678 COUNTRY CLUB ROAD
EUGENE, OR 97401
PHONE: 541.484.7022
TOLL FREE NO. 800.600.6470
FAX: 541.484.0143

Exhibit "3"

MOORE & JENSEN ATTORNEYS AT LAW

ALL CORRESPONDENCE TO:
PO BOX 7788
SPRINGFIELD, OR 97475

ATTORNEYS
CHRISTOPHER MOORE
CHRISTINE JENSEN

PARALEGALS
ANNETTE NICHOLS
MELONEE CLARK

November 16, 2017

Fred Bruyns, Rules Coordinator
Workers' Compensation Division
DEPARTMENT OF CONSUMER & BUSINESS SERVICES
P.O. Box 14480
Salem, OR 97309-0405

VIA FACSIMILE 503-947-7514

RE: PROPOSED CHANGES TO WORKERS' COMPENSATION RULE OAR 436-060-0025

Dear Mr. Bruyns:

The proposed rules do not address one of the biggest problems with the current rule: The treatment of workers who have a pay increase during the 52 weeks preceding the date of injury without a change in job functions. These are the folks who get a raise for longevity, gained experience, cost of living increases, or statutorily defined minimum wage increases. In other words, many are adversely affected by it.

If time loss is intended, as I believe it is, to replace the wages actually being lost following an injury, the current rule and the proposed rule fail in the accomplishment of that goal. I believe the rule is inconsistent with the statute and will be subject to correction through litigation. However, many will suffer while that process goes on. Calculation of an injured worker's average weekly wage affects his temporary disability rate and his permanent partial disability award. The current rule is patently unfair, often to those who can least afford it.

The previous incarnation of OAR 436-060-0025 required an insurer to average the hours worked in the 52 weeks prior to the injury and compute the average weekly wage using the new hourly rate and the average hours worked, including overtime. This method is the best one available in terms of accomplishing stated statutory goals. The Department needs to go back to the calculation provided in old OAR 436-060-0025(5)(a)(B)(i). The rule was equitable, understandable, and easily implemented from payroll information that, in the normal course of business, should be available to every employer/insurer.

Enclosed is a copy of a brief to the Board on precisely this issue which shows the detrimental effect of this rule in the real world.

Very truly yours,

CHRISTINE JENSEN
CIJ/edk
Enclosure (as cited)

WCD Policy

NOV 16 2017

THREE TOWN CENTER
10121 S.E. SUNNYSIDE ROAD, SUITE 300
CLACKAMAS, OREGON 97015
TELEPHONE 503.653.5608

WWW.WORKERSCOMPATTORNEYOREGON.COM

3427 ASH STREET
NORTH BEND, OREGON 97459
TELEPHONE 541.756.6200

ROSEBURG NO. 541.673.2105

BEFORE THE WORKERS' COMPENSATION BOARD

OF THE STATE OF OREGON

In the Matter of the Compensation	)	WCB Case No. 17-01729
	)	
of	)	Claim No. [redacted]
	)	
[redacted], Claimant	)	APPELLANT'S BRIEF

Claimant appeals Administrative Law Judge Naugle's Opinion and Order of September 25, 2017. He seeks a higher rate of temporary disability, additional temporary disability benefits as a consequence of the rate increase, an assessed attorney fee under ORS 656.383, a penalty and fee under ORS 656.262(11) for unreasonable claim processing, and an attorney fee for work on appeal, should he prevail. OAR 438-015-0029.

ARGUMENT

Claimant bears the burden to establish the nature and extent of his disability. ORS 656.266(1). The version of OAR 436-060-0025(4) which SAIF employed became effective on January 1, 2017. The rule inappropriately contradicts ORS 656.210 and the overriding intent of ORS Chapter 656. For this reason, it is an invalid rule.

