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Workmen's Compensation: Concurrent Employment and Determination of the "Average Weekly Wage"

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WORKMEN'S COMPENSATION: CONCURRENT EMPLOYMENT AND DETERMINATION OF THE "AVERAGE WEEKLY WAGE"

I. INTRODUCTION

Workmen's Compensation statutes generally provide that the "average weekly wage" shall be the basic unit by which benefits are measured.[1] The South Carolina statute follows this approach, using the "average weekly wage" as the basis for determining compensation in both total and partial disability cases.[2] To the "average weekly wage" there is typically applied a fixed statutory percentage in order to determine the amount of weekly benefits which will be paid.[3] In South Carolina a totally disabled employee will receive "a weekly compensation equal to sixty percent of his average weekly wages, but not more than fifty dollars, nor less than five dollars a week . . . ."[4] A partially disabled worker will receive "a weekly compensation equal to sixty percent of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than fifty dollars a week . . . ."[5]

This note will deal with the problem of determining the "average weekly wage" in the situation where the injured employee is engaged in two employments at the time of his injury. The general rule covering this situation is as follows:

> Under or apart from statutes so providing, where an employee works for several employers at the same time, or at different times under concurrent contracts of employment, his earnings may be taken as though all the services were performed for the employer in whose service he was injured, the total earnings being considered in computing a basis for compensation payments, even though the employment in which he was injured was a full-time, year-round employment. At least this is so as to earnings where the employments are the same or similar for each of the employers, although the rule does not apply to earnings from dual and dissimilar employments.[6]

1. LARSON, WORKMEN'S COMPENSATION LAW §60.00 (1961).
2. S.C. CODE ANN. §§72-151 through 72-153 (Supp. 1970).
3. LARSON, WORKMEN'S COMPENSATION LAW §60.11 (1961).
4. S.C. CODE ANN. §72-151 (Supp. 1970).
5. S.C. CODE ANN. §72-152 (Supp. 1970).
6. 99 C.J.S. *Workmen's Compensation* §294 (d) (1955) (footnotes omitted).

It shall be the purpose of this paper to examine the development of this rule in several jurisdictions and to question the validity of the distinction drawn for compensation purposes between concurrent similar and concurrent dissimilar employments.

This area should be of particular interest in South Carolina due to the uncertainty created by the case of *McCummings v. Anderson Theatre Co.*[7] The injured employee in this case earned an average of $55 to $60 per week as a bricklayer and earned an additional $6 per week working one day a week as a relief projectionist and carpenter for the Anderson Theatre Company. The employee was injured while on the job with the theatre company, but the South Carolina Supreme Court, affirming a lower court's decision, allowed the average wages from the obviously dissimilar bricklaying employment to be combined with the earnings from the theatre for the determination of the average weekly wages.[8] In doing so, however, the court stated that "such is not to be considered as a precedent for the purpose of computing an employee's average weekly wages within the contemplation of the Workmen's Compensation Act."[9]

II. DEVELOPMENT OF THE "CONCURRENT SIMILAR EMPLOYMENT DOCTRINE"

Due to statutory differences from state to state, the development of the rule which *distinguishes* between concurrent similar and concurrent dissimilar employment has also varied from state to state. The development of this rule in New York is particularly interesting. New York's workmen's compensation statute does not explicitly answer the question of when, if ever, the wages received from a concurrent employment should be combined with those from the employment

7. 225 S.C. 187, 81 S.E.2d 348 (1954).

8. The method of determining the "average weekly wages" under the South Carolina act is found in S.C. CODE ANN. §72-4 (Supp. 1970). The decision in the *Anderson Theatre* case is based on the second paragraph of this section which states:

> But when for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

9. 225 S.C. 187, 194, 81 S.E.2d 348, 350 (1954).

in which the injury occurred for the purpose of computing the average weekly wage.[10]

The line of New York cases which fashioned that jurisdiction's law on this question began in 1936 with *Moochler v. A. H. Herrick & Son.*[11] In this case the deceased had worked as a night watchman for seventeen different employers, receiving $10 per week from A. H. Herrick & Son, on whose premises he was injured, and a total of $12.25 per week from the other sixteen employers. In its per curiam opinion affirming the Industrial Board's finding that the average weekly wage was $22.25, the court found that the deceased was not an independent contractor, but placed no emphasis on the similarity of his employments.

