 N.W.2d 17, 23–24.

Also, SDCL 62-4-25 addresses the determination of AWW and specifically refers to the consideration of fairness in the calculation. The statute provides, in pertinent part,

> [I]f 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.

The Department concludes that it would be unfair and inequitable to disregard Schoenfelder's employment at STC in the calculation. Therefore, Schoenfelder was an employee of STC as an adjunct professor at the time of her injury.

Effect of Injury on Concurrent Employment

The Department has reviewed the briefs of both parties on the issue of whether the injury prevented Schoenfelder from performing her duties as an employee at STC as required by SDCL 62-1-25 and has concluded that genuine issues of material fact remain.

Therefore, Schoenfelder's Pre-Hearing Motions for Determination of Average Weekly Wage (AWW) are granted in part and denied in part.

Schoenfelder was concurrently employed at STC at the time of her injury while working for Employer.

Genuine issues of material fact remain on the question of whether the injury prevented Schoenfelder from performing her duties as an employee at STC as required by SDCL 62-1-25.

Sincerely,

Michelle M. Faw
Administrative Law Judge

MMF/das