As of January 1, 2017, the Department's revised version of OAR 436-060-0025 advises how to calculate average weekly wage in various situations. At OAR 436-060-0025(3)(a) the rule, by stating, "the benefits of a worker who incurs an injury must be based on the worker's wage at the time of the injury" mirrors the statute. However, as you will soon see, later provisions in the rule contradict the statute when the rule is applied to an often recurring scenario among injured workers. We ask that you redress that wrong by refusing to apply the rule under the circumstances presented here. Application of the rule clearly contravenes the standard set by the statute and thereby thwarts the intent of the workers' compensation law.

ORS 656.0012(2) delineates the objectives of the workers' compensation system of laws. The intended purpose of workers' compensation is to provide, among other things, "fair, adequate and reasonable income benefits to injured workers and their dependents." ORS 656.012(2)(a). The legislature then determined that "66 and two-thirds of wages" (ORS 656.210(1)) fulfills this intention.

Generally, the Department effected the statute and stated objective by looking to a worker's earnings in the year preceding the date of the injury unless the worker was employed less than four weeks. OAR 436-060-0025(4)(b). Such an approach recognizes the variation in wages that can occur seasonally or in connection with market demand. OAR 436-060-0025(4). It is a reasonable, sound approach in most situations, but not all. For this reason, the rule identifies several instances that require a different calculation. Gaps in employment of more than 14 days have to be eliminated from the 52 weeks used as a divisor in calculating the average. OAR 436-060-0025(4)(b)(A). If an injured worker's wage earning agreement changed in the year preceding the injury because of a change of hours worked or a change of job duties or for any reason "other than only a change in rate of pay," OAR 436-060-0025(4)(b)(B) "the insurer must average earnings only for the weeks worked under the most recent wage earning agreement." (Id.) "If the worker had been employed at injury for less than four weeks or the worker's wage earning agreement had been in effect for less than four weeks, the insurer must base the rate of compensation on the intent of the worker's wage earning agreement in place at the time of the injury, as confirmed by the employer and the worker." OAR 436-060-0025(4)(c). The delineated exceptions are noteworthy for excluding special consideration for workers who, during the year preceding the injury, experience variation in income due "only to a change in rate of pay." OAR 436-060-0025(4)(b)(B). In contrast, former OAR 436-060-0025(5)(a)(B)(i), which was in effect through December 31, 2016, prescribed the appropriate calculation of average weekly wage for workers who experienced a change in rate of pay as follows:

> "Where there has been a change in the wage earning agreement due only to a pay increase or decrease during the 52 weeks prior to the date of injury, insurers must use the worker's average weekly hours worked for the 52 week period, or lesser, as required in (5)(a)(A) of this section, multiplied by the wage at injury to determine the worker's current average weekly earnings."

It is a fact of employment life that workers who stay put in their employments, whether professionals or hourly wage earners, generally get raises that are based on longevity and positive performance. For example, consider the Oregon minimum wage law. From July 1, 2016, through July 1, 2022, every minimum wage worker in the state will receive yearly increases in rate of pay, either $0.50 per hour or $0.75 per hour. Assume a worker who, on July 3, 2021, is making $12.75 per hour. On July 3, 2022, he goes to work delighted with the prospect that he is now making $13.50 per hour for exactly the same work. His average weekly wage for a 40 hour work week is $510.00 based on the $12.75 pay rate. Based on the $13.50 new pay rate, his average weekly wage is $540.00. We absolutely know these wide-spread increases will occur.

The average weekly wage calculation is extremely important in claim processing. It is what establishes the temporary total disability rate – in the above example, $340.02

versus $360.02 per week. Converting this to a monthly time loss rate calculates to $1,479.09 versus $1,566.09. The discrepancy is $87.00 per month. Even in this day and age that could buy a few bags of groceries or a few tanks of gas for that injured working person and the family.

The average weekly wage is also used to calculate permanent partial disability for workers unable to return to regular work. So, let's look at a hypothetical based on the above discrepancies. Assume a state average weekly wage of $1,000.00 and a worker with a 15% impairment plus work disability of 20%. Using the $510.00 average weekly wage, claimant's permanent partial disability award would be $41,775.00. The $540.00 average weekly wage would yield a permanent partial disability award of $43,350.00, a considerable difference.

