JUSTIZ V. WALGREEN'S, 1987-NMSC-095, 106 N.M. 346, 742 P.2d 1051 (S. Ct. 1987)

Maria Justiz, Petitioner,
vs.
Walgreen's and The Travelers Insurance Company, Respondents

No. 16830

SUPREME COURT OF NEW MEXICO

1987-NMSC-095, 106 N.M. 346, 742 P.2d 1051

September 16, 1987, Filed

ORIGINAL PROCEEDINGS ON CERTIORARI Frank H. Allen, District Judge.

COUNSEL

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AUTHOR: WALTERS

OPINION

WALTERS, Justice.

{1} Respondents Walgreen's and the Traveler's Insurance Company appeal a worker's compensation award on the ground that the trial court, when computing benefits due, improperly aggregated petitioner's earnings from both of the worker's employments. We granted certiorari from the court of appeals' decision reversing the trial court, and now we reverse the court of appeals.

{2} The issue is whether a worker's average weekly wage for compensation benefits is to be computed on the basis of wages the worker was earning in the employment in which she was injured, or on the basis of her total earnings from all of her employments.

FACTS

{3} Petitioner was employed as a full-time teacher in the Albuquerque Public School System and, during non-school hours, as a part-time liquor store clerk at Walgreen's. On March 23, 1984, while lifting a case of liquor at her job at Walgreen's she suffered a

compensable injury to her back. The trial court determined that as a result of the injury petitioner was totally unable to perform her duties as a liquor store clerk and was unable, to the extent of forty percent, to perform her job either as a teacher or as a sales clerk. The court held that she had sustained a combined disability of sixty percent.

{4} The trial court aggregated petitioner's teaching and Walgreen's wages to determine the average weekly wage upon which *{*347}* her benefit amount would be calculated. A divided panel of the court of appeals reversed and held that the wage calculation provisions of the Workmen's Compensation Act, NMSA 1978, Section 52-1-20, as interpreted in **Eberline Instrument Corp. v. Felix**, 103 N.M. 422, 708 P.2d 334 (1985), do not allow aggregation of wages under the facts of this case. We do not agree that either the statute or **Eberline** mandated that conclusion, and conclude that Judge Garcia correctly stated the law in his dissenting opinion.

{5} Section 52-1-20 governs the method for computing average weekly wages. It provides, in pertinent part:

A. whenever the term "wages" is used, it shall be construed to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the accident, * * *

B. average weekly wages for the purpose of computing benefits provided in the Workmen's Compensation Act shall, except as hereinafter provided, be calculated upon the monthly, weekly, daily, hourly or other remuneration which the injured or killed employee was receiving at the time of the injury, * * *

C. provided, further, however, that in any case where the foregoing methods of computing the average weekly wage of the employee by reason of the nature of the employment or the fact that the injured employee has not worked a sufficient length of time to enable his earnings to be fairly computed thereunder, or has been ill or in business for himself, **or where for any other reason said methods will not fairly compute the average weekly wage; in each particular case, computation of the average weekly wage of said employee [shall be made] in such other manner and by such other method as will be based upon the facts presented [to] fairly determine such employee's average weekly wage** [.]

(Emphasis added.)

{6} We held in **Eberline** that a worker's compensation benefits were to be computed on the average weekly wage being earned by the employee at the time of his accident rather than on the average weekly wage he had been earning in his primary employment at some time prior to the accident. The employee, Felix, had been working for Eberline since 1978 as a utility worker. In 1982, Felix was given the choice of being laid off or accepting a lower-grade job as a machine operator at $6.35 per hour. Felix chose to continue working at the lower wage, and it was as a machine operator that he was injured on December 9, 1982. **Eberline**, 103 N.M. at 423, 708 P.2d at 335. We

reasoned that, under the plan wording of Section 52-1-20(B)(4),[1] Felix's benefits pursuant to the Workmen's Compensation Act were to be calculated upon the hourly remuneration he was receiving at the time of the injury. It was unnecessary to consider Section 52-1-20(C) to determine Felix's benefits, because the method provided under Section 52-1-20(B)(4) fairly computed what Felix's average weekly wage was at the time of the accident. We observed that Section 52-1-20(C) would be controlling in unusual circumstances, as in **Kendrick v. Gackle Drilling Co**., 71 N.M. 113, 376 P.2d 176 (1962) (injured worker's income erratic because he worked only a few days at each job), where a worker's average weekly wage could not "fairly be determined by the precise methods outlined in Section 52-1-20(B)." **Id**. at 424, 708 P.2d at 336.

