WORKERS' COMPENSATION
MANAGEMENT-LABOR ADVISORY COMMITTEE
Full MLAC Meeting
January 9, 2018
1:30 p.m. – 3:30 p.m.

Committee Members Present:
Aida Aranda, Oregon and Southern Idaho Labor-Employers Training Trust
Kevin Billman, United Food and Commercial Workers
Guy Boileau, Louisiana-Pacific Corporation
Tammy Bowers, May Trucking
Alan Hartley, Shari's Restaurants
Lynn McNamara, CityCounty Insurance
Ateusa Salemi, Oregon Nurses Association {via tele-conference}
Diana Winther, IBEW Local 48
Kimberly Wood, Perlo Construction
Cameron Smith, Acting Director, *ex-officio*
Theresa Van Winkle, MLAC Committee Administrator

Meeting Participants:
Barb Belcher, Workers' Compensation Division
Julia Hier, Workers' Compensation Division
Lou Savage, Workers' Compensation Division

Agenda Item	Discussion
Opening (0:00:00)	Guy Boileau opened the meeting at 1:31 p.m.
Department Updates (0:01:09)	Theresa Van Winkle noted the purpose of today's meeting is to provide information about calculation of average weekly wage. This is separate from conversations about proposals for changing current rule.
Rate of Temporary Disability Compensation Presentation (0:02:09)	Lou Savage, Worker's Compensation Division, provided a brief summary of today's meeting topic. ▪ If a worker misses time off due to a workers' compensation claim, they are entitled to temporary disability benefits (often called time loss or wage replacement benefits). The benefits must be authorized by the worker's attending physician. ▪ Oregon statute sets the benefit level at 66 $\frac{2}{3}$ of the worker's wage at injury, with upper and lower benefit limits. The statute also provides guidance on calculating the worker's weekly wage at time of injury. Factors that impact this include the number of jobs, whether it was an injury or occupational disease, or whether the worker is regularly employed. Finally, the statute delegates rulemaking authority to the Department of Consumer and Business Services (DCBS) to set the wage calculation method for workers who are not regularly employed. Over the years, the temporary disability administrative rule has become more complex in attempts to address different employment situations. ▪ Industry performance showed calculations for benefits were not accurate, which resulted in workers not receiving accurate benefits. In 2015 and 2016, the division worked with stakeholders to improve and streamline the rule so benefits are calculated more accurately and consistently using an

Agenda Item	Discussion
	averaging method. On January 1, 2017, 15 separate calculation guidelines were changed or removed from administrative rule. ▪ One of the 2017 changes deleted a provision regarding union hiring halls, which had an unintended adverse impact on those workers. Based on feedback, the division adopted a temporary rule on October 1, 2017 to restore the union hiring hall rule. Subsequent stakeholder meetings were held to make that temporary rule permanent. During those meetings, there was not much controversy about the union hiring hall provision, but several stakeholders had serious concerns about other parts of the rule that took effect on January 1, 2017. Addressing those concerns requires more discussion, so the division is starting a new rulemaking process to have a more focused and detailed discussion about the rule and to make sure future changes minimize unintended consequences. ▪ The stakeholder advisory committee meeting is scheduled for January 18, 2018, and the division encourages participation. At today's MLAC meeting, the division is providing background on the rule for the upcoming discussion and an opportunity to ask questions.
Department Updates (0:06:26)	Guy Boileau introduced Cameron Smith, acting director of the Department of Consumer and Business Services. Cameron started with department on December 21, 2017 and was most recently the director of the Oregon Department of Veterans' Affairs.
Rate of Temporary Disability Compensation Presentation (0:08:47)	Julia Hier, Workers' Compensation Division, provided a presentation on the rate of temporary disability compensation. *Weekly Wage* ▪ State Average Weekly Wage (SAWW) refers to Oregon average weekly wage in covered employment. SAWW is calculated by the Oregon Employment Department. ▪ Worker's Weekly Wage or average weekly wage is based on the worker's wages. It is established by statute ORS 656.210 and in part by OAR 436-060-0025 and is used to calculate temporary disability benefits. *Temporary Disability* ▪ Temporary disability is 66 $\frac{2}{3}$ of the worker's gross wages, with upper and lower limits. The upper limit is no more than 133 percent of SAWW (which is currently $1280.80). The lower limit is the lesser of 90 percent of wages per week or $50. The limits are adjusted yearly by any percentage increase in SAWW. Less than one-third of all claims result in payment of temporary disability. ▪ There are two types of temporary disability, total and partial. Temporary total disability (TTD) is used when the worker is off work completely. Temporary partial disability (TPD) is used when a worker returns to work on a part time basis or is not making their full wage, and they have a release from their provider. ▪ An authorized provider needs to authorize the time off work, whether the worker is completely off work or can only do modified work. ▪ The first payment of temporary disability is due from the insurer within 14

