

## Division 60 rule opening, recommendations

### **060-0019 (1) (c)**

The employer may end up with a time loss claim in situations where the worker did not lose any wages on the first day and merely did not complete their shift. The language in 1(c) of 436-060-0019 appears to be contrary to the logic in 1(a).

We recommend the following changes to 0019 (1) (c):

*(c) If the worker does not complete the work shift, that day shall be considered the first day of the three day waiting period only if there is a loss of wages ~~even if there is no loss of wages~~. If there is a loss of wages. For the purpose of this rule, an attending physician's or authorized nurse practitioner's authorization of temporary disability is not required to begin the waiting period; however, the waiting period would not be due and payable unless authorized.*

### **060-0025 (2)**

A common area for mistakes when calculating TPD benefits is obtaining "post-injury wage" information from the employer. Often the work comp pay cycle and employer's pay cycle do not match; therefore, it can be problematic to obtain the gross earnings that match the TPD period. An employer may not be able to provide actual gross earnings for a time period that doesn't replicate their pay cycle until after the employer "runs" payroll. Many employees receive varying rates of pay (e.g. shift differential, premium pay, OT, etc.) that are applied at the end of the pay cycle. Therefore, the insurer tries to determine the "post-injury wage" as best they can and then makes adjustments to future TPD payments or issues a late payment because they don't receive payroll information timely.

One option to reduce this problem is to allow (optional) the insurer to pay TPD benefits at the same pay interval (e.g. bi-weekly, twice per month, etc.) that the worker received while regularly employed. This would allow the insurer to "sync" the worker's TPD payment to the regular and predictable pay cycle the worker was accustomed to when regularly employed. *The rule could provide some safeguards: 1) require written notification to the worker of a change in their TPD payment cycle, 2) TPD must be paid at least monthly, 3) TD payments would revert to every 14 days if TPD reverts to TTD.*

The Director has the latitude to allow this, and in some very limited circumstances it is already permissible (ORS 656.262 (4) (a)). WCD stated one of their goals was to increase the accuracy and timeliness of benefits delivered to workers. This is an instance where its rules have not kept pace with changing business practices or hamper the insurer's ability to provide benefits accurately and timely.

ORS 656.262(4)(a) The first installment of temporary disability compensation shall be paid no later than the 14th day after the subject employer has notice or knowledge of the claim, if the attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 authorizes the payment of temporary disability compensation. Thereafter, temporary disability compensation shall be paid at least once each two weeks, except where the Director of the Department of Consumer and Business Services determines that payment in installments should be made at some other interval. The director may by rule convert monthly benefit schedules to weekly or other periodic schedules.

(b) Notwithstanding any other provision of this chapter, if a self-insured employer pays to an injured worker who becomes disabled the same wage at the same pay interval that the worker received at the time of injury, such payment shall be deemed timely payment of temporary disability payments pursuant to ORS 656.210 and 656.212 during the time the wage payments are made.

#### **436-060-0025 (5)**

Define "seasonal worker" and place in separate 060-0025(5) subsection as follows:

(OSHA definition): "Seasonal workers are employed in a job tied to a certain time of year by an event or pattern and for not more than 10 months in a calendar year."

- Broad enough to include variety of occupational categories (not just agricultural workers)
- Could include examples: Examples include but are not limited to agriculture, construction, etc.

Use same calculation methodology as OAR 436-060-0025(5)(a)(A) with instruction that seasonal layoff is not considered extended gap. Return from seasonal layoff shall not be considered a new wage earning agreement.

#### **436-060-0030 - add (13)**

(13) (proposed language) If an employer verbally offers physically suitable modified work approved by the attending physician, and the worker returns to modified work without a formal, written offer of modified work, this shall have the same effect as if the offer was in writing.

This is outlined in case law, but not in the rules.

*Strict compliance with job offer rules not required where the claimant actually begins the modified job.* Strict compliance with the rules for offering a modified job is not required if the claimant accepted and commenced wage-earning employment. *Ricky J. Haflich*, 41 Van Natta 182 (1993).

*Written offer not required where claimant begins modified job.* Employer did not give claimant a written offer of the modified job. However, claimant did return to modified work. Claimant later "voluntarily quit" the modified job by refusing to take a drug test. The employer was entitled to terminate benefits for temporary disability under *former* ORS 656.268(3)(a), and was not required to make a written offer of employment. *Viking Industries v. Gilliam*, 118 Or App 183 (1993).

#### **436-060-0050 (6)**

An industry notice was issued on June 30, 2015 that appears to be more prescriptive than the current rule – should the rule be modified to provide the information as outlined in the Industry Notice?

[http://www.cbs.state.or.us/external/wcd/communications/industry\\_notices/6\\_15.pdf](http://www.cbs.state.or.us/external/wcd/communications/industry_notices/6_15.pdf)

WCD cannot modify a process required in rule by an Industry Notice. The rule should be modified to reflect the wording in the industry notice.

### **436-060-0150 (13)**

(13) Payment of a Claim Disposition Agreement must be made no later than the 14th day after the Board or Administrative Law Judge mails notice of its approval of the agreement to the parties, ~~unless otherwise stated in the agreement~~ announces approval under one of the methods listed under 438-009-0028 (1).

ORAR 438-009-0028 provides three methods to obtain notice of the approval (Board's website, Board's website portal, postcards).

ORAR 438-009-0028 (1) Except as provided in section (2) of this rule, the announcement that a Claim Disposition Agreement has received approval by the Administrative Law Judge who mediated the agreement or the Board may be provided in the following manner:

- (a) For registered users, notification will be provided through the Board's website portal (<https://www.portal.wcb.oregon.gov>);
- (b) The announcement of the order approving a Claim Disposition Agreement will be posted on the Board's website, which shall constitute notice of the approval of the agreement to the party and the party's attorney; or
- (c) By postcards as prescribed in sections (3) and (4) of this rule.

### **060-0153 (3)**

Issue: U.S. Bank is out of compliance with their management of ReliaCards. "*The worker must be able to make an initial withdrawal of the entire amount of the benefit paid without delay or cost to the worker.*" If workers are receiving benefits on a ReliaCard that are above \$2500 (e.g. settlement), there can be a delay for the worker to get the amount through no fault of the insured. These funds are limited to transaction limitations (daily withdrawal limits and fees). We recommend striking the language of 060-0153 (3) to make this process consistent with actual practice:

~~(3) The instrument of payment must be negotiable and payable to the worker for the full amount of the benefit paid, without cost to the worker. The worker must be able to make an initial withdrawal of the entire amount of the benefit paid without delay or cost to the worker.~~

**General comment for all of -060** - We would like to see verbiage added to Division 60 that specifies that insurers be able to send documents electronically to parties if they consent to it [according to ORS 84.072 (and 84.043; 84.004)]. Allowing electronic delivery of documents reflects the changing attitudes toward information delivery and provides a method by which insurers can respond to the needs of the parties involved, and reduce paper waste.