{7} Respondents vigorously urge that **Eberline** would limit determination of the average weekly wage to the amount petitioner was receiving under **a** specific "contract of hire in force at the time of the accident," and therefore was, as the court of appeals decided, only the hourly wage from her part-time employment at Walgreen's. They contend that since petitioner's average *{*348}* weekly wage at Walgreen's is fairly determinable by the precise methods outlined in Section 52-1-20(B), resort to Subsection (C) is inappropriate.

{8} That argument overlooks the portion of Section 52-1-20(C) which directly applies to "any other reason [Subsection B] will not fairly compute the average weekly wage." **Eberline** does not preclude the aggregation of petitioner's wages from her two separate but concurrent employments if that is necessary to **fairly** compute petitioner's average weekly salary and, in fact, **Eberline** offers absolutely no insight on the question of an average weekly wage derived from more than a single employment. On the other hand, **Eberline** makes it clear that fair computation is the essence of the Section 52-1-20 calculation. Subsection (C) permits the trial court, in cases where a worker's weekly wages are for any reason not fairly determinable by the provisions of Subsections (A) or (B), to utilize such other manner or method as will fairly make that determination.

{9} The primary test for disability entitling a worker to compensation is the capacity to perform work. **Medina v. Zia Co**., 88 N.M. 615, 617, 544 P.2d 1180, 1182 (Ct. App.1975), **cert. denied**, 89 N.M. 6, 546 P.2d 71 (1976). The trial court determined petitioner to be sixty percent unable to perform any work for which she was fitted by age, education, training, general physical and mental capacity, and previous work experience. Since, according to the trial court's findings, the injury occurring on the part-time job disabled petitioner from working at 100 % capacity at either of her jobs, her capacity as a wage earner patently was impaired beyond the limits of the part-time job. Compensation benefits, therefore, were logically based on her combined wages and correctly reflected her reduced earning capacity in both employments. **See American Uniform & Rental Serv. v. Trainer**, 262 So.2d 193, 194 (Fla.1972); 2 Larson, **Workmen's Compensation Law**, § 60-31(c) (1987).

{10} It is the earning capacity of the whole person, not the capacity of the part-time or full-time worker that is at issue. **See American Uniform & Rental Serv**,. 262 So.2d at 194. The fact that petitioner's earnings with the school system have not diminished does

not mean her earning capacity has not been adversely affected. Actual earnings are not the same as earning capacity. **Mascarenas v. Kennedy**, 74 N.M. 665, 669, 397 P.2d 312, 315 (1964); **County of Maricopa v. Ind. Comm'n of Arizona**, 145 Ariz. 14, 19, 699 P.2d 389, 394 (App.1985). Fairness mandates consideration of what petitioner would have earned, in total, had she not been injured. According to 2 Larson, **Workmen's Compensation Law**, § 60.31(a) (1987) at 10-688, a growing number of jurisdictions have held earnings from more than one employment source are to be combined in the calculation of average weekly wages, whether or not the employments are related or similar.

{11} Responding to the trial court's justification for aggregating wages as providing fairness to the employee, Walgreen's argues that the ruling is not fair to the employer, and grants petitioner more in benefits than she had earned previously from both jobs. Respondent emphasizes that petitioner is still able to perform her primary job as a teacher, and in the meantime she has been given a raise; that, with her disability benefits, she now receives more each year than she earned while working at two jobs. There is ample authority, however, for the proposition that an individual may work while still disabled and entitled to worker's compensation benefits. **Davis v. Homestake Mining Co**., 105 N.M. 2, 3, 727 P.2d 941, 942 (Ct. App.), **cert. quashed**, 104 N.M. 702, 726 P.2d 856 (1986); **Roybal v. County of Santa Fe**, 79 N.M. 99, 102 440 P.2d 291, 294 (1968). Walgreen's has not faced the fact that the amount which petitioner would be earning were it not for the injury would include earnings from all sources -- that is, from both Walgreen's and the school system -- including the raise she received subsequent to the accident.

