

**OAR 436-060-0025 – “Rate of Temporary Disability”
Requirements for determining Average Weekly Wage (AWW)**

Situation:

- While some companies perform well in accurately determining AWWs, overall industry performance in this regard has historically been unsatisfactory.
- Past rule revisions have attempted to address evolving employment practices and variables. As a result, 19 of 31 topics in the current rule address specific situations and what to include/exclude in the worker’s wage. However, frequent industry feedback addresses the rule’s complexity and the challenges in applying its provisions.
- Recent Pre-Closure Audit results:
 - Overall industry performance in payment accuracy - 63.2%. Eliminating AWW calculation errors would have raised overall payment accuracy to nearly 87%.
 - 23.3% of AWW calculations inaccurate; an incorrect AWW was a reason for 70.7% of inaccurate payments and the sole cause for 61.1% of inaccurate payments.
 - Most common error when calculating AWW (at 25.3%): averaging gross earnings when rule requires averaging hours worked and using at-injury pay rate.
- Fall 2014 industry focus groups identified the need for an AWW calculation method that is “simpler,” “cleaner,” and “more easily explained,” and “increases consistency and predictability.” Some attendees suggested averaging gross earnings for all workers. The groups agreed that the calculation method should be “fair and equitable” for both workers and employers.
- Discussion and input is needed about the value of continued, clarifying revisions to 060-0025 vs. rewriting the rule to require a different, “simpler” method for calculating accurate AWWs for all workers.

Consider:

There are two options for amending 060-0025: 1) further clarify how to handle varied employment and wage situations, or 2) substantially rewrite the rule to implement some other approach for determining the AWW. Regardless of the option chosen, the following needs to be considered:

- 1) Statutory provisions and case law re: “wage at the time of injury” and the director’s authority to prescribe methods for establishing the worker’s weekly wage for workers who are not “regularly employed” or “whose remuneration is not based solely upon daily or weekly wages;” ORS 656.210(2)(a)(A), (2)(d)(A), and (2)(d)(B)(e).
- 2) An approach that applies to the majority of cases, while a) facilitating accuracy and consistency; and b) balancing those objectives with ease of application.

- 3) Which scenarios or factors warrant situation-specific differences from a given approach.
- 4) How to reasonably ensure a “fair” or “equitable” calculation for both workers and employers. For example, if using a 52-week or length-of-employment average of gross earnings, what should be done for recently-hired workers or regarding the timing of pre-injury pay raises? Are there times when the wages of a similar employee or the “amount most closely approximating the amount the employee would be earning but for the injury” should be a factor?
- 5) How to define and handle extended gaps when averaging earnings. For example, should the rule specify a number of days or weeks, or a percentage of the number of weeks averaged? Or should “extended gaps” be determined on a case-by-case basis? (See *SAIF Corp. v. Fitzsimmons*, 159 OR. App. 464, 470, 978 P.2d 404 407 (1999)) Also, identify exceptions; for example, salaried workers with no pay variations?
- 6) Clarifying the definition of gross earnings, including the inclusion/exclusion of various types of leave, “paid time off” accounts, etc., given differing industry, NCCI, division, and statutory standards.
- 7) Potential difficulty in obtaining worker’s wage records for periods of varying duration, when averaging earnings.
- 8) Ability to incorporate or adapt to evolving employment and pay practices, while limiting the need for continuing rule revision. Issues include cyclical and seasonal work, differential pay, multiple pay rates, varying hours, shifts, and duties, contractual vs. non-contractual overtime and bonuses, temporary or contract jobs, etc.
- 9) Situations where there isn’t an initial or clear “intent of wage earning agreement.” The current rule references such agreements as the basis for resolving certain AWW calculation problems.
- 10) Whether AWW calculations should consider more than the wage at injury, to reflect what the worker would have actually earned during the subsequent period of time loss. For example, for workers who perform different duties at different wage rates or receive a lower wage during a training period.
- 11) Avoiding, where possible, increased litigation over the AWW calculation.
- 12) Whether changing Oregon’s “5-day worker” methodology (re: how to treat scheduled days off, weekends, etc.) to a “7-day” basis would also improve accuracy, consistency, and simplicity. Or, should this factor be deferred until after any rule changes affecting AWW methodology are implemented and evaluated?
- 13) Impact, if any, on vocational services rules establishing the adjusted weekly wages for determining “suitable wage.”