In 1938, the Court of Appeals of New York, in the case of *McDowell v. Flatbush Congregational Church,*[12] affirmed an order of the Appellate Division allowing the claimant's wages as a high school dietician to be combined with the wages she received as "assistant housekeeper" at her church, in which capacity she was injured. In her capacity as "assistant housekeeper" the claimant had the responsibility of arranging a number of dinners for various church organizations. Here again, however, there was no emphasis placed on the similarity of the employments in either the opinion of the Appellate Division or the opinion of the Court of Appeals. It would appear to be a reasonable conclusion that both the *Moochler* and the *McDowell* cases were based more on sympathy for the claimant than any logical legal theory.

The 1939 case of *Birch v. Budd*[13] is interesting in that it is the first New York case to put any emphasis on the similar-dissimilar distinction. In this case the Appellate Division *held* that the earnings which the deceased received from his job as a barber could not be considered in computing his average weekly wage since his fatal injury was received while he was acting in his capacity as an apartment house janitor. The court, referring to the state workmen's compensation law stated:

10. N.Y. WORKMEN'S COMPENSATION LAW §§ 14, 15 (McKinney 1971).

11. 247 App. Div. 841, 286 N.Y.S. 397, *aff'd per curiam* 272 N.Y. 545, 4 N.E.2d 729 (1936).

12. 252 App. Div. 799, 298 N.Y.S. 892 (1937), *aff'd per curiam* 277 N.Y. 536, 13 N.E.2d 462 (1938).

13. 256 App. Div. 53, 8 N.Y.S.2d 781 (1939), *leave to appeal denied* 280 N.Y. 850, 21 N.E.2d 219 (1939).

> The entire scheme of the statute limits the employee's average weekly wages, and the consequent compensation or death benefit rate, to earnings in the employment in which the employee is working at the time of the accident. It is only under subd. 3 that the State Industrial Board may consider earnings in any employment other than the specific one in which the workman is injured, and then it may consider them only for the purpose of finding a sum which shall reasonably represent the annual earning capacity of the injured employee in the *specific* employment in which he is working when injured.
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> . . . . . .
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> There have been two cases in the Court of Appeals in which the employee's earnings from more than one employer were considered in determining his average weekly wages. . . . However, the nature of the employment was in each instance the same.[14]

The Court of Appeals denied leave to appeal in this case.[15] It appears that the lower court did not really think that earnings should be combined in any situation, and that the reference to the similarity of employment in the two Court of Appeals cases was merely an attempt by the court to distinguish the case at hand in order to prevent being overruled.

The formulation of the rule emphasizing the similar-dissimilar distinction was apparently finalized in the case of *Brandfon v. Beacon Theatre Corporation*.[16] Here the court, not allowing the combination of wages, stated:

> In order to arrive at claimant's reduced earnings, it was of course essential to consider both his weekly average wage at the time of the accident and his earnings thereafter. As noted, the Board fixed the average weekly wage solely on the basis of his employment as electrician, without regard to his earnings as projectionist. *That was correct since the employments were dissimilar.* . . .
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> . . . . . .
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> . . . While superficially it might appear that the employee's earnings from any and all sources must be taken into account, more careful study, as well as a regard for the context and design of the statute, makes it evident that it does not apply or relate to a case in which an employee was engaged, prior to the accident, in dual and dissimilar employments. . . .[17]

The illogic of the similar-dissimilar distinction which New York emphasizes seems to reach a peak in the 1961 case of *Smith v. Jones*.[18] Here the court allowed the combination of

14. *Id.* at 56-57, 8 N.Y.S.2d at 784-85 (emphasis added).
15. 256 App. Div. 53, 8 N.Y.S.2d 781 (1939), *leave to appeal denied* 280 N.Y. 850, 21 N.E.2d 219 (1939).
16. 300 N.Y. 111, 89 N.E.2d 617 (1949).
17. *Id.* at 114, 89 N.E.2d at 618 (emphasis added).
18. 12 App. Div. 2d 833, 209 N.Y.S.2d 622 (1961).

wages. The claimant earned $10 per week working as a maid for the employer-appellant and earned another $40 per week working as a maid for a beauty shop. The court put emphasis on the claimant's testimony describing her duties at the beauty parlor as " 'Cleaning. I waited on the customers. Put them under the dryers. Clean the mirrors and keep the bathrooms and served lunches, and things like that. That was all.' "[19] Presumably the court would not have allowed the combination of the wages if the claimant had worked as a beautician at the beauty parlor rather than as a maid.