{12} As Professor Larson has noted in his text, 2 Larson, **Workmen's Compensation Laws** § 60.31(c) (1987), at 10-713, fairness to the employee and fairness to the employer *{*349}* upon whose job the employee was injured are not necessarily symmetrical nor should the assessment of fairness be judged by the same standards. To the employee, the injury resulting in lost wages is everything; to the employer (and even more to the carrier), this is just one case among many. Only the injured worker bears the burden of reduced wages. But any unfairness to the employer, in the form of the extra cost of an injury to its employee who also is concurrently employed, is eventually offset by the times the employer may benefit when the injury occurs in the employee's other employment. Spreading the risk is the essential concept of a system such as worker's compensation. **Id**. In our view, that is the answer to the discussion of **liability** raised in the dissent hereto. Liability for compensation is an issue entirely separate from the calculation of benefit entitlement. Our resolution of this case in no way conflicts with but, indeed, reinforces the manner of assessing liability against the employer for whom services were being performed at the time of the injury, as enunciated in **Clemmer v. Carpenter**, 98 N.M. 302, 309, 648 P.2d 341, 348 (Ct. App.1982).

{13} For the foregoing reasons, we reverse the majority decision of the court of appeals, agreeing with rationale of Judge Garcia's dissent. The judgment of the trial court is AFFIRMED.

{14} IT IS SO ORDERED.

SCARBOROUGH, C.J., and SOSA, Senior Justice, concur.

DISSENT

STOWERS, Justice, dissents.

RANSOM, J., not participating.

STOWERS, J., dissenting.

{15} I dissent.

{16} The majority argues that the district court was justified in aggregating petitioner Maria Justiz's (Justiz) wages from her two separate but concurrent employments pursuant to NMSA 1978, Subsection 52-1-20(C). However, by the clear and unambiguous language of this statute, Subsection C is only appropriate when the average weekly wage cannot be fairly computed by the methods of computation provided for in Subsection B. No evidence was introduced in this case to prove that Justiz's average weekly wage could not be fairly **computed** according to Subsection B. The majority's reliance on Subsection C is therefore misplaced.

{17} In its findings of fact and conclusions of law, the district court stated:

Combining the compensation rate for the two jobs (up to the maximum) was done because of § 52-1-25 N.M.S.A. 1978. Disability is decided by all of the work which a person is fitted. If disability can be denied because a workman can do other work than what he was doing at the time of the accident, **then it seems only fair that all the work he was doing should be considered for determining the amount of compensation**. [Emphasis added.]

What the district court considered "fair" under the circumstances should not be confused with the statutory term "fairly computed." As interpreted by this Court earlier in the case of **Kendrick v. Gackle Drilling Co**., 71 N.M. 113, 376 P.2d 176 (1962), Subsection C (virtually identical to the former subsection at issue in the **Kendrick** case) is to be used in circumstances where, because of some practical difficulty such as the employee working only four days at the job, the actual mathematical computation of the employee's average weekly wages cannot be fairly **computed** by Subsection B of the same statute. Subsection C itself provides several examples of the type of situation wherein the "methods of computing the average weekly wage of the employee" cannot be fairly computed. Such examples include "the nature of the employment or the fact that the injured employee has not worked a sufficient length of time to enable his earnings to be fairly computed thereunder, or has been ill or in business for himself." The present case simply does not fall within the category of cases described in Subsection C.