When a worker is injured on the job, his temporary disability payments are intended to replace the wages that he would be earning had he not been injured. It is to cover his reasonably anticipated wage loss going forward. If, during the year preceding his date of injury, the worker had an increase in pay with no other changes in his job, he would not be compensated at the rate determined by the legislature to be his "fair, adequate and reasonable" compensation for him and his dependents, i.e. two-thirds of his time of injury wage. His temporary disability rate would necessarily deprive him of the benefit of his pay increase going forward.

Over the years, the calculation of time loss rate has proven to be a tricky business which has spawned a substantial amount of litigation as unique fact scenarios occurred. It took litigation to determine that a new wage earning agreement is not formed each time an employer's job assignment results in the employee working additional or fewer hours.

Rivers v. SAIF, 256 Or App 838, 844-45 (2013); *Travis J. Vistelb*, 68 Van Natta, 1954 (2016). In *Concrete Cutting Co. v. Clevenger*, 191 Or App 157 (2003), the court dealt with a union call board scenario under old OAR 436-060-0025(3)(b), which is not on point here. Of benefit, however, is the court's discussion of the statute and rules regarding time loss calculation:

> "OAR 436-060-0025 was enacted pursuant to ORS 656.210, which governs temporary total disability payments. Subparagraph (2)(d)(A) of that statute provides that the 'benefits of a worker who incurs an injury shall be based on the wages of the worker *at the time of the injury*' (emphasis added). OAR 436-060-0025(1) likewise provides that, with certain exceptions, '[t]he rate of compensation [for temporary disability] shall be based on the wage of the worker *at the time of the injury.*' (Emphasis added.) Based on the statute's direction, we conclude that the underlying purpose of OAR 436-060-0025 is to determine or approximate, to the extent possible, the worker's wage at the time of injury based on existing employment circumstances."

New OAR 436-060-0025 does not accomplish this end. An administrative agency may not, by its rules, amend, alter, enlarge, or limit the terms of a legislative enactment. *Gouge v. David, et al.*, 185 Or 437 (1949). The Workers' Compensation Department cannot rewrite the law; it can only fill in the gaps in the legislation to aid in the accomplishment of the statute's purpose. *VanRipper v. Liquor Control Commission*, 228 Or 581, 591 (1961). Here, the purpose of the statute is unambiguous – to provide fair, adequate, and reasonable income to the injured worker and his dependents, i.e. two-thirds of the injured worker's average weekly wage at time of injury. Unquestionably, OAR 436-060-0025(4) thwarts that purpose in this situation.

Claimant is not asserting that the time loss rate must be calculated according to the strictest meaning of the words of the statute, i.e. only the wage rate in effect on the date of the injury. No, in many cases, there is a logic to calculating time loss entitlement based on wages received over the previous year. This allows for consideration of occasional variations in a person's employment compensation. Injured workers and employers alike are not left to a serendipitous determination of time loss benefits. By averaging all wages earned in the 52 weeks prior to the date of the injury, the worker injured on a date when he worked four hours of overtime will be treated the same as a worker injured on a day when he was sent home after working only six hours.

Long ago, the Department reasonably determined that "at the time of the injury" in ORS 656.210(1) should not be given its most literal meaning, i.e. the precise moment or day of the injury event. Rather, the rule should generally look at a year-long snapshot of the worker's employment experience. Income during that year usually represents claimant's wage at "the time of the injury." In the absence of judicial construction, administrative construction is informative, and, unless clearly at odds with the express terms of the statute, it is entitled to respect. *University of Oregon Cooperative Store v. State Department of Revenue*, 273 Or 539 (1975). However, revised OAR 436-060-0025 thwarts the statute's objectives, as demonstrated above with the discussion of the mandatory minimum wage increases we know will occur over the next several years. Do you really want to have a time loss rate that does not reflect those wage increases that are mandated by the state?