Agenda Item	Discussion
	days. Subsequent payments are due every 14 days.

- The worker's average wage is used in benefit calculations beyond temporary disability.
    - If a worker has ratable permanent impairment (e.g., reduced range of motion), they can get benefits for that impairment. If they cannot return to their job at injury, they may receive a work disability benefit.
    - Vocational eligibility determination examines whether the worker is capable of making 80 percent of an adjusted version of the workers average wage.
    - Miscalculations of the average wage result in inaccurate benefits in temporary disability, and potentially in work disability or vocational eligibility. They also cause underpayments or overpayments to workers.
    - If calculations are incorrect, there could be inequitable treatment amongst different workers. Inaccuracy can also lead to litigation and a generally poor experience with the workers' compensation system. Overpayments can result in a worker's benefit being unexpectedly reduced. If not discovered, they are an additional cost to the system.

ORS 656.210

- The statute defines a variety components to look at when determining AWW.

Work injuries versus occupational diseases.	▪ Work injuries occur suddenly or over a discrete period of time. Benefits are based on the wage at the time injury. ▪ Occupational disease claim typically occur over a longer period (e.g., hearing loss because of prolonged noise exposure). Benefits are based on the wage of the worker at the time of medical verification that the worker is unable work due to disability caused by the occupational disease. If they're not working at that point, then it based on their last regular employment.
Number of jobs	▪ If a worker has one job, the temporary disability benefit is the worker's daily wage multiplied by the number of days they are regularly employed. ▪ If a worker has multiple jobs, in certain circumstances, temporary disability will consider all earnings from all subject employment.
Regular employment with remuneration	▪ Regularly employed is defined in the statute as actual employment or availability for such employment.

Agenda Item	Discussion

- "At the time of injury" has been interpreted by the Court of Appeals and the Supreme Court; it is an inexact term that provides the agency with interpretative, but not legislative responsibility. It is a term that doesn't look at the precise moment the injury occurred, but refers to the worker's earnings during the period of time. They have also recognized that determining the exact wage at time of injury is not always possible.
- The statute provides authority for DCBS to prescribe methods for establishing average wages when the worker is not regularly employed, or when the worker's remuneration is not solely based on a daily or weekly wage.

Legislative History

Year	*Implemented in ORS 656.210*
1914	Wages at the time of injury
1965	Definition of regularly employed Three day waiting period
1969	Calculation of a weekly wage
1985	Stated authority for DCBS to prescribe methods to establish wage
1987	Method for occupational disease claims Pay for time missed for doctor appointments (if over four hours)
2001	One job versus multiple job provisions

Temporary disability categories and calculations

In order apply the calculation, the wage category or categories needs to be determined.

- Category: Regular wages
  - Regular wages is a term defined by rule and is separate from the term "regularly employed." It is the money paid a constant rate at uniform intervals, including, but not limited to, wages paid on a daily or weekly basis.
  - Hourly wages can be considered regular if the same number of hours is worked each pay period.
  - Owners and corporate officers are exceptions to regular wages.
- Category: Assumed wages
  - Owners and corporate officers fall into this category, along with workers with no wages (e.g. volunteers).
- Category: Irregular wages
  - A money rate that is paid at a variable rate, or paid on unscheduled or unpredictable intervals.
  - The worker receives earnings not based on wages alone.
  - Can include seasonal workers, on call workers, workers paid hourly, or workers paid by piece. Examples:
    - A waitress that works different shifts as they are available, and receives an hourly rate and tips (both irregular wages).
    - For a salaried worker with bonuses or commissions, their salary would be calculated in the regular wage category while their bonuses or commissions would be calculated in the irregular wage category.
- Calculation: Regular wages