{18} Moreover, New Mexico has already addressed the issue of workmen's compensation liability in dual employment situations. The case of **Clemmer v. Carpenter**, 98 N.M. 302, *{*350}* 648 P.2d 341 (Ct. App.), **cert. denied**, 98 N.M. 336, 648 P.2d 794 (1982), described dual employment as follows:

Dual employment occurs when a single employee, under contract with two employers, and under the separate control of each, performs services for the most part for each employer separately, and when the service for each employer is largely unrelated to that for the other. In such a case, the employers may be liable for workmen's compensation separately or jointly, depending on the severability of the employee's activity at the time of injury.

Id. at 308, 648 P.2d at 347 (quoting 1C A. Larson, **The Law of Workmen's Compensation** § 48.40 (1980)). Next, the court went on to very clearly specify how liability for workmen's compensation was to be determined. It stated:

In dual-employment situation, if the accident occurs when the work[er] is clearly performing services for only one employer, then that employer is liable for any workmen's compensation benefits. If, however, the services being performed at the time of the accident cannot be attributed to a specific employer, but are services performed for both employers, then both employers are liable.

Id. at 309, 648 P.2d at 348 (emphasis added).

{19} While the court of appeals' dissent, in which the majority relies in this case, summarily dismissed the **Clemmer** case as being inapplicable in that the **Clemmer** case dealt with the doctrine of dual employment while the present case is one of concurrent employment, I find this a distinction without substance. Justiz's employment situation fits squarely within the **Clemmer** definition of dual employment. Consequently, since the accident occurred while Justiz was clearly performing services for only one employer, Walgreen's, then only Walgreen's should be liable for any workmen's compensation benefits. **See Clemmer**.

{20} The use of the term "fairly computed" in the state is presumed to carry its ordinary meaning. **See State v. Lujan**, 103 N.M. 667, 670, 712 P.2d 13, 16 (Ct. App.1985), **cert. denied**, 103 N.M. 740, 713 P.2d 556 (1986) (citations omitted). Accordingly, I think the district court erred in aggregating Justiz's wages as there was nothing to prevent their fair computation pursuant to Subsection B as provided by the Legislature.

{21} I believe the court of appeals' majority opinion correctly disposed of the issues in this case. I therefore dissent.

APPENDIX "A"

OPINION By the Court of Appeals; HENDLEY, Chief Judge.

Defendants appeal a worker's compensation award to plaintiff. The injury occurred in March 1984 while working full-time as a retail clerk with Walgreen's and not during the work time of plaintiff's employment as a full-time teacher with Albuquerque Public Schools. The judgment required defendants to pay benefits based on plaintiff's combined earnings from both jobs. The issue concerns the trial court's aggregation of plaintiff's earnings from the two separate but concurrent employments in order to determine her average weekly wage.

We reverse.

We recite the litany of our worker's compensation statutes. They are suit generis. **Garza v. W. A. Jourdan, Inc**., 91 N.M. 268, 572 P.2d 1276 (Ct. App.1977). It is the province of the Legislature to make changes in the provisions of statute law. **Sanchez v. Bernalillo County**, 57 N.M. 217, 257 P.2d 909 (1953). While the Workmen's Compensation Act is to be liberally construed, its provisions cannot be disregarded. **Ross v. Marberry & Co**., 66 N.M. 404, 349 P.2d 123 (1960). The statute should not be construed in such a way as to nullify its provisions. **Security Trust v. Smith**, 93 N.M. 35, 596 P.2d 248 (1979). A strained construction is proscribed. **Armstrong v. Stearns-Roger Electrical Contractors, Inc**., 99 N.M. 275, 657 P.2d 131 (Ct. App.1982).

Compensation benefits paid to disabled workers are computed in accordance with various formulae contained in NMSA 1978, Section 52-1-20. The wage calculation statute provides the trial court with a method of calculating what the worker's averages were, so the court can more accurately predict the worker's probable future earning loss. The statute provides in relevant part:

A. whenever the term "wages" is used, it shall be construed to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the accident... [.]

B. average weekly wages for the purpose of computing benefits provided in the Workmen's Compensation Act shall, except as hereinafter provided, be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or killed employee was receiving at the time of the injury, and in the following manner, to wit:

(4) where the employee is being paid by the hour, the weekly wage shall be determined by multiplying the hourly rate by the number of hours in a day during which the employee was working at the time of the accident, or would have worked if the accident had not intervened... [.]

C. provided, further, however, that in any case where the foregoing methods of computing the average weekly wage of the employee by reason of the nature of the employment or the fact that the injured employee has not worked a sufficient length of time to enable his earnings to be fairly computed thereunder, or has been ill or in business for himself, or where for any other reason said methods will not fairly compute the average weekly wage; in each particular case, computation of the average weekly

wage of said employee [shall be made] in such other manner and by such other method as will be based upon the facts presented [to] fairly determine such employee's average weekly wage[.]

The trial court stated that if disability can be denied because a worker can do other work he was trained for "then it seems only fair that all work he was doing should be considered for determining the amount of compensation." We agree that it would be fair; however, fairness must be considered within the statutory confines of the Workmen's Compensation Act. **See Varos v. Union Oil Co. of California**, 101 N.M. 713, 688 P.2d 31 (Ct. App.1984).

In **Transport Indemnity Co. v. Garcia**, 89 N.M. 342, 552 P.2d 473 (Ct. App.1976), the Workmen's Compensation Act provided a remedy -- the right to reimbursement. The Act did not spell out the procedure or give guidance as to how the remedy was to be secured. In that situation, we held that fundamental fairness was to be the guideline. Thus, liberality of this remedial Act only went to liberality in construing a provision in the Act and not in creating a new remedy.

In **Varos**, we had a situation where a prior holding (**Purcella v. Navajo Freight Lines**, 95 N.M. 306, 621 P.2d 523 (Ct. App.1980)) had added a provision to the Act by adding an exception to a provision which nullified the statutory provision. **Purcella** provided a remedy where none had been provided by the Legislature. There was no question that **Purcella** was a fair and equitable holding. However, it was "contrary to the statutory scheme of the Workmen's Compensation Act and it [was] not our function to legislate." **Varos**.

Based on **Eberline Instrument Corp v. Felix**, 103 N.M. 422, 708 P.2d 334 (1985), and its predecessor cases, an argument has been made that Section 52-1-20(C) is applicable because the worker's average weekly wage cannot fairly be determined by application of a specific formula. We disagree. **Eberline** must be read in context.

In **Eberline**, the injured worker had worked for his employer for four years. His pay level reached $9.72 per hour, but seven weeks before his injury, he took a pay cut to $6.35 per hour in order to avoid being laid off. The trial court ruled that the worker should be compensated based on the hourly rate of $9.72 per hour. The Court of Appeals affirmed but the Supreme Court reversed, holding that the correct applicable hourly rate was $6.35 per hour. The Supreme Court said that the meaning of the statutory language, "contract of hire **in force at the time of the accident**" (emphasis theirs), was clear on its face, and that it meant "amount of 'wages' that a workman was receiving at the time of the accident." The Supreme Court felt that it was inappropriate to go back to the worker's previous wage, and distinguished **Kendrick v. Gackle Drilling Co**., 71 N.M. 113, 376 P.2d 176 (1962). The Supreme Court felt that $6.35 per hour fairly represented the worker's wages at the time of the accident. The Supreme Court said that Section C should only be resorted to in unusual circumstances such as those which appeared in **Kendrick**. In concluding, the Supreme Court held:

We therefore determine that the wording of Section 52-1-20(A) and (B) is plain and clear and dictates that benefits should be computed on the basis of the wages the worker was earning under the contract for hire in effect at the time of the accident. Where such wages are easily calculable and fairly compute the worker's average weekly salary, then the methods for calculating benefits under Section 52-1-20(B) control. No resort need be taken to the exceptions provided in Section 52-1-20(C). That section should be reserved for the unusual case where the workman's average weekly wage is not easily determinable.

Eberline precludes the award in this case. Resort to Section C is unnecessary because plaintiff's wages in this case were "easily determinable." Here, "the contract of hire in force at the time of the accident" was with Walgreen's. **See** 52-1-20(A). Contract, as used in the statute, is singular not plural. The average weekly wage is to be determined under the contract of hire with Walgreen's. Further, injury must be read in terms of where and for whom plaintiff was working at the time of the accident. This is the statutory scheme. Aggregation of the two separate and concurrent employments was improper. The Act does not provide for aggregation of wages under the facts of this case.

Both parties refer to out-of-state cases to support their positions on this issue. By virtue of **Eberline**, the following cases which were decided by reference to fairness provisions are inapplicable: **American Uniform & Rental Service v. Trainer**, 262 So.2d 193 (Fla.1972); **Curtis v. Ermert Funeral Home & Insurance Co. of N.A.**, 4 Ark. App. 274, 630 S.W.2d 57 (1982); **Lyttle v. State Compensation Insurance Fund**, 137 Colo. 212, 322 P.2d 1049 (1958); **Maver v. Dwelling Managers Co**., 59 N.J. Super. 576, 158 A.2d 235 (1960); **Produce v. Industrial Commission**, 657 P.2d 1354 (Utah 1983); **Max E. Landry, Inc. v. Treadway**, 421 P.2d 829 (Okla.1966), **Barnhardt v. Yellow Cab Co**., 266 N.C. 419, 146 S.E.2d 478 (1966); and **Catteyson v. Falls Mobile Home Center, Inc**., 183 Mont. 284, 599 P.2d 341 (1979).

The following cases are inapplicable for the reasons noted: **In re Nelsons Case**, 333 Mass. 401, 131 N.E.2d 193 (1956) (decision based on state's aggregation statute); **Gee v. Cartwheel Restaurant**, 197 Mont. 335, 642 P.2d 1070 (1982) (court held that employments may not be aggregated if worker's jobs not concurrent. Pay from prior employment may not be used to determine compensation); **J.J. Murphy & Son, Inc. v. Gibbs**, 137 So.2d 553 (Fla.1962) (state statute had provision for aggregation when worker engaged in similar employments); **Brown v. Saltillo Borough Counsel**, 137 Pa. Super. 599, 10 A.2d 93 (1939) (state statute specifically authorized aggregation); **K. Lee Williams Theatres v. Mickle**, 201 Okla. 279, 205 P.2d 513 (1949); and **Geneva-Pearl Oil & Gas Co. v. Hickman**, 147 Okla. 283, 296 P. 954 (1931) (statute specifically authorized aggregation because benefits allowed on the basis of the **employment** of the worker, whether or not it was for the same employer); **Fox Building Supply Co. v. Bond**, 604 P.2d 859 (Okla. 1979) (same); **Marvin's Case**, 234 Mass. 145, 125 N.E. 154 (1919); and **King's Case**, 234 Mass 137, 125 N.E. 153 (1919) (court held that when weekly wage determinable from the contract of the parties, there is no need to resort to alternate statutory methods to determine it); **Walters v. Greenland Drilling Co**., 184

Kan. 157, 334 P.2d 394 (1959) (statutory provision allowing aggregation removed by Legislature must be presumed a nullity); **Wells v. Industrial Commission**, 63 Ariz. 264, 161 P.2d 113 (1945) (statutory definition of "monthly wage" different from that which exists in New Mexico); **Lott v. Louisiana Power & Light Co**., 377 So.2d 1277 (La. App.1977) (same). These cases are not applicable in this jurisdiction because they are based on statutes unlike that which exists in New Mexico.

We reverse and remand with directions to the trial court to withdraw its judgment and compute average weekly wage based on the contract of hire with Walgreen's. Since the original trial judge is no longer sitting, this can be done by Judge Allen's successor.

IT IS SO ORDERED.

I CONCUR: A. JOSEPH ALARID, Judge. LORENZO F. GARCIA (Dissenting).

GARCIA, Judge (dissent)

I do not read **Eberline** to prohibit the trial court's wage calculation in this case. To the contrary, while **Eberline** sets strict limits on when the trial court may rely on Subsection C, it reaffirms the principle that in unusual cases where the worker's wages are not easily determinable, the trial court may utilize other manner and methods of computation as necessary under the facts presented. Cases involving disabling injuries affecting concurrent employment represent unique circumstances. To conform to the tenets of the Workmen's Compensation Act, a worker's weekly wages in total must be taken into account. I think it appropriate to adopt the concept of aggregation or "stacking" of plaintiff's earnings from separate but concurrent employers for the purpose of determining the worker's average weekly wage in light of the Act as a whole. While I agree with the legal concepts outlined in the majority's litany, I do not believe they operate to preclude wage aggregation.