Why the Department wrote out OAR 436-060-0025(5)(a)(B)(i), which did a commendable job of calculating prospective lost wages in situations in which a worker experienced a pay increase during the 52 weeks prior to the date of the injury, is not specifically known. However, the Department did announce recently that it is going to have a meeting to review the changes that were put into effect on January 1, 2017, and is forming a rule-making advisory committee to review possible amendments. In that solicitation of input from participants in the system, the Department itself wrote that it wanted to hold discussions in order to "better understand the outcomes of *streamlining changes* that went into effect on January 1, 2017." [emphasis added] What is known is that the majority of workers who fit that description and are injured do not receive two-thirds of their average prospective weekly wages when they receive time loss benefits. The only way to effect that is to use the average hours worked at the new rate of pay as was done under the old rule.

Again, an example: A worker made $400.00 his first week in the 52 weeks preceding his date of injury and $500.00 thereafter. Calculating under the new rule, his average weekly wage is $498.07, a figure less than his time of injury $500.00 per week wage. Working one-half the year at $400.00 per week and one-half the year at $500.00 per week, his average weekly wage would be $450.00 per week. Had he worked 51 weeks at $400.00 per week and one week at $500.00 per week he would have an average weekly wage of $401.92. Contrast that to calculation under the old rule. At time of injury, the worker was making $500.00 per week. Using his hours worked, assuming no missed work, his average weekly wage will be the $500.00 as it should be. In the latter instance, he will get the statutorily mandated temporary disability payment to which he is entitled.

Look at the numbers and recognize it for what it is, contrary to the statute. Who argued for this change? Who thought the Department should *streamline* the means of calculating average weekly wage? Could it have been the insurance companies who, charged with the responsibility of calculating time loss rates in the first instance, didn't bother to check to see if an injured worker had had a pay increase in the year preceding his time of injury? Did they too often get assessed a penalty and attorney fee for unreasonably calculating claimant's average weekly wages? Streamlining certainly seems to be the perfect solution to that problem. Obviously, it is so much easier just to use actual payroll numbers, add them up and divide by fifty-two. Easier does not make it right or consistent with the statute.

Claimant does not dispute that the insurer relied on new OAR 436-060-0025(4) when it calculated claimant's average weekly wage and temporary disability rate. Therefore, he does not seek a penalty. He does, however, assert that he is entitled to a higher rate of temporary disability under the statute and that the Department overstepped its authority when it promulgated the rule upon which the insurer relied. The Department inappropriately traded the insurer's ease in calculation of the appropriate benefit for the worker's entitlement to two-thirds of his wage at injury. Numbers do not lie. The Department's rule is inconsistent with the statute requiring that a claimant be paid two-thirds of his average weekly wage. The rule is invalid because it subverts the intent of the statute.

Turning to the facts of this case, claimant suffered a disabling compensable injury on January 19, 2017. To determine his average weekly wage, the relevant period to consider is January 19, 2016 to January 19, 2017. He received an annual bonus of

$1,650.00 that also should have been included in the original calculation of his proper average weekly wage.

Claimant alleges that he was injured at work on January 19, 2017. He did not, however, file an 801 form until March 30, 2017. (Ex. 3). He first sought medical treatment on March 31, 2017, at which time his doctor submitted an 827 form. (Ex. 4). His doctor recommended surgery, and he performed the surgery on April 5, 2017. (Ex. 5A). As a consequence of the surgery, claimant was taken off work. (Ex. 5B). Claimant thereafter remained on limited duty until May 19, 2017. (Ex. 8B). His doctor released him to full duty without limitations as of May 20, 2017. (Ex. 8B).

Until August 16, 2016, claimant regularly worked and was paid $16.00 per hour. His rate of pay went up to $17.00 per hour in August, however. From that point, until his injury on January 19, 2017, claimant worked regularly and was compensated at the $17.00 per hour rate with an overtime rate of $25.50 per hour. (Ex. 6).