Agenda Item	Discussion

- The methodology comes from ORS 656.210, and instructs that daily wages should be multiplied by the number of days per week the worker was regularly employed.
- OAR 436-060-0025 addresses a few other situations.
  - Monthly wages should be divided by 4.35 (the average number of weeks in a month).
  - Other pay intervals should be calculated on an equivalent basis.
  - Union hiring halls should base wages on a five day work week at 40 hours per week.
- The 2017 rule changes did not significantly change this category, with the exception of union hiring halls provision (which was removed and then reinstated).

▪ Calculation: No wages, owners, and corporate officers calculation
- Based on assumed wage used to determine the employer's premium. This concept has been around since about 1980 and is unchanged in current rule.

▪ Calculation: Irregular wages calculation
- If a worker is in a wage earning agreement for four weeks or more, then the methodology is to average up to 52 weeks of their earnings (with some exceptions).
- If a worker is in a wage earning agreement for less than four weeks, the methodology is to look at the intent of the wage earning agreement in place at time of injury. For instance, if a worker is injured on day two of their job, it can be difficult to determine an average of what the earnings would have been. In these situations, conversation with the employer and worker about expectations (regarding earnings and amount of work) would be needed to determine what the intent was.
- A wage agreement is essentially the worker's current job. A new wage earning agreement means that there were changes outside of the rate of pay changing. This can include, but is not limited to, a change of hours worked or job duties (e.g., a promotion with a new wage). Examples:
  - A cashier works for a retailer, has varying hours, and earns $10 an hour. After a year, they get a promotion that involves additional job duties and a pay raise. Six weeks after that promotion, they are injured. Since they are working varying hours and are an hourly employee, they are in the irregular wage category. In this case, the wage earning agreement started when their promotion started, so there is at least 4 weeks of data. This means that the calculation would be an average of six weeks of earnings.
  - A sales associate at Macy's moves from working part time to full time after 6 months. An injury occurs eight weeks after the move to full time work. This worker is also in the irregular wage category because the hours vary and they are an hourly employee. The new wage agreement started eight weeks ago, so there is enough information to average the

Agenda Item	Discussion

eight weeks of earnings. If the injury instead occurred at 3 weeks, the calculation would be based on the intent of the wage agreement.

- Calculation inclusions and exclusions

Inclusions	▪ Total earnings (wages, salary, commission, and other remuneration under wage earning agreement) ▪ In-kind considerations (e.g., rent or utilities) if they are not continuing during disability.
Exclusions	▪ Expenses reimbursed by the employer ▪ Unanticipated gaps that are more than 14 days

A very basic history of irregular wage calculation

Year	*Implemented in Administrative Rule*
1980-1984	Average weekly earnings over past 26 weeks, minus extended gaps.
1994-1996	Average weekly earnings over past 52 weeks (or lesser period if new wage earning agreement), minus extended gaps. This was done in order to moderate seasonal changes in wages and get a more true picture of what the wages were for averaging.
1996-2016	In cases where workers had a pay increase or decrease, average the weekly hours for the 52 week period and multiply by wage at injury. Otherwise, average earnings in the 52 week period. Rulemaking records are unclear about the intent of this change.

2017 Administrative rule changes to irregular wage calculation

- Generally, more things are considered in calculating average wages than before. The division is trying to recognize that the labor market and how people are paid is evolving, and trying to ensure different types of employment situations are covered. The pre-2017 rules didn't address all employment situations.
- The union hiring hall rule was excluded, first by temporary rule effective October 1, 2017, then by permanent rule effective January 1, 2018.

Type of pay	*Old*	*New*
Overtime	Only included if worked on a regular basis.	Always included as a part of total earnings.
Bonuses	Only included if a part of a written or verbal employment contract as a means to increase wages.	Always included as a part of total earnings.
Incentive pay	Only included if regularly earned.	Always included as a part of total earnings.