It does not appear that the New York courts have at any time set out any logical reasoning for their statutory interpretation creating the similar-dissimilar distinction. The distinction seems, however, to have developed as a result of sympathy in a few early cases, and a closer reading of the statute in some later cases.

The Florida courts have also been confronted with a workmen's compensation statute which does not specifically answer the question as to when, if ever, wages from concurrent employment should be combined.[20] In the case of *J. J. Murphy & Son, Inc. v. Gibbs*,[21] the Florida court, referring to the determination of the average weekly wage, interpreted FLA. CODE ANN. § 440.-14(1)[22] to mean that "only wages received by an employee for performance of the same or similar services during the prescribed period may be combined . . . ."[23]

In making this statutory interpretation, the court went into the basic question of who should bear the burden of meeting the economic loss caused by an employee's injury:

> As has been pointed out many times workmen's compensation legislation is designed to relieve society generally, and injured employees specifically, of the economic burden resulting from work connected injuries and place the burden on industry. The Florida act places this responsibility on the employer for whom the injured employee was working at the time of the injury. Thus, the burden is

19. *Id.* at 834, 209 N.Y.S.2d at 624.

20. FLA. STATUTES ANN. §440.14 (Supp. 1971-72).

21. 137 So. 2d 553 (Fla. 1962).

22. (1) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of thirteen weeks immediately preceding the injury, his average weekly wage shall be one-thirteenth of the total amount of wages earned in such employment during the said thirteen weeks.

23. 137 So. 2d 553, 559 (Fla. 1962).

not shifted to industry generally but rather to the specific segment of industry which caused the injury.

Therefore it seems reasonable that the legislature, having placed the burden of meeting the economic loss caused by the injury on a specific segment of industry, would logically have restricted the determination of the amount of the loss to the wages earned by an injured employee in that segment of industry in which the employee was working at the time of the injury. However, since industry for the purposes of this discussion may be classified either according to what it produces or according to the services rendered by the injured employee, we think it necessary to point out that unless it be classified according to the type or nature of the services rendered by the injured employee the interpretation given the statute here would be unfavorable to the employee and would not fully accomplish the obvious purpose of the act, which is compensate the injured worker, in part, for loss of future earnings.

Therefore it seems to us that in determining whether wages from several employments may be combined in arriving at an average weekly wage the prime factor is the sameness or similarity of the work performed by the employee rather than the thing done or produced by the employer, although the latter factor may also be considered.[24]

This reasoning appears to be at best questionable. Its results would undoubtedly be fair to the employee in some circumstances, but it can hardly be classified as fair in the situation where compensation is severely restricted because the employee happens to perform different tasks in his two jobs.

Within one year of the *Murphy* decision, the Florida Supreme Court, in *Central Welding & Iron Works v. Renton*,[25] again faced the question of whether wages earned in two jobs should be combined. Although the court did not recede from the position it took in *Murphy*, it did display a greater awareness of the possible injustices which that position might allow:

It may occur to a reader that a conclusion that the earnings from diverse employments may not be consolidated to fix the amount of benefits works unfairness to the workman because he is compensated disproportionately to his personal loss. But the opposite position is not without merit for as Mr. Larson observes ". . . It can be argued that it is unfair to one employer, his carrier and his industry to burden them with a liability, out of proportion to [the] payroll and premium computed thereon, arising from a risk not associated with his type of employment." *This distinction becomes exceedingly dim when differentiating between occupations similar and dissimilar for in either event the same inequality would be present.* Pursuing the subject Mr. Larson concludes that the objection must spring from the thought that one

24. *Id.* at 558-59.

25. 145 So. 2d 876 (Fla. 1962).