SAIF originally calculated an average weekly wage of $680.00 per week, yielding a weekly TTD rate of $453.36. That calculation was based on information provided by the employer, noting that claimant's rate of pay was $17.00 per hour. SAIF based its calculation on a 40 hour work week and no bonus payment. (*See* Ex. 3). SAIF then obtained claimant's actual payroll records and recalculated his average weekly wage. It corrected that to $790.08 per week, yielding a TTD rate of $526.75. (Ex. 8). It paid claimant a TTD check at the rate of $526.75 on April 19, 2017, which covered the March 31, 2017 through April 5, 2017, period. (Ex. 10; *see also* Ex. 8).

Even SAIF acknowledges that its original calculation was deficient. (Ex. 8). It paid claimant $58.71 on May 3, 2017, after correcting his time loss rate. This payment was approximately one month late. Claimant seeks a 25% penalty and an attorney fee of $1,000.00 for this late payment. The payroll records were under the employer's control. The employer failed to provide the payroll records when the claim was filed; instead, it provided erroneous information that in no way assisted SAIF to calculate and pay appropriate benefits. Whether the delay in payment was caused by SAIF or caused by the employer is irrelevant. *SAIF v. Nix*, 80 Or App 656 (1986). It is the clear duty of both to provide timely payment of time loss benefits to claimant, a duty which both failed.

By statute, claimant is supposed to receive two-thirds of his average weekly wage for temporary total disability. SAIF believes that claimant should be satisfied with its corrected time loss rate and payment of benefits, but he is not. He knows that he did not receive two-thirds of his average weekly wage. His wage at time of injury was $17.00 per hour, and he expected to continue to receive that wage going forward. To include wages that he made at $16.00 per hour unreasonably deprives him of the full two-thirds of his time of injury wage.

To properly compensate claimant, the insurer should consider the year preceding his date of injury, in order to allow for seasonal variations in his employment, and convert his number of hours during that time period to a pay rate of $17.00 per hour. *See* old OAR 436-060-0025(5)(a)(B)(i). Under this method, claimant's average weekly wage is $844.73, and his time loss rate is $563.18, considerably higher than the $526.75 calculated by SAIF using the rule which went into effect in January of 2017. (*See* Ex. 16-1).

Numbers do not lie. The Department's rule is inconsistent with the statute requiring that claimant receive two-thirds of his average weekly wage for wage replacement for him and his dependents while he is off work due to his claimed injury. For this reason, you cannot apply the new rule to the facts of his case. That would prevent claimant from receiving two-thirds of his wage as reasonable compensation for his missed work. The rule is unenforceable because it subverts the intent of the statute.

A calculation of average weekly wage that relies on both the claimant's time of injury rate of pay and his hours worked over the year preceding his date of injury is a calculation that is fair to both injured workers and employers. It prevents a time loss rate that is serendipitously tied to either an uncharacteristically high or uncharacteristically low wage. It comports with a reasonable understanding of the requirement of the statute. For establishing claimant's right to additional time loss benefits, claimant seeks a $4,000.00 attorney fee pursuant to ORS 656.383; OAR 438-015-0010(4). Although I did not keep precise time records, I estimate time of about ten hours devoted to the case at and before hearing. The issue is complex, and, given the status of the administrative rules, you must agree that there is a substantial risk that claimant's attorney's efforts will not be compensated. You must also recognize that the issue presented here is one that has great significance to everyone involved in the workers' compensation system. It is not your usual time loss rate case. Claimant stands to receive about a forty dollar weekly benefit increase. I have been practicing almost exclusively in the area of workers' compensation law for over 30 years and have gained a fair amount of expertise as a consequence. For work on appeal, claimant seeks an attorney fee of $4,500.00, again giving consideration to the above factors. *See* OAR 438-015-0010; OAR 438-015-0029.

Respectfully submitted,

MOORE & JENSEN

CHRISTINE JENSEN, OSB #852443
Of Attorneys for Claimant [redacted]