

Agenda

Rulemaking Advisory Committee

Workers' Compensation Division Rules

OAR chapter 436, division 060, rule 0025

Rate of Temporary Disability Compensation

Type of meeting:	Rulemaking advisory committee
Date, time, & place:	Jan. 18, 2018, 8:30 a.m., Pacific Time Room F (basement), Labor and Industries Building, 350 Winter Street NE, Salem, Oregon Teleconference: 1-213-787-0529 Access code: 9221262#
Facilitators:	Fred Bruyns and Julia Hier, Workers' Compensation Division
8:30 to 8:40	Welcome and introductions; meeting objectives
8:40 to 10:00	Discussion
10:00 to 10:15	Break
10:15 to 11:15	Discussion continued
11:15 to 11:25	Summing up – next steps – thank you!

[OAR 436-060-0025](#)

Rate of Temporary Disability Compensation

Purpose of the Meeting:

1. To discuss concerns related to averaging up to 52 weeks of total earnings to obtain the rate of temporary disability for those workers who earn irregular wages or earnings not based on wages alone; and

2. To hear any proposed changes to OAR 436-060-0025 from stakeholders.

Background:

Stakeholders have expressed concerns related to some changes made to OAR 436-060-0025 which took effect on January 1, 2017. The rule in effect prior to January 1, 2017, sometimes required an insurer to average the worker's weekly *hours* in the 52 weeks preceding the injury, and to then multiply the average weekly hours by the wage at injury to obtain the worker's weekly wage.¹ In this situation, the current rule now requires the insurer to average the workers *total earnings* for a period of up to 52 weeks before the date of injury or verification of disability caused by an occupational disease.

During an advisory committee meeting on October 27, 2017, stakeholders raised concerns about the effect this rule change had on the following types of workers:

- Workers who earn minimum wage;
- Workers who complete their probationary period and obtain a pay raise for that reason; and
- Workers who received raises during the year but have the wages earned at the lower rate of pay included in the averaging.

Also at that meeting, stakeholders highlighted the following concerns related to calculating a worker's weekly wage:

- Evaluating the balance between incentivizing workers to return to the work force while also ensuring they receive adequate pay while off work for their injury;
- Having a rule which considers the varying types of pay records and wage differentials;
- Considering whether to look at the worker's wages on the exact day of injury; and
- Having a rule where the employer can independently understand and verify the calculation of the worker's weekly wage.

The purpose of this meeting is to further discuss concerns related to the January 1, 2017, rule change, and to hear any proposed changes to the rule from stakeholders. This will be the first of at least two meetings dedicated to discussing OAR 436-060-0025. A second meeting is scheduled for Thursday, February 1, 2018, at 9:00 a.m., Room 260, Labor and Industries Building, 350 Winter Street NE, Salem, Oregon.

¹ This calculation method applied to what is now generally referred to as a worker with "irregular wages", when there was 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.

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436-060-0025 Rate of Temporary Disability Compensation**(1) Continuation of wages, insured employers.**

An employer may not continue to pay wages in place of temporary disability benefits. However, with the consent of the worker, the employer may pay the worker amounts in addition to the temporary disability benefits due the worker, if:

- (a) The employer identifies temporary disability benefits separately from other payments; and
- (b) The employer does not withhold payroll deductions from the temporary disability benefits.

(2) Continuation of wages, self-insured employers.

Notwithstanding section (1) of this rule, a self-insured employer may continue to pay the same wage at the same pay interval that the worker received at the time of injury. Such payment qualifies as timely payment of temporary disability under ORS 656.210 and 656.212. If the self-insured employer continues to pay wages in place of temporary disability benefits under this section:

- (a) Normal deductions including but not limited to, taxes, benefits, and voluntary deductions, must be withheld;
- (b) The claim must be classified as disabling;
- (c) The self-insured employer must report to the division the rate and duration of temporary disability that would have been paid had wages not continued; and
- (d) If the pay interval changes or the amount of wages decreases, the worker must be paid temporary disability as otherwise prescribed by the workers' compensation law.

(3) Rate of compensation, generally.

