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In the Matter of the Compensation of  
WCB Case No. 15-01837  
**CHRIS D. HARDER**, Claimant  
ORDER ON REVIEW  
Brian L Pocock, Claimant Attorneys  
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Johnson and Weddell.

Claimant requests review of Administrative Law Judge (ALJ) Donnelly's order that based claimant's work disability award on his average weekly wage for his "job at injury." On review, the issue is permanent disability (work disability).<sup>1</sup> We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following supplementation and summary.

On June 6, 2013, claimant sustained a compensable right shoulder injury while employed as a year-round volunteer firefighter/paramedic/part-time mechanic for a city. (Exs. 1, 10). At the time of the injury, he was also employed as a paramedic for an urgent care facility. (Exs. 9, 30-2).

The SAIF Corporation accepted a disabling right rotator cuff strain and right shoulder type 2 SLAP tear. (Exs. 4, 12, 16, 35). Claimant received temporary disability benefits based on wages from both his primary job (the job at injury) and his secondary job. (Exs. 9, 10, 14, 34-3, 36-1).

A December 9, 2014 Notice of Closure awarded 9 percent whole person impairment for the right shoulder and right arm (elbow) and 17 percent work disability. The dollar value for the work disability award was based on the average weekly wage (AWW) of claimant's "at-injury" job. (Ex. 34).

Claimant requested reconsideration, contending that he was entitled to an increased work disability award. Specifically, he argued that the AWW used to

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<sup>1</sup> The Workers' Compensation Division (WCD), on behalf of the Director, has participated in this proceeding. ORS 656.726(4)(h).

calculate his work disability award should have included the earnings from his second job. (Ex. 36).

On March 18, 2015, an Order on Reconsideration based on the dollar value of claimant's 17 percent work disability award on the AWW of his wages with both his primary (job at injury) and secondary employers. (Ex. 37). SAIF requested reconsideration, arguing that supplemental disability is not considered in the determination of the worker's AWW when calculating work disability. (Ex. 38).

On April 10, 2015, a second Order on Reconsideration recalculated claimant's work disability award. Applying OAR 436-035-0009(6)(d)(A) (which provides that supplemental disability is not considered in the determination of the worker's AWW when calculating work disability), the reconsideration order based the dollar value of claimant's work disability award on his AWW at his "job at injury." (Ex. 39). Claimant requested a hearing.

#### CONCLUSIONS OF LAW AND OPINION

The ALJ found that the Director did not exceed the authority granted under ORS 656.726(4) in providing standards to determine work disability, including the promulgation of OAR 436-035-0009(6)(d)(A). Concluding that the calculation of claimant's work disability award does not include consideration of supplemental disability, the ALJ affirmed the second Order on Reconsideration.

On review, claimant renews his argument that, under ORS 656.210(2)(a)(B), his AWW for purposes of determining his work disability award should include the earnings from both his job at injury and his second job. He argues that ORS 656.214(2)(b) is clear that work disability factors include the weekly wage, which is calculated using ORS 656.210(2), and that ORS 656.210(2)(a)(B) includes earnings from all subject employment in calculating the weekly wage. He contends that OAR 436-035-0009(6)(d)(A) is arbitrary and should be declared void and of no effect because it runs counter, and is *ultra vires*, to the statute.

SAIF responds that, by its terms, ORS 656.210(2)(a), which includes the provision for supplemental temporary disability, provides for the calculation of a worker's weekly wage for purposes of that section only and does not apply to other parts of Chapter 656 involving the use of weekly wages to determine benefits. SAIF also argues that the plain text of ORS 656.214 establishes that the

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legislature did not intend to have work disability determined based on wages from jobs other than the job at which the worker was injured. Based on this reasoning, SAIF asserts that OAR 436-035-0009(6)(d)(A) is valid.

WCD contends that, under ORS 656.726(4), the Director has authority to provide standards for the evaluation of disabilities, including the “criterion for evaluation of work disability under ORS 656.214,” which is “permanent impairment as modified by the factors of age, education, and adaptability to perform a given job.” ORS 656.726(4)(f)(C). WCD asserts that the Director exercised that authority in adopting OAR 436-035-0009(6), which provides for the calculation of work disability. In addition, WCD argues that the changes to ORS 656.210 in 2001 and to ORS 656.214 in 2003 support a conclusion that supplemental disability benefits are limited to temporary disability benefits. Based on the text of amended ORS 656.214(2)(b), which provides for calculation of work disability benefits using “the worker’s weekly wage for the job at injury as calculated under ORS 656.210(2),” WCD contends that the legislature did not intend to include supplemental disability in the determination of the worker’s weekly wage in calculating work disability under ORS 656.214(2)(b). Finally, asserting that OAR 436-035-0009(6)(d)(A) is consistent with that legislative intent, WCD reasons that the rule is valid.

After considering the parties’ positions regarding this disputed issue, we conclude that the calculation of claimant’s work disability award does not include consideration of his wages from his second employer. We reason as follows.<sup>2</sup>

To interpret OAR 436-035-0009(6)(d)(A), we first must interpret ORS 656.214(2)(b), the statute applied in that rule. In interpreting statutes, we ascertain the intentions of the legislature by examining the text of the statute in its context, along with any relevant legislative history, and, if necessary, relevant canons of statutory construction. *State v. Gaines*, 346 Or 160, 171-73 (2009); *PGE v. Bureau of Labor & Industries*, 317 Or 606, 610-12 (1993); *State v. Rocha*, 233 Or App 1, 5 (2009). The objective of statutory interpretation is to “pursue the intention of the legislature if possible.” *Gaines*, 346 Or at 165; *see also* ORS 174.020 (“In the construction of a statute, a court shall pursue the intention of the legislature if possible.”).

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<sup>2</sup> Because claimant’s claim was closed by a December 9, 2014 Notice of Closure, the applicable standards are found in WCD Admin. Order 12-061 (eff. January 1, 2013). *See* OAR 436-035-0003(1).

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ORS 656.214(2)(b) addresses work disability benefits and provides:

“(2) When permanent partial disability results from a compensable injury or occupational disease, benefits shall be awarded as follows:

“\* \* \* \* \*

“(b) If the worker has not been released to regular work by the attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 or has not returned to regular work at the job held at the time of injury, the award shall be for impairment and work disability. *Work disability shall be determined in accordance with the standards provided by the director pursuant to ORS 656.726 (4).* Impairment shall be determined as provided in paragraph (a) of this subsection. Work disability benefits shall be determined by multiplying the impairment value, as modified by the factors of age, education and adaptability to perform a given job, times 150 times *the worker’s weekly wage for the job at injury as calculated under ORS 656.210(2).* The factor for the worker’s weekly wage used for the determination of the work disability may be no more than 133 percent or no less than 50 percent of the average weekly wage as defined in ORS 656.005.” (Emphasis added).

ORS 656.726(4), as cited in ORS 656.214(2)(b), provides that the Director, in administering, regulating, and enforcing laws that include ORS 656.214, has the authority to “[m]ake and declare all rules and issue orders which are reasonably required in the performance of the director’s duties.” ORS 656.726(4)(a). The Director also has authority to provide standards for the evaluation of disabilities, including the “criterion for evaluation of work disability under ORS 656.214” which is “permanent impairment as modified by the factors of age, education, and adaptability to perform a given job.” ORS 656.726(4)(f)(C).

Because the focus is on the meaning of specific statutory terms, we follow the methodology set forth in *Springfield Education Assn. v. School Dist.*, 290 Or 217, 221-30 (1980), which held that there are three classes of statutory

terms, each of which conveys a different responsibility for the agency promulgating the rules under the statute and for the administrative/judicial body reviewing the agency's rule making: (1) terms of precise meaning, whether of common or technical parlance, requiring only fact-finding by the agency and administrative/judicial review for substantial evidence; (2) inexact terms which require agency interpretation and administrative/judicial review for consistency with legislative policy; and (3) terms of delegation which require legislative policy determination by the agency and administrative/judicial review of whether that policy is within the delegation.

ORS 656.726(4) is a delegative statute because it grants broad authority to the Director to make "all rules" that are "reasonably required" in performing his duties and to provide standards for the evaluation of disabilities, including the criterion for evaluation of work disability under ORS 656.214. *See* ORS 656.726(4)(a), (4)(f)(C).

The Director exercised that authority in adopting OAR 436-035-0009(6), which provides for the calculation of the total permanent partial disability (PPD) award and includes the calculation of work disability, as follows:

"(6) If the worker has not met the return or release to regular work criteria in section (3) or (4) of this rule, the worker receives both an impairment and work disability benefit, and the total permanent partial disability award is calculated as follows.

"(a) Determine the percent of impairment as a whole person (WP) value under these rules.

"(b) Determine the social-vocational factor, under OAR 436-035-0012, and add it to (a).

"(c) Multiply the result from (b) by 150 per ORS 656.214.

"(d) Multiply the result from (c) by worker's average weekly wage as calculated under ORS 656.210.

"(A) Supplemental disability is not considered in the determination of the worker's average weekly wage when calculating work disability.