> industry should not carry the burden of injury to a person concurrently engaged in another industry.
>
> We are not unaware of the hardship that would result were a workman, who had been forced to follow two unlike vocations in order to provide for his family, so injured in one of them that his income in the one would be greatly reduced, while the income from the other would be entirely lost.[26]

The court concluded that they could only construe the statute as they thought the legislature intended for it to be construed, and that "unsatisfactory treatment" could be eliminated by legislative action.[27]

In the case of *St. Paul-Mercury Indemnity Co. v. Idov*,[28] the Georgia Court of Appeals allowed the combination of wages in determining the average weekly wage where the employee was engaged in two jobs as a retail liquor salesman and a third job as a retail clothing salesman.[29] The court emphasized the fact that the employee's duties were the same in all three jobs, *i.e.*, "to sell items at retail to customers."[30] The court went on to say:

> . . . There is nothing connected with a clothing store which would make it a more hazardous occupation than that of selling liquor, so far as appears from the record. The employee may therefore be said to have been steadily and concurrently engaged in three jobs, the total of which represented one employment, that of retail salesman, and the sum of his salaries in these three positions constituted his average weekly wages and established his total earning capacity at that time.[31]

Although the court was not faced directly with the concurrent dissimilar employment question, they did state:

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26. 145 So. 2d 876, 877 (Fla. 1962), quoting from LARSON, WORKMEN'S COMPENSATION LAW §60.31 (1961) (emphasis added). Assuming that Mr. Larson's use of the word industry is a reference to employers, his conclusion does not seem to be a valid justification for Florida's policy since the court, in the *Murphy* case, stated that the relevant similarity was the similarity of jobs performed rather than the similarity of the employers' businesses. 137 So. 2d 553, 559 (Fla. 1962).

27. 145 So. 2d 876, 877 (Fla. 1962).

28. 88 Ga. App. 697, 77 S.E.2d 327 (1953), *writ of cert. dismissed* 210 Ga. 256, 78 S.E.2d 799 (1953).

29. The Georgia workmen's compensation statute does not specifically set forth when, if ever, wages from concurrent employment should be combined. *See* GA. CODE ANN. §114-402 (1).

30. 88 Ga. App. 697, 698, 77 S.E.2d 327, 329 (1953).

31. *Id.* What difference does it make how dangerous the other job was? *i.e.* Had the employee's other job been a great deal more dangerous, and had the employee been injured on such other job, the other employer would be the one liable for the compensation.

> The concurrent similar employment doctrine is applied only where the accident arises out of and in the course of the employment while the employee is engaged for an employer subject to the provisions of the Workmen's Compensation Law, *and his concurrent work must be similar in character to the work in the course of which the accident was sustained.*[32]

Although the result in this case was fair to the particular claimant involved, the doctrine set forth led to a somewhat less than fair result in the 1970 case of *Black v. American & Foreign Insurance Company.*[33] In the *Black* case, the employee was injured in his part-time employment as a courier which the court determined was not similar to his full-time job as a supervisor in the finishing department of a printing firm. Thus, the court, relying on the "concurrent similar employment doctrine" set forth in the *Idov* case, upheld an award basing the claimant's compensation on his part-time wages without regard to his wages from his "dissimilar" full-time job. Three judges dissented in this case and Presiding Judge Hall, concurring only out of deference to the doctrine of stare decisis, advocated the abolition of the "concurrent similar employment doctrine," but felt that such action could only be taken by the legislature.[34] Presiding Judge Hall stated:

> I agree with the view . . . that the fact that one industry may ultimately be harmed by being required to bear part of the burden of an injury produced by another "is so remote and theoretical that it hardly seems to offset the very real injustice of relegating a disabled man accustomed to full earnings to a benefit level below that of destitution because of the circumstances that he happened to earn his living in two 'dissimilar' jobs."[35]

Presiding Judge Jordan, dissenting, advocated the overruling of so much of the *Idov* case as requires concurrent employment to be similar, and adopted the opinion of the trial judge, which recommended that Georgia adopt a doctrine of "concurrent employment" as opposed to the doctrine of "concurrent similar employment". This opinion, in recognizing the difficulties in determining when employment is "similar," pointed out that there are almost always some similarities as well as some dissimilarities in concurrent employment, and stated that concurrence and the knowledge of concurrence

32. 88 Ga. App. 697, 700-01, 77 S.E.2d 327, 330 (1953) (emphasis added).
33. 123 Ga. App. 133, 179 S.E.2d 679 (1970).
34. *Id.*
35. *Id., quoting from* LARSON, WORKMEN'S COMPENSATION LAW §60.31.

by all employers is all that should be necessary.[36] The opinion emphasized the theory of workmen's compensation:

> The theory of Georgia 'Workmen's [sic] Compensation law is to compensate the employee based on his *earning capacity*. As stated so succinctly in the above cited case, '. . . . The one high aim constituting the foundation of this law is compensation for an injured employee, in proportion to his loss on account of injury. . . . We think the fairest yardstick by which his compensation to cover his injury can be measured is what he was able to earn and was actually earning when the misfortune came upon him. . . . It cannot be doubted that, at the time of his death, this employee's earning capacity was the total of his wages from the three jobs he was doing . . . rather than the wage received from part-time employment. . . . Where an employee is working for several different employers and is injured, in order that he may be reasonably compensated for the loss of his earning powers, his total wages must be taken into consideration. Any other construction of the statute would result in great injustice and lead to absurdities.'[37]

The dissenting opinion of Judge Deen advocated a theory of "similar employment" based on similarity of risk or hazard rather than similarity of duties. While this theory might prevent some injustices, it would still allow inadequate compensation in a number of other situations, and the logic on which it is based is at best questionable.[38]

The development of the law of Arizona on the point under discussion is interesting, but in the opinion of this writer it is not very encouraging. In the 1945 case of *Wells v. Industrial Commission*,[39] the Arizona court allowed the combination of wages where the claimant worked full-time as a salesman and part-time as a painter. The court stated:

> "[S]ince the act is wholly remedial, it should be given a liberal construction to accomplish the purpose intended. . . ."
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> . . . . . .
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> Where an employee is working for several different employers and is injured, in order that he may be reasonably compensated for the loss of his earning power, his total wages must be taken into consideration. Any other construction of the statute would result in great injustice and lead to absurdities. . . .
>
> . . . In answer to the claim that where the total wages of the

36. 179 S.E.2d 679, 683-85 (1970).

37. 179 S.E.2d 679, 683-84 (1970), *citing* St. Paul-Mercury Indem. Co. v. Idov, 88 Ga. App. 697, 77 S.E.2d 327, cert. dism. 210 Ga. 256, 78 S.E.2d 799 (1953).

38. *See* footnote 31, *Supra.*

39. 63 Ariz. 264, 161 P.2d 113 (1945).

> employee are added together and imposed upon the particular employer in whose employ the employee was at the time of the accident, in *Western Metal Supply Co. v. Pillsbury*,[40] . . . the court said: ". . . There is undoubtedly an element of hardship in throwing the entire burden upon the applicant (employer). The burden is, however, thrown upon it under the act by reason of the fact that the employee was killed while in its service."[41]

The court went on to state, by way of dictum, that it did not think that one employer should ever be burdened with a responsibility for compensation greater than that which would have resulted had the injured employee been employed by him "continuously at the usual and regular rates for the particular services he was performing at the time of the accident."[42] In other words, the court felt that if an employee was injured in his part-time job it would be acceptable to consider wages from his full-time job, but only to the extent that the combination did not exceed the amount which the employee could have earned from the part-time employer if he had been working for such employer on a full-time basis.[43] This theory would seem to imply that if the employee were injured in his full-time employment, the wages earned in his part-time employment could not be considered.

In 1964 the Arizona Supreme Court, in *Sanchez v. Industrial Commission*,[44] refused to allow the combination of wages in a situation involving concurrent dissimilar employment, and stated: "Any inference to the contrary arising out of *Wells v. Industrial Commission* . . . is specifically overruled."[45] Another basis for the decision in this case, in addition to the dissimilarity of employments, was the fact that the concurrent employer was not subject to the compensation act.[46]

The year after the *Sanchez* case, the Arizona court was faced with a situation involving concurrent dissimilar employment in which both employers were subject to the compensation act. In this case, *Wesolowski v. Industrial Commis-*

40. 172 Cal. 407, 156 P. 491 (1916).

41. 63 Ariz. 264, 270-71, 161 P.2d 113, 115-16 (1945), *quoting in part from* Butler v. Industrial Comm., 50 Ariz. 516, 73 P.2d 705 (1939).

42. 63 Ariz. 264, 272, 161 P.2d 113, 116 (1945).

43. This theory is advocated by Justice Oxner, concurring in result, in McCummings v. Anderson Theatre Co., 225 S.C. at 194, 81 S.E.2d at 351.

44. 96 Ariz. 19, 391 P.2d 579 (1964).

45. *Id.* at 23, 391 P.2d at 582.

46. *Id.*

sion,[47] the court again refused to allow the wages to be combined. In neither the *Sanchez* case nor the *Wesolowski* case did the court attempt to elaborate as to the logic or reasoning behind their decision.

The policy adopted by North Carolina with regard to the combination of wages from concurrent employment is particularly significant because of the fact that the North Carolina statutory definition of "average weekly wages" is substantially identical to the statutory definition in South Carolina.[48] In the 1966 case of *Barnhardt v. Yellow Cab Co.*,[49] the North Carolina Supreme Court refused to allow the combination of wages for determining the "average weekly wage" where the claimant worked full-time as a machine maintenance man and part-time as a taxicab driver. The claimant was shot while driving his cab and was totally and permanently disabled.

The pertinent portions of North Carolina's statutory definition of "average weekly wages", as pointed out by the court, are:

> "Average Weekly Wages.—(1) *'Average weekly wages' shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury* during the period of fifty-two weeks immediately preceding the date of the injury, . . . "(4) *But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury."*[50]

The North Carolina court recognized that the facts in this case were indistinguishable from those in the South Carolina case of *McCummings v. Anderson Theatre Co.*, referred to in the Introduction to this note,[51] and recognized that the applicable statutory provisions of the two states were identical. The court, however, concluded that *McCummings*, as has

47. 99 Ariz. 4, 405 P.2d 889 (1965).

48. *Compare* N.C. GEN. LAWS ch. 97 §97-2(5) (Supp. 1971) *with* S.C. CODE ANN. §72-4 (Supp. 1970).

49. 266 N.C. 419, 146 S.E.2d 479 (1966).

50. 266 N.C. 419, 421-22, 146 S.E.2d 479, 481 (1966), *citing* N.C. GEN. LAWS ch. 97 §97-2(5) (1963). The paragraph numbers were supplied by the court and are not found in the statute.

51. *See* note 7 *supra.*

been pointed out, "is not authority for *any* method of computing average weekly wages under any circumstances."[52]

In spite of the fact that the South Carolina court specifically refused to give precedential value to the method of computing the average weekly wage used in *McCummings,* it is interesting to note that the decision in that case, allowing wages to be combined, was based on the portion of South Carolina's statute which is identical to paragraph (4) of the North Carolina statute, set out above.[53] The North Carolina court, however, felt that paragraph (4) was limited by the words "in the employment in which he was working at the time of the injury" found in paragraph (1). In justifying this statutory interpretation, the court stated:

> It is frequently said that the Workmen's Compensation Act must be liberally construed to accomplish the humane purpose for which it was passed, i.e., compensation for injured employees. The purpose of the Act, however, is not only to provide a swift and certain remedy to an injured workman, but also to insure a limited and determinate liability for employers. . . .
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> It seems reasonable to us that the Legislature, having placed the economic loss caused by a workman's injury upon the employer for whom he was working at the time of the injury, would also relate the amount of that loss to the average weekly wages which that employer was paying the employee. Plaintiff, of course, will greatly benefit if his wages from both jobs are combined; but, if this is done, Cab Company and its carrier, which has not received a commensurate premium, will be required to pay him a higher weekly compensation benefit than Cab Company ever paid him in wages. Whether an employer pays this benefit directly from accumulated reserves, or indirectly in the form of higher premiums, to combine plaintiff's wages from his two employments would not be fair to the employer. Method (4), "while it prescribes no precise method for computing 'average weekly wages,' sets up a standard to which results fair and just to both parties must be related."[54]

The *Barnhardt* court did not, however, seem convinced that the policy which they felt their statute demanded was necessarily the best policy. The opinion recognized "the potential plight of all workers who are concurrently engaged in more than one employment" and stated: "It is tragic indeed that plaintiff should be thus victimized by his diligence and his ambition to provide for his own—particularly since,

52. 266 N.C. 419, 425, 146 S.E.2d 479, 483 (1966).
53. 225 S.C. 187, 192, 81 S.E.2d 348, 349-50 (1954).
54. 266 N.C. at 427, 146 S.E.2d at 484-85.

in our society, voluntary idleness is frequently compensated. Only the Legislature, however, can remedy this condition."[55]

Further evidence of the North Carolina Supreme Court's attitude is found in *Joyner v. A. J. Carey Oil Co.*,[56] decided the same day *Barnhardt* was decided. Here the court stated:

> When an employee who holds two separate jobs is injured in one of them, his compensation is based only upon his average weekly wages earned in the employment producing the injury. This case and *Barnhardt* point out a hiatus in our Workmen's Compensation Act which the Legislature may wish to bridge to prevent future duplication of these unhappy results.[57]