Agenda Item	Discussion

- Examples:
  - A lifeguard works varying hours and occasionally does overtime. Under the old rules, the overtime pay would have been excluded.
  - A paper mill worker gets a bonus when the economy is doing well, but this is not in the employment contract. Under the old rules, the bonus would have been excluded.
  - A worker is paid incentive pay for occasionally doing work out of town. Under the old rules, the incentives may have been excluded.
- Workers who only had a pay increase or decrease
  - Old rule: Average weekly hours for the 52 week period, multiplied by wage at injury.
  - New rule: Average 52 weeks of wages.
- Gaps in earnings
  - Old rule: Claim by claim basis, not added together, determined per length, circumstances, and if contemplated when relationship formed.
  - New rule: Not included if not anticipated and over 14 days. For example, if a worker unexpectedly left work for four weeks to care for an ill family member, those four weeks would be excluded from the 52 week period. The average would only cover 48 weeks instead.
- Cyclic workers
  - Old rule: The cycle is considered to have no days off, and hours are averaged over the entire cycle. For instance, if a worker works 10 hours day (doing seven days on and seven off), they work 70 hours in that 2 week period. Their average hours per week would be 35 hours.
  - New rule: The cycle is still considered to have no days off; this is important for purposes of payment of temporary disability. However, averaging hours is no longer part of the calculation.
- School teachers
  - Old rule: Annual salary divided by 52 weeks, with temporary disability extended over the calendar year.
  - New rule: No exception necessary since covered in current calculation scenarios.
- Commissions
  - Old rule: Average based on 52 weeks of earnings. If 52 weeks of information not available, use assumed wage.
  - New rule: Included as part of total earnings and subject to the 52 week average method.
- These changes broaden the rule, should make benefits more accurate and reflective of actual earnings, reduce areas of conflict, and offer less discretion in the insurer's decision making.

Workers' Compensation Division Audit

- The audit focused on accuracy of temporary disability benefits to workers. To analyze this, they looked at calculation of average wages and accuracy of payment of temporary disability benefits.
- The audit highlighted deficiencies in the prior rule, which was a driving force behind rule changes. Findings:

Agenda Item	Discussion

- Some weekly wage scenarios didn’t fit into the old rules. For instance, a clothing store would pay commissions based on items sold. If a worker made more in commissions than they would have in their hourly wage, their check would be a commission. If their commissions were lower than their hourly wage, they would be paid based on their hourly wage. Under the old rules, it wasn’t possible to calculate that worker’s weekly wages.
- Some weekly wage scenarios fit into more than one section of the rule, resulting in there being more than one right answer. An example of this would be cyclical workers who also had a varying pay rate.
- In many scenarios, the old rule required the insurer to average hours and multiply by the current wage rate. Doing that required a high rate of data entry, which is prone to human error.
- Overtime, incentive pay, and bonuses weren’t always captured, and sometimes missed. This was amplified by the quality in some payroll records, which sometimes did not specify the different pay types. The result in some cases was a decrease in the average wages because it was miscalculated.
- Some wage scenarios which would require a lot of back and forth between the insurer and employer to obtain adequate information (e.g., were bonuses a part of an employment contract as a means to increase wages, or were they just a nice gesture?).
- Some wage scenarios that would take hours to accurate obtain information and calculate. In one situation, auditors took the same information and each audited what they thought the average wages should be. Each auditor arrived at a different answer, in part because the rules would give different options. Various provisions could apply, which made it difficult to come to a uniform result.

- Results:
  - Of 2,528 weekly wage calculations audited, 23.3 percent of calculations were inaccurate, and 15.4 percent of calculations were unsubstantiated (there was not enough information in the file to determine whether it was accurate).
  - The division also audited 22,932 temporary disability payments, with 8,437 of the payments being inaccurate. The sole reason behind 61.1 percent of those was because the average wage calculation was wrong. In 70.7 percent of them, the average wage calculation was a contributing factor to inaccuracy.

Administrative rule change

- The division wanted to see what could be done to the rule to improve regular and accurate benefits for the worker.
  - Improved benefit delivery
  - Improved workability, covering all scenarios
  - Ability to verify (allow workers, employers, and insurers to independently understand the calculation so they can verify it was done correctly).
- The division knew that no matter what methodology selected, there would be outliers. The division tried to address the bulk of situations.

Agenda Item	Discussion

	Wage scenarios
	The presentation presented calculation examples for:
	
	▪ Salaried worker
	▪ Regular hours with pay raise
	▪ Varying hours with pay raise (irregular wage scenario)
	▪ Varying hours with pay raise and bonus
	▪ Minimum wage with varying hours
	▪ Different pay rates
	
	What's next
	▪ Going into the rule changes, the division was aware there was no way to enact change without having increases or decreases in some individual worker's average wages. The division tried to create a rule that did not change the overall average of the weekly wages.
	▪ The division is working to gather data to analyze the effect of the rule change.
	▪ The division started another temporary disability accuracy audit, and gathering data to evaluate the impact of the change. Auditors are specifically calculating average wages under both the new and old rule to see the impact of the rule change.
	▪ The division also had the department's senior economist and a research analyst review the data to look more closely at any changes. At this point, the data is limited. Based on the data obtained thus far:
	    o There is no evidence that the rule change made an impact on the overall average of the worker's weekly wage. There have been some changes to individual workers.
	    o The data did not show s measurable impact for specific industries (such as agriculture, forestry and fishing, construction, healthcare and social service, and manufacturing).
	    o For eight large self-insured employers, the data showed no measurable impact on weekly wage of those injured in the first part of 2017 compared to those injured in 2014-2016.
	    o The data is limited, and on an individual level, some workers now receive a lower or higher weekly wage under the new rules.

Discussion (1:12:46)	Guy Boileau asked if there is any data to support that rates are being calculated correctly since the new rule went into effect. Barb Belcher, Workers' Compensation Division, she was unsure the division could really answer question at this point. The temporary disability audit just started in December 2017, and only conducted audits at a small number of companies. They can't say what the industry wide impact is yet. So far, the change has increased accuracy, but they are still seeing inaccurate calculations despite education and audits from the prior cycle. The overall impact on the individual level is unknown, but they will be collecting more data as they go along. Kimberly Wood asked how long it will be to get empirical data. Barb Belcher responded that the first temporary disability audit took 4.5 years to

Agenda Item	Discussion
	complete, however it was a new audit that they had to develop. For the current audit, the methodology was set already. The audit looks at weekly wage calculations under both the new and old rules (to see if there was any impact based on training and education during the previous audit) and to see if insurers are following the rules. She estimates the audit will be completed in 2.5 to 3 years. However, they could provide some data in about the next six months. Kevin Billman asked about the interpretation of "at time of injury" since 1996. Julia Hier responded that the wage at time of injury was one component to the calculation, the other component was the hours. The hours were based on the average, up to a 52 week period, depending on when the wage earning agreement went in place. There could be multiple categories of wages on one day, so it would be applied under each category. The wages were based on at the time of injury, the hours based on the 52 week average, and under each category, that would be applied an average. Kevin Billman asked about the minimum wage worker example mentioned in the presentation. Based on the calculation of AWW being $372 and dividing by average hours (38), he comes up with $9.39. He asked if it is accurate to say that the workers' compensation benefit is less than minimum wage at the time. Julia Hier responded that it is an average, and in this scenario, because they had the change of rate, that could be the accurate math for this scenario. Kevin Billman noted that is possible to be less than the current minimum wage, and that it concerns him some. Kevin also noted that some teachers choose to have their pay spread over 12 months instead of 9 months. Barb Belcher noted that for school teachers, regardless of whether they decide to spread their pay over 9 months or 12 months, the average wage calculation is still the annual salary divided by 12, then by 4.35. Diana Winther asked what the division considers inaccurate. Barb Belcher responded if the average wage calculation was within $1.50, it was considered accurate. Payments were considered accurate if they were within $1 per week or $5 overall. Diana Winther asked if there is an understanding of to what extent people who are not getting the benefit of the wage increase compared to people who are benefitting from incentive pay, bonuses, etc. She has a concern about more vulnerable people, who tend to fall into the irregular hours category, and don't get the easier calculation. Her concern is that those people are ending up with a decrease in average wages are not the people who are going to get gains from bonuses and incentives. Barb Belcher responded that by including things that were previously excluded, there is sort of a tradeoff. However, the division's motive going into this was recognizing that there is a problem with the rule being not applicable in many cases, and streamlining the rule so it is more reflective of what a worker had earned in the past 52 weeks. In regards to outliers who have been harmed, they recognize those

Agenda Item	Discussion
	are vulnerable workers, and that's why they're glad we're having this conversation again. Diana Winther noted that IBEW Local 48 members recently received a $3 pay increase. She is concerned workers that get injured may potentially lose out on that substantial increase and that is significant to their members. She worries to what extent the new rule captures the wide variety of increases we're talking about. Diana noted that the changes around 1994-1996 are similar to what is being done now, that it didn't seem like it stayed that way for long. Julia Hier responded that the rulemaking record was not clear in that period. It was clear that the change from 26 weeks to 52 weeks was to address seasonal workers, but as far as the change to hours, it wasn't clear. In response to Kevin Billman's comment about coming up with a figure that is less than minimum wage, Alan Hartley noted the average wage is what he would expect for an average. Alan understands the issue with minimum wage going up, but benefits not going up as well. Cameron Smith, Department of Consumer and Business Services, asked about the other benefits impacted by the average wage calculation. Julia Hier responded that once you have average wage determined, that is one part of the formula for work disability benefits. If average wages were to go up or down, work disability would increase or decrease accordingly. For vocational eligibility, average wages are a component that you would then adjust based on various factors. The vocational counselor looks to see if the worker is capable of earning 80 percent of that adjusted wage. Depending on whether the average wage goes up or down, it affects the 80 percent threshold. One of the key parts is making sure average wages are calculated correctly initially, because if it is incorrect, those other benefits will be equally skewed. Lou Savage noted that the division has been looking at number options to address the concerns people have. They didn't want to bring those up at today's meeting, primarily because they believe the rules advisory committee is place to do that and get input. They encourage MLAC members and others to participate in that effort. Ateusa Salemi noted that she was not clear on why there was a need for the rule change. Lou Savage responded that the reason for the change was that workers weren't getting accurate benefits. Ateusa Salemi noted that she was unclear on the cause of the inaccurate benefits. Was it because rules were being interpreted incorrectly, or because data was being entered inaccurately? She noticed a lot of references to inaccurate data entry, which is a human error, not necessarily an error of the rule. Barb Belcher responded that there were many problems, and it wasn't just data entry. There was a problem with the rules and their structure in that you had to

Agenda Item	Discussion
	select a rule, and you couldn't be dynamic and select multiple rules when they could have applied. The structure of the rules was ill-functioning which drove inaccurate wage calculations. There were issues with data entry, which will likely reduce because you're not entering, averaging, and calculating hours over 250 pages of payroll records. Instead, you're just averaging gross earnings. Lou Savage noted that the division has tools to use if an insurer or service company is not doing its job. The division has exercised those tools, primarily in the penalty area. The rule change was not a function of just errors by insurers and service companies. Ateusa Salemi asked if the division can be dynamic now. Barb Belcher responded that it is different now. The focus has shifted from the type of worker to the types of earnings. For example, a salaried worker could have a regular wage earnings agreement, but also have overtime, incentive pay, and bonuses. The overtime, incentive pay, and bonuses would fall under the irregular earnings, which are calculated differently than the regular wages, but they are all added together in the end. Diana Winther asked about further meetings beyond the January 18 rulemaking meeting. Lou Savage responded that given topic, and options to be discussed, he would predict that there would be more than one meeting. They really want to hear what people have to say and suggestions for addressing issues people have raised. Diana Winther noted that she doesn't think anyone is ignoring the difficulty of doing a variety of different calculations, just that there is concern about losing out on recent pay increases (especially since there is impact on other benefits).
Minutes Review (1:37:40)	Lynn McNamara moved to approve the minutes from the September 18, 2017 meeting, and Alan Hartley seconded. The minutes were approved.
Department Updates (1:38:00)	Theresa Van Winkle announced that Rachel Brozovich has resigned from the committee, effective immediately. The Governor's Office is working towards finding a replacement.
Meeting Adjourned (1:38:27)	Guy Boileau adjourned the meeting at 3:09 p.m.

*****These minutes include time stamps from the meeting audio found here:
http://www.oregon.gov/dcbs/mlac/Pages/2018.aspx

**Referenced documents can be found on the MLAC Meeting Information page here:
http://www.oregon.gov/dcbs/mlac/Pages/2018.aspx