NMSA 1978, Section 52-1-20 must necessarily be viewed with an eye to Sections 52-1-24 and -25 which define total and partial disability. **See Security Trust v. Smith**, 93 N.M. 35, 596 P.2d 248 (1979). In the instant case, the trial court determined plaintiff to be sixty-percent disabled. In pertinent part, Section 52-1-25 defines partial disability as:

[A] condition whereby a workman, by reason of injury arising out of and in the course of his employment, is unable to some percentage-extent to perform the usual tasks in the work he was performing at the time of his injury and is unable to some percentage-extent to perform any work for which he is fitted by age, education, training, general physical and mental capacity and previous work experience.

Thus, here, as in other cases involving concurrent employment, an accurate appraisal of the extent of the worker's disability can only be determined by viewing the disability in the light of all jobs held.

It is well established that the primary test for disability is the capacity to perform work. **Medina v. Zia Co**., 88 N.M. 615, 544 P.2d 1180 (Ct. App.1975), **cert. denied**, 89 N.M. 6, 546 P.2d 71 (1976). Plaintiff must establish that the injury totally or partially prevented him from doing **any** work for which he was fitted. The trial court found plaintiff to be partially disabled to the extent of 100 % to perform the work she was performing at the time of her injury and forty-percent unable to perform the duties of her second job. The trial court ultimately determined plaintiff to be sixty-percent unable to perform any work for which she is fitted by age, education, training, general physical and mental capacity and previous work experience. Loss of earning capacity is the basis for determining the amount of compensation to which an employee is entitled. **Mascarenas v. Kennedy**, 74 N.M. 665, 397 P.2d 312 (1964).

The fact her earnings with the school system have not diminished does not mean her earning capacity has not been adversely affected. Actual earnings are not the same as earning capacity. **County of Maricopa v. Industrial Commission of Arizona**, 145 Ariz. 14, 699 P.2d 389 (Ct. App.1985). In rejecting an argument that a claimant did not sustain a loss of earning capacity because she received sick pay income, the Arizona Court of Appeals stated:

There are a number of reasons why an employee who receives the same or higher wages after an injury than he earned before the injury may nevertheless have suffered a loss of earning capacity. **See** 2 Larson, **Worker's Compensation Law**, 57.31 **et seq**. (1983); Annot., 149 A.L.R.2d 413, 438 (1944). Wages paid an injured employee out of sympathy, or in consideration of his long service with the employer, clearly do not reflect his actual earning capacity, and for purposes of determining permanent disability are discounted. [Citations omitted.]

In this case, plaintiff has lost a portion of her earning capacity. It is of little consequence that her actual earnings as a teacher have not been diminished. The trial court's findings indicate that plaintiff is disabled. Thus, her earning capacity is diminished. Wage stacking or aggregation is meant to compensate for the injured worker's loss of earning capacity. This concept is discussed in **American Uniform and Rental Services v. Trainer**, 262 So.2d 193, 194 (Fla.1972), where the court said:

If the injury occurring on the part-time job has disabled the employee from working on 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. It is the capacity of the "whole man," not the capacity of the part-time or full-time worker that is involved.

The decision in **Eberline** does not change this.