“(B) The worker’s average weekly wage can be no less than 50% and no more than 133% of the state’s average weekly wage at the time of injury when determining work disability benefits.

“(e) Add the result from (d) to the impairment benefit value, which would be calculated using the method in section (4) of this rule.

“(f) The result from (e) is the permanent partial disability award that would be due the worker.”

OAR 436-035-0009(6)(d)(A), which provides that supplemental disability is not considered in the determination of the worker’s average weekly wage when calculating work disability, is within the broad range of discretion delegated to the Director by the legislature under ORS 656.726(4). Furthermore, it effectuates the legislature’s intent, as addressed below.

In determining the legislative intent regarding the calculation of work disability, we begin with a brief review of the history of the laws at issue, which provides the context regarding that calculation. In 2001, Senate Bill (SB) 485 (2001) amended ORS 656.210 to provide for secondary wages to be considered as part of an award of *temporary* disability. Before the enactment of SB 485, only wages from the job at injury were considered in awarding temporary disability benefits. In order to provide for supplemental temporary disability for a secondary job at injury, the following changes were made to the pertinent statutes.

ORS 656.210(2)(a) was amended, “[f]or the purpose of this section,” to include in the calculation of the worker’s weekly wage earnings the worker was receiving from all subject employment.<sup>3</sup> See ORS 656.210(2)(a)(B). ORS

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<sup>3</sup> Specifically, SB 485 amended ORS 656.210(2)(a) as follows:

“(2)(a) For the purpose of this section, the weekly wage of workers shall be ascertained:

“(A) **For workers employed in one job at the time of injury**, by multiplying the daily wage the worker was receiving by the number of days per week that the worker was regularly employed; **or**  
“(B) **For workers employed in more than one job at the time of injury**, by adding all earnings the worker was receiving from all subject employment.” (Added language is in bold print).

656.210(2)(b) was added to provide for the required notice to the carrier of any additional job at the time of injury. ORS 656.210(2)(c) was added to provide that, notwithstanding ORS 656.005(7)(c), an injury to a worker employed in more than one job at the time of injury is not disabling if no temporary disability benefits are payable for time lost from the job at injury. ORS 656.210(2)(c) also provided that claim costs for “supplemental temporary disability benefits” may not be used in data for ratemaking, individual employer rating, or dividend calculations if the injured worker is not eligible for permanent disability benefits or temporary disability benefits for time lost from the job at injury.

SB 485 also added ORS 656.210(5) to allow the carrier at injury to elect to be responsible for the “payment of supplemental temporary disability benefits.” ORS 656.210(5)(a) provided that, “[i]n accordance with rules adopted by the director,” carriers who elected to be responsible for such payment would be reimbursed by the Workers’ Benefit Fund for that portion of the temporary disability benefits paid that exceeds the amount payable had the worker been employed in only one job at the time of injury. For those cases where there was not such an election, the Director or his assigned paying agent would pay the supplemental benefits directly. *See* ORS 656.210(5)(b). Finally, ORS 656.605, which addresses the Workers’ Benefit Fund, was amended to include the “[p]ayment of supplemental temporary disability benefits,” as well as reimbursement for the costs of administering payments for those carriers who elected to process those payments. ORS 656.605(2)(d).

As illustrated by these statutory amendments, the changes to allow for supplemental disability were explicitly limited to *temporary* disability benefits, both in the amendments to ORS 656.210 and the amendments to ORS 656.605. These amendments created a system for determining and paying supplemental *temporary* disability benefits. Moreover, there is no ambiguity – the word “temporary” is used multiple times in the plain language of these amendments regarding this new supplemental benefit. Thus, SB 485 clearly limited this additional benefit to *temporary* disability benefit awards.

We turn to ORS 656.214, the statute providing for PPD benefits. For work injuries occurring before 2005, such benefits were based on fixed rates for scheduled and unscheduled disability, rather than the worker’s wage at the time of injury. ORS 656.214 (1999). Specifically, the criteria for rating scheduled PPD was the “permanent loss of use or function of the injured member due to the industrial injury,” with the worker receiving a specified dollar amount for each degree of loss for various listed (scheduled) body parts. ORS 656.214(2)-(4)

(1999). The criteria for rating unscheduled PPD benefits (*i.e.*, PPD other than that described in ORS 656.214(2)-(4) (1999)) was the “permanent loss of earning capacity due to the compensable injury,” with the worker receiving specified dollar amounts based on various ranges of the total degrees of unscheduled PPD calculated. ORS 656.214(5), (6) (1999). In addition, ORS 656.726(4)(f)(A) provided that the criteria for evaluation of disability for unscheduled PPD was “permanent impairment due to the industrial injury as modified by the factors of age, education and adaptability to perform a given job.” *See* Or Laws 1987, ch 884, § 2; Or Laws 1999, ch 876, § 9.

Senate Bill (SB) 757 (2003) changed the method of calculating PPD benefits for injuries occurring on or after January 1, 2005 by eliminating the distinction between scheduled and unscheduled PPD awards. Instead, under SB 757, PPD consisted of: (1) permanent impairment; or (2) permanent impairment and work disability.<sup>4</sup> *See* ORS 656.214(1)(c). Moreover, SB 757 amended ORS 656.214(2)(b) to include the provisions for calculation of work disability benefits, which provides as follows: “Work disability benefits shall be determined by multiplying the impairment value, as modified by the factors of age, education and adaptability to perform a given job, times 150 times *the worker’s weekly wage for the job at injury as calculated under ORS 656.210 (2).*”<sup>5</sup> (Emphasis added).

At issue before us is the meaning of the above-highlighted phrase. Claimant contends that the reference in this phrase to “ORS 656.210(2)” constitutes a legislative incorporation of supplemental disability benefits into a work disability award. Based on the following reasoning, we disagree.

The text of this phrase expressly provides for “the worker’s weekly wage *for the job at injury as calculated under ORS 656.210(2).*” (Emphasis added). By its terms, this statutory phrase clearly references the weekly wage “for the job at

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<sup>4</sup> SB 757 defined “impairment” as “the loss of use or function of a body part or system due to the compensable industrial injury or occupational disease determined in accordance with the standards provided under ORS 656.726, expressed as a percentage of the whole person.” *See* ORS 656.214(1)(a). “Work disability” was defined as “impairment modified by age, education and adaptability to perform a given job.” ORS 656.214(1)(e).

<sup>5</sup> ORS 656.214(2)(b), as quoted above, presents the language enacted by SB 757, with the exception of the first sentence. As enacted by SB 757, the first sentence of ORS 656.214(2)(b) provided: “If the conditions for the worker’s return to or release for regular work in ORS 656.726(4) have not been met, the award shall be for impairment and work disability.” The change to the current language was made in 2005. *See* Or Laws 2005, ch 653 § 3. This change to clarify entitlement to work disability benefits does not affect our reasoning regarding the calculation of such benefits.

injury,” referencing a *single* job at injury. Claimant’s interpretation disregards the language “for the job” in the phrase “for the job at injury.”. Moreover, if the legislature had intended that the calculation of work disability included *all* of the worker’s employment at the time of injury, there would have been no reason to include the singular language “for the job” in the phrase “weekly wage *for the job* at injury as calculated under ORS 656.210(2).”<sup>6</sup> (Emphasis added).

When interpreting statutes, we must not insert what has been omitted or omit what has been inserted, and must attempt to give effect to all provisions or particulars if possible. ORS 174.010. Here, claimant’s interpretation of ORS 656.214(2)(b) would essentially omit or render superfluous the modifier “for the job” in the phrase “for the job at injury.” We are not authorized to endorse such an interpretation.

Thus, in accordance with the express terms of ORS 656.214(2)(b), a work disability award must be based on the weekly wage *for the job* at injury. Furthermore, pursuant to the statutory scheme, supplemental disability is not included in the determination of the worker’s weekly wage when calculating work disability pursuant to ORS 656.214(2)(b).

Therefore, OAR 436-035-0009(6)(d)(A) is consistent with the statutory scheme. Consequently, the second Order on Reconsideration properly applied OAR 436-035-0009(6)(d)(A) in determining claimant’s average weekly wage without considering his supplemental disability; *i.e.*, his earnings from jobs other than his job at injury. Accordingly, we affirm.

### ORDER

The ALJ’s order dated August 20, 2015 is affirmed.

Entered at Salem, Oregon on March 7, 2016

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<sup>6</sup> In this regard, in ORS 656.210(2) (the “temporary disability” statute), the more general and unmodified phrase of “weekly wage” is used in providing for calculations of temporary disability. However, in ORS 656.214(2)(b) (the “permanent disability” statute), the legislature explicitly modified the phrase “weekly wage at injury” by inserting the singular modifier “*for the job*,” resulting in providing for calculations of work disability using “the worker’s weekly wage *for the job* at injury as calculated under ORS 656.210(2).” (Emphasis added).

Furthermore, no legislative history has been submitted supporting the proposition that the 2003 amendments to ORS 656.214 were intended to include supplemental temporary disability benefits in the calculation of work disability benefits.