

# Agenda

## Rulemaking Advisory Committee

Workers' Compensation Division Rules  
OAR chapter 436, division 060, rule 0025

Rate of Temporary Disability Compensation

<b>Type of meeting:</b>	Rulemaking advisory committee
<b>Date, time, &amp; place:</b>	Feb. 1, 2018, 9:00 a.m., Pacific Time  Room 260 (2 <sup>nd</sup> Floor), Labor and Industries Building, 350 Winter Street NE, Salem, Oregon Teleconference: 1-213-787-0529   Access code: 9221262#
<b>Facilitators:</b>	Fred Bruyns and Julia Hier, Workers' Compensation Division
<b>9:00 to 9:10</b>	Welcome and introductions; meeting objectives
<b>9:10 to 9:20</b>	Recap of the options identified thus far. Any others?
<b>9:20 to 10:30</b>	Discuss pros and cons
<b>10:30 to 10:45</b>	Break
<b>10:45 to 11:45</b>	Discussion continued
<b>11:45 to 11:55</b>	Summing up – next steps – thank you!

## **OAR 436-060-0025**

### **Rate of Temporary Disability Compensation**

#### **Purpose of the Meeting:**

To analyze options for calculating the rate of temporary disability for those workers who earn irregular wages or earnings not based on wages alone, and who have a change in only their rate of pay in the 52 weeks preceding their injury.

#### **Background:**

On January 18, 2018, stakeholders met in a rulemaking advisory committee meeting to discuss their 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.<sup>1</sup> In this situation, the current rule now requires the insurer to average the worker's *total earnings* for a period of up to 52 weeks before the date of injury or verification of disability caused by an occupational disease.

After discussing the concerns, stakeholders put forth several options for changing the calculation method for the rate of temporary disability/worker's weekly wage for these workers. The division also set forth several options for changing the calculation method. All of these options are summarized below.

In addition, stakeholders at the meeting asked the Division if we could provide examples of the potential calculation methods. As such, to assist the reader in understanding these options, we have attached an Excel spreadsheet to help the reader see each option being applied to a worker's weekly wage calculation. The worker used in the example is a minimum wage worker who had varying hours, with some wages at an overtime rate. The minimum wage rate is what was in effect in 2017 in some parts of Oregon.

Please be aware the example is just one of what seems to be an infinite number of examples. Please do not interpret the answers offered to mean the worker's wage would be higher or lower under certain options. Changing the number of different pay categories, the timing of the pay raise, or the amount of hours worked during different times of the year may change the calculation significantly under the different options. If stakeholders have the opportunity to apply these options to real life examples, it would be great to hear feedback related to that experience.

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<sup>1</sup> 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.

- **Option 1.** Average the worker's hours under each pay category over the 52 week period (or lesser period if there was a "new wage earning agreement" which went into effect) and apply the average hours to the wage the worker was earning on the date of injury. The pay categories could include things such as wages earned at the basic hourly rate, overtime wages, wages at different pay differentials. (*Please note Jennifer Flood has provided suggested language for this option.*)
- **Option 2.** Establish that a change in the rate of pay only is a change in the wage earning agreement. This would result in averaging the wages only since the change of rate of pay occurred.
- **Option 3.** Calculate the worker's weekly wage under the current rule, and also calculate the worker's average total earnings since a pay increase, then use the higher number for the worker's weekly wage.
- **Option 4.** Create one or more carve outs or new sections within the current rule to address specific concerns, only averaging wages during the new period of time.
  - A. **Option 4.1: Probationary Status Changes:** If a worker has their rate of pay change due to a change in probationary status, consider this change in probationary status a new wage earning agreement. This would result in averaging the wages only since the probationary status change occurred.
  - B. **Option 4.2: Changes due to minimum wage increases:** If a worker had their rate of pay change due only to a change in the minimum wage, only average that workers wages since the change in minimum wage took effect.
- **Option 5.** Create other types of carve outs - if xyz occurs, apply the average hours method for the irregular wages rather than the average wages method. (Average hours method = average hours under each pay category over 52 weeks, then multiply the average hours by the wage at injury within each pay category)
  - **Option 5.1: Changes due to minimum wage increases:** If a worker had their rate of pay change due only to a change in the minimum wage, use an average hours method.  
**Option 5.2: Changes in rate of pay beyond x percent:** If a worker had their rate of pay changed more than a certain percentage (to be identified in rule), use an average hours method.
  - **Option 5.3: Timing based:** If a worker has their rate of pay change within *x* weeks or months of the injury, average hours instead of earnings
  - **Option 5.4: Timing based:** If the change in the rate of pay represents less than *x*% of the payroll history period, average hours instead of earnings (Ex. If change occurred in latter 50% period)
- **Option 6.** Create a formula to apply an adjustment factor the worker's weekly wage.

Under this option, the employer would calculate the weekly wage using a method similar to the following:

**First**, they would calculate the preliminary weekly wage of the worker by dividing up to 52 weeks of gross earnings by 52 (or a smaller number if the worker was either (a) not under their wage earning agreement for 52 weeks or (b) had extended gaps).

**Second**, they would calculate the adjustment factor to account for periods prior to a wage change. The rule would need to clearly identify this formula. For example, it could say the following:

If the worker's wage earning agreement changed only due to an increase or decrease in the rate of pay, the insurer must:

- (a) Subtract the worker's oldest pay rate in the relevant 52 week period from the worker's newest pay rate and divide by the worker's old pay rate (to determine the percentage change in the rate of pay);
- (b) Divide the number of weeks worked under all of the older pay rates by the total number of weeks of employment used to calculate the worker's weekly wage (to determine the proportion of time the worker's old rate of pay was in effect);  
and
- (c) Multiply the results of (a) and (b);

**Third**, the adjustment factor would be applied to the preliminary weekly wage by multiplying the preliminary weekly wage by one plus the result of (c) above.

- **Other:** If you have any other options you feel should be considered please let us know.

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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](http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf)