
In the Matter of the Compensation of
BURKE RIVERS, Claimant
WCB Case No. 11-00635
ORDER ON REVIEW
Jodie Phillips Polich, Claimant Attorneys
Holly O'Dell, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Biehl, Lowell, and Herman. Member Biehl dissents.

Claimant requests review of Administrative Law Judge (ALJ) Kekauoha's order that: (1) did not increase the rate of claimant's temporary disability benefits; and (2) did not assess penalties and attorney fees for allegedly unreasonable claim processing. On review, the issues are rate of temporary disability and penalties and attorney fees.

We adopt and affirm the ALJ's order.

ORDER

The ALJ's order dated March 9, 2011 is affirmed.

Entered at Salem, Oregon on November 4, 2011

Member Biehl dissenting.

Claimant worked at various construction jobs for the employer. He was dispatched to varying work locations, and he worked varying hours, for varying rates of pay.

Claimant sustained a compensable low back injury in 2007, while performing construction work for the employer. He returned to work in February 2008, and he worked on a public highway project from March 11 through March 19, 2008. Claimant sustained another compensable low back injury on March 19, 2008.

The two injury claims were ultimately closed by closure notices in August 2010. Claimant requested a hearing contesting the average weekly wage used in determining the 2008 injury claim, thereby alleging entitlement to additional temporary disability compensation.

I agree with the majority that claimant's temporary disability rate is properly calculated under OAR 436-060-0025(5)(a), because he was regularly employed, but paid on other than a daily or weekly basis.¹ However, I disagree with the majority's decision that the disability rate should be determined by averaging claimant's earnings for the weeks worked during the 52 weeks prior to the 2008 injury. The majority applies OAR 436-060-0025(5)(a)(B)(ii), reasoning that the overall wage earning agreement between the parties contemplated the variations among claimant's jobs, including wage variations.

I would apply subsection (iii) of the rule instead, because claimant worked on the 2008 highway project for less than 4 weeks, and this subsection provides that the compensation rate is based on the intent of the most recent wage earning agreement under such circumstances.

In sum, subsection (ii) of the rule applies if the change in the wage earning agreement occurred when claimant returned to work after his injury in February 2008 (over 4 weeks before the 2008 injury). Subsection (iii) applies if the change in the wage earning agreement occurred when he started working on the highway project where he was injured (within 4 weeks of the injury).

¹ OAR 436-060-0025(5)(a)(B) states in pertinent part:

“(5) The rate of compensation for workers regularly employed, but paid on other than a daily or weekly basis, or employed with unscheduled, irregular or no earnings shall be computed on the wages determined by this rule.

“(a) For workers employed seasonally, on call, paid hourly, paid by piece work or with varying hours, shifts or wages:

“* * * * *

“(B) * * * * *

“(ii) Where there has been a change in the wage earning agreement due to a change of hours worked, change of job duties, or for other reasons either with or without a pay increase or decrease, during the 52 weeks prior to the date of injury, insurers must average earnings for the weeks worked under the most recent wage earning agreement, calculated by the method described in (5)(a)(A).

“(iii) For workers employed less than 4 weeks under a changed wage earning agreement as described in this subsection, insurers must use the intent of the most recent wage earning agreement as confirmed by the employer and the worker.”

Because claimant's wages, hours, and work sites varied continually, the majority finds that these variations defined the wage earning agreement. Under my approach, each of claimant's jobs is the subject of a changed and more specific wage earning agreement. I submit that this approach is more consistent with the nature of claimant's work and therefore a more logical reading of the administrative rule.

Moreover, this approach is more consistent with ORS 656.210(2)(d)(A), which provides that, the rate of temporary disability compensation "shall be based on the wage of the worker at the time of injury." In other words, if this worker's temporary disability rate depends specifically on the wages paid for the job at injury, the compensation more accurately represents "wage replacement" (for the wages paid for the job that caused the injury) as required by the statute. Because the majority chooses a subsection of the applicable rule that results in a compensation rate farther removed from the wages paid for the job at injury, I respectfully dissent from the majority's decision.