

State of South Dakota

NINETY-FIRST SESSION
LEGISLATIVE ASSEMBLY, 2016

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HOUSE COMMERCE AND ENERGY ENGROSSED NO. **HB 1084** - 01/27/2016

Introduced by: Representatives Anderson, Beal, Dryden, Haggar (Don), Hawley, Heinemann (Leslie), Hunhoff (Jean), Hunt, Jensen (Alex), Johns, May, Mickelson, Otten (Herman), Romkema, Rounds, Sly, Willadsen, Wollmann, and Zikmund and Senators Shorma, Cammack, Fiegen, Haverly, Novstrup (David), Peters, and White

1 FOR AN ACT ENTITLED, An Act to define when concurrent employment may be used to
2 calculate earnings in workers' compensation cases.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. That the code be amended by adding a NEW SECTION to read:

5 The Legislature finds that the aggregation of wages from concurrent employment was not
6 within the Legislature's intent when it enacted the definition of earnings in subdivision 62-1-
7 1(6). Therefore, the holding in Wheeler v. Cinna Baker LLC, 2015, 864 N.W. 2d, regarding the
8 aggregation of wages is abrogated.

9 Section 2. That chapter 62-1 be amended by adding a NEW SECTION to read:

10 For a workers' compensation claim arising before May 6, 2015, an employee's earnings up
11 to the claimed date of injury are calculated exclusively on the wages earned at the place of
12 employment where the injury occurred.

13 Section 3. That chapter 62-1 be amended by adding a NEW SECTION to read:



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

9 Section 4. That subdivision (6) of § 62-1-1 be amended to read:

10 (6) "Earnings," the amount of compensation for the number of hours commonly regarded
11 as a day's work for the employment in which the employee was ~~engaged~~ working at
12 the time of ~~his~~ the employee's injury. It includes payment for all hours worked,
13 including overtime hours at straight-time pay, and does not include any sum which
14 the employer has been accustomed to pay the employee to cover any special expense
15 entailed by ~~him~~ the employee by the nature of ~~his~~ the employment; wherever
16 allowances of any character made to an employee in lieu of wages are specified as
17 a part of the wage contract, ~~they~~ the allowances shall be deemed a part of ~~his~~ the
18 employee's earnings;

19 Section 5. That chapter 62-6 be amended by adding a NEW SECTION to read:

20 An employer which complies with this title shall produce, if demanded by any employer or
21 insurer against whom an injured employee has made a workers' compensation claim, the work-
22 related records referring to its employee available for the fifty-two weeks preceding the
23 employee's claimed dates of injury, such as:

24 (1) The weeks in which the employee performed services;

- 1 (2) The earnings the employee received for the services, as defined in subdivision 62-1-
- 2 1(6);
- 3 (3) Interruptions in employment if the employee was rehired or seasonally employed;
- 4 (4) Changes in the employee's grade of employment;
- 5 (5) The employee's job description; and
- 6 (6) Federal or state tax deductions.

7 The employer receiving this demand shall produce the employee's work-related records in
8 ten business days, and may charge a fee for the production of the records. The fee for the
9 production of the employee's work-related records may not exceed fifteen dollars.

10 An employee waives any right to privacy to these work-related records when the employee
11 makes a claim for workers' compensation benefits and the employee consents to the release of
12 these work-related records to the employer or insurer against which the employee is making a
13 claim for workers' compensation benefits.

14 Section 6. That chapter 62-2 be amended by adding a NEW SECTION to read:

15 The Workers' Compensation Advisory Council shall include in its annual report data about
16 the average amount of disability or fatality benefits paid for a claim over the most recent
17 calendar years, the ratio of disability and fatality benefits to overall benefits paid, and any
18 changes in premium base rates directly attributable to including concurrent earnings in benefits.
19 It shall report to the 2019 Legislature the impact of this Act.

20 Section 7. That § 58-20-3.1 be amended to read:

21 58-20-3.1. Premiums for workers' compensation insurance may not be based on wages paid
22 to employees while they are on vacation, holidays, or sick leave or on wages received from
23 employment not performed for the insured employer.