In spite of the prevalence of the "concurrent similar employment doctrine," there are states which allow the combination of wages regardless of "similarity." One such state is Massachusetts. In *In Re Quebec*,[58] a 1923 case, the Massachusetts court decided that under the compensation statute in effect at that time wages from concurrent employment could not be combined in determining the average weekly wage. The Massachusetts statute was subsequently amended, however, and it now provides, in pertinent part:

> In case the injured employee is employed in the concurrent service of more than one insured employer or self-insurer, his total earnings from the several insured employers and self-insurers shall be considered in determining his average weekly wages.[59]

In 1956, the provision was interpreted as allowing the combination of wages in either similar or dissimilar employment.[60]

California's workmen's compensation statute provides in part:

> (b) *Employment by two or more employers.* Where the employee is working for two or more employers at or about the time of the injury, the average weekly earnings shall be taken as 95 percent of the aggregate of such earnings from all employments computed in terms of one week; but the earnings from employments other than the employment in which the injury occurred shall not be taken at a higher rate than the hourly rate paid at the time of the injury.[61]

55. 266 N.C. 419, 429, 146 S.E.2d 479, 486 (1966).
56. 266 N.C. 519, 146 S.E.2d 447 (1966).
57. *Id.* at 521, 146 S.E.2d at 449.
58. 247 Mass. 80, 141 N.E. 582 (1923).
59. ANN. LAWS OF MASS. ch. 152, §1 (1957).
60. In Re Nelson, 333 Mass. 401, 131 N.E.2d 193 (1956).
61. WEST CAL. LABOR CODE §4453 (b) (West 1971).

Pennsylvania's workmen's compensation law also allows the combination of wages but requires knowledge by the defendant employer of the concurrent employment. The applicable portion of the statute states:

> Where the employee is working under concurrent contracts with two or more employers and the defendant employer has knowledge of such employment prior to the accident, his wages from all such employers shall be considered as if earned from the employer liable for compensation.[62]

It is interesting to note that the original version of the Pennsylvania statute, enacted in 1915, did not require that the defendant employer have knowledge of the concurrent employment.[63] The state of Maine also allows the consideration of all wages earned in concurrent employment.[64]

III. CONCLUSION

Regardless of whether the solution lies within the province of the judiciary or the province of the legislature, the problem is the same, *i.e.*, by what standard should an employee engaged in concurrent dissimilar employment be compensated?

One thing seems clear. There is no *valid* reason for the distinction between similar and dissimilar employment. In *either* situation, if the insured employer or self-insurer, in whose employ the employee is injured, is forced to compensate the employee on a basis of combined wages, an injustice results to the insurer. On the other hand, if wages are not combined, the results will often be extremely unjust to the employee. Who can best withstand the effects of the injustice? The only reasonable conclusion is that in the vast majority of cases it is with the insurance company or self-insured employer that the burden can most comfortably be carried.

The policy of requiring knowledge by the employer of the concurrent employment appears on the surface to be reasonable and fair to both sides. It would seem, however, that this policy could lead to the situation where a person, employed on a full-time basis, would have a difficult time finding part-time work, unless he did not inform his prospective employer of his full-time job, thereby effectively waiving his

62. 77 PA. STAT. ANN. §582 (Supp. 1971).

63. 77 PA. STAT. ANN. §582 *Historical Note.*

64. SCHNEIDER, WORKMEN'S COMPENSATION TEXT §2259 (e), *citing* Juan's Case, 125 Me. 350, 134 A. 161 (1926).

rights to "full" compensation. The desirability of this possible result is questionable.

It is hoped by this writer that if the question of combining wages is again brought up in South Carolina, the South Carolina Supreme Court will not be persuaded by the statutory interpretation promulgated by the North Carolina court in the *Barnhardt*[65] case, but rather that it will give precedential value to the theory on which *McCummings*[66] was decided.

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65. 266 N.C. 419, 146 S.E.2d 479 (1966).

66. 225 S.C. 187, 81 S.E.2d 348 (1954).

As pointed out earlier, note 8, *supra,* the combination of wages in the *McCummings* case was based on the following portion of the South Carolina Workmen's Compensation Law:

> But when for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury. S.C. CODE ANN. §72-4 (1970).