Except when payments are made under section (2) of this rule, the worker must receive compensation as calculated under ORS 656.210 during the period of temporary total disability, subject to the following:

- (a) The benefits of a worker who incurs an injury must be based on the worker's wages at the time of injury;
- (b) The benefits of a worker who incurs an occupational disease must be based on the worker's wages at the time there is medical verification that the worker is unable to work because of the disability caused by the occupational disease. If the worker is not working at the time that there is medical verification that the worker is unable to work because of the disability caused by the occupational disease, the benefits must be based on the worker's wages at the worker's last regular employment;
- (c) The benefits of a worker who was employed in multiple jobs at the time of injury, and who is eligible for supplemental disability under ORS 656.210(2)(b) and OAR 436-060-

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0035, must be based on the worker's earnings from all eligible subject employment under OAR 436-060-0035;

(d) For a worker with a cyclic schedule, the cycle must be considered to have no scheduled days off; and

(e) When a work shift extends into another calendar day, the date of injury used to determine the wage under this section is the date the employer used for payroll purposes.

(4) Rate of compensation, irregular wages.

If a worker receives irregular wages, or receives earnings that are not based on wages alone, the insurer must calculate the worker's rate of compensation under section (3) of this rule based on the weekly average of the worker's total earnings for the period up to 52 weeks before the date of injury or verification of disability caused by occupational disease.

(a) As used in this section:

(A) "Total earnings" means all wages, salary, commission and other remuneration for services rendered under the worker's wage earning agreement with the employer.

(i) The insurer must include a reasonable value of any in-kind considerations as part of total earnings only if the considerations will not continue during the period of disability.

(ii) The insurer must not include expenses incurred due to the job and reimbursed by the employer (e.g., meals, lodging, per diem, equipment rental) as part of total earnings.

(B) "New wage earning agreement" means the worker's wage earning agreement changed for reasons other than only a change in rate of pay, including but not limited to a change of hours worked or a change of job duties. A job assignment from a temporary service provider or worker leasing company as defined in OAR 436-050 is not considered to be a new wage earning agreement.

(b) If, on the date of injury or verification of disability caused by occupational disease, the worker had been employed by the employer at injury for four weeks or more, the insurer must average the worker's total earnings for the period up to 52 weeks of employment before the date of injury or verification of disability caused by occupational disease, subject to the following:

(A) The insurer may not include any gap in earnings of more than 14 days that was not anticipated in the wage earning agreement, when calculating the average earnings;

(B) If the worker began work under a new wage earning agreement in the 52 weeks before the date of injury or verification of disability caused by occupational disease, the insurer must average earnings only for the weeks worked under the most recent wage earning agreement.

(c) If, on the date of injury or verification of disability caused by occupational disease, the worker had been employed by the employer at injury for less than four weeks, or the

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worker's new wage earning agreement had been in place 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 injury, as confirmed by the employer and the worker.

(5) Rate of compensation, regular wages.

If a worker receives regular wages, the insurer must calculate the worker's rate of compensation as outlined in ORS 656.210. To determine the worker's weekly wage:

- (a) Daily wages must be multiplied by the number of days per week the worker was regularly employed;
- (b) Monthly wages must be divided by 4.35;
- (c) Wages for other pay intervals must be calculated on an equivalent basis; or
- (d) For workers employed through a union hiring hall, the insurer must calculate the rate of compensation on the basis of a five-day work week at 40 hours a week, regardless of the number of days actually worked per week.
 - (A) The rate of compensation for workers employed through a union hiring hall with dates of injury on or after January 1, 2018 must be calculated under this subsection.
 - (B) The rate of compensation for workers employed through a union hiring hall with dates of injury from January 1, 2017 through December 31, 2017 must be calculated under this subsection, unless such calculation would result in a reduction of benefits.

(6) Workers with no wages.

If the worker is a volunteer, inmate, or other covered worker that receives no wage earnings, the insurer must calculate the rate of compensation based on the assumed wage used to determine the employer's premium.

(7) Owners and corporate officers.

If the worker is a sole proprietor, partner, officer of a corporation, or limited liability company member, the insurer must calculate the rate of compensation based on the assumed wage used to determine the employer's premium.

(8) Wage disputes.

If the worker disputes the wage used to calculate the rate of compensation, the insurer must attempt to resolve the dispute by contacting the employer to confirm the correct wage and then contacting the worker with that information. If the worker still does not agree with the wage calculated by the insurer, the worker may request a hearing under OAR 436-060-0008.

Statutory authority: ORS 656.210(2), 656.704, and 656.726(4)
 Statutes implemented: ORS 656.210, 656.704
 Hist: Amended 12-1-2009 as WCD Admin. Order 09-057, eff. 1-1-2010
 Amended 11/28/16 as WCD Admin. Order 16-055, eff. 1/1/17
 Amended 9/21/17 as WCD Admin. Order 17-059, eff. 10/1/17
 Amended 12/28/17 as WCD Admin. Order 17-065, eff. 1/1/18
 See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf