

OIW's (J.Flood) thoughts for possible rule changes for worker's wage calculations...using current rule (17-059) as foundation. My suggestion only addresses the issue of an hourly rate increase/decrease...

436-060-0005 Definitions

Unless a term is specifically defined elsewhere in these rules or the context otherwise requires, the definitions of ORS chapter 656 are hereby incorporated by reference and made a part of these rules. For the purpose of these rules unless the context requires otherwise:

(14) "Regularly employed worker" means any worker who receives a regular wage as defined in section (17) of this rule. For workers who are paid a daily wage, "regularly employed" means actual employment or availability for such employment.

(17) "Wage" is as defined in ORS 656.005(29). As used in these rules:

(a) "Irregular wage" means a money rate paid at variable rate, or is paid on unscheduled or unpredictable intervals, including but not limited to workers who are seasonally employed, on call, paid hourly, or are paid by piece rate; and

(b) "Regular wage" means a money rate which is paid at a constant rate at uniform intervals including, but not limited to, wages paid on a daily or weekly basis. Hourly wages may be considered regular if the same number of hours are worked each pay period.

(18) "Wage earning agreement" means the verbal or written contract of hiring or terms of employment made between the worker and employer.

436-060-0025 Rate of Temporary Disability Compensation; Workers' Weekly Wage calculation

(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 and may include wages that are regular, irregular, or both;
- (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 and may include wages that are regular, irregular, or both;
- (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 436-060-0035, 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~~, Calculation of 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 irregular wages ~~rate of compensation under section (3) of this rule~~ based on the weekly average of the worker's total earnings of the irregular wages under the current wage earning agreement for the period up to 52 weeks before the date of injury or verification of disability caused by occupational disease.

- (a) ~~(a)~~ As used in this section:

(A) "Total earnings" means all wages, salary, tips, 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 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.

(d) When 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, it is not considered a new wage earning agreement. To determine the worker’s average irregular wage in these circumstances, the insurers must use the worker’s average weekly hours worked for each pay category, multiplied by the wage rate(s) at injury – plus, the average of all other irregular wages paid that are based on something other than an hourly rate.

(5) ~~Rate of compensation,~~ Calculation of regular wages.

If a worker receives regular wages, the insurer must calculate the worker’s regular wages in a weekly wage: 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) Employer and Insurer calculation responsibilities...???

(9) 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 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