The majority point out that the statute does not specifically provide for aggregation as some compensation statutes do. **See** for example, Ann. Laws of Mass. ch. 152, 1 (1957); 77 Pa. Stat. Ann. 582 (Supp.1971). That observation is correct. Yet, while the

statute as a whole is silent on the subject of concurrent employment, there is no legislative statement prohibiting aggregation in concurrent employment situations. Where no guidance is given, fundamental fairness must be the guideline. **Transport Indemnity Co. v. Garcia**, 89 N.M. 342, 552 P.2d 473 (Ct. App.1976). Since this act is remedial legislation, it must be liberally construed to effect its purpose. **Lipe v. Bradbury**, 49 N.M. 4, 154 P.2d 1000 (1945); **Stevenson v. Lee Moore Contracting Co**., 45 N.M. 354 115 P.2d 342 (1941). Moreover, the legislature's broad grant of authority to courts in the "catchall" provisions of Subsection C of Section 52-1-20, allows courts to utilize creative approaches in unusual cases to provide for fairness to the employee. By virtue of Subsection C as well as Section 51-1-25, aggregation is not only fair but is within the statutory confines of the Act. **See Varos v. Union Oil Co. of California**, 101 N.M. 713, 688 P.2d 31 (Ct. App.1984).

As noted earlier, Subsection C provides for computation of the average weekly wage in any such manner or method as will be based on the facts present to fairly determine the employee's average weekly wage. When a plaintiff, for one reason or another, works at two or more different jobs for two or more different employers, the employee's weekly wages are the sum total of all paychecks.

The trial court's decision in this case finds support in **Larson** and in a small but growing number of jurisdictions. **See** 2 A. Larson, **The Law of Workmen's Compensation**, Sections 60.31 to -.32 (1986). This approach is not unique. Most states allow aggregation of wages when the concurrent employments are the same or similar. Citing a failure of most courts to explain any consistent rationale for the same or similar test, Larson urges rejection of the concept as unfair and insupportable. Larson, § 60.31(d). Several states, relying on the concept of fairness to the employee, have moved in the direction of allowing wage aggregation irrespective of the same or similar test. Other states now authorize aggregation by specific statutory provision.

While aggregation may provide fairness to the employee, Walgreen's argues that the trial court's ruling is unfair to the employer and that the payment of benefits to the employee would not be based on the wages the individual employer pays, nor would it be calculated based on the premium paid by the employer to its carrier. Defendant cites **Clemmer v. Carpenter**, 98 N.M. 302, 648 P.2d 341 (Ct. App.1982) to support this proposition. However, the issue in **Clemmer** is the doctrine of dual employment. The court there held that in cases of dual employment; benefits are to be apportioned between the employers on the basis of the percentage of the worker's total wages paid by each employer. The situation in this case is one of concurrent employment and **Clemmer** is, therefore, inapplicable

While defendant's unfairness argument appears to have merit, it presupposes a uniform standard of fairness is applicable to both an employer and an employee. While the Act provides benefits to both employees and employers, it does not seek to establish one standard of fairness for both. Larson provides an appropriate response to defendant's argument:

What this line of argument overlooks... is that fairness to the employee and fairness to the employer-carrier are not symmetrical, and cannot be judged by the same standards. To this one employee, this one loss is everything -- he has nothing against which to offset it. To the employer, and even more to the carrier, this is just one case among many. The rule operates impartially in both directions. 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 to one of its employees in a concurrent employment situation, when it happens to be the other employment in which the injury occurs. This is the essence of the concept of spreading the risk in a system like workmen's compensation....

Section C, 2 A. Larson, **The Law of Workmen's Compensation**, Section 60.31 at 10-630 to -31 (1986).

The ultimate purpose of the Act is to compensate an injured employee for the reduction of his earning capacity. **Webb v. Hamilton**, 78 N.M. 647, 436 P.2d 507 (1968). The trial court's aggregation of wages afforded a proper method to determine plaintiff's diminished loss of earning capacity. Finally, I believe that this case does involve an unusual factual situation authorizing reliance on Subsection C of the statute.

CONCLUSION

In my opinion, the trial court properly applied the statutory provisions involved in calculating plaintiff's compensation benefits. The concept of aggregating earnings from concurrent employment for the purposes of determining a worker's average weekly wage should be adopted.

I would affirm.

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1 Section 52-1-20(B)(4) provides:

[W]here the employee is being paid by the hour, the weekly wage shall be determined by multiplying the hourly rate by the number of hours in a day during which the employee was working at the time of the accident, or would have worked if the accident had not intervened, to determine the daily wage; * *