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In the Matter of the Compensation of  
**CRYSTAL M. BALL, Claimant**  
WCB Case No. 16-01419  
**ORDER ON RECONSIDERATION**  
Alana C DiCicco Law, Claimant Attorneys  
Reinisch Wilson Weier, Defense Attorneys

Reviewing Panel: Members Johnson and Lanning.<sup>1</sup> Member Lanning concurs.

On May 11, 2017, we abated our April 14, 2017 order that, in part, determined that claimant's shift differential pay had not been included as part of her "wage at injury" for purposes of *former* OAR 436-060-0025(5)(a)(B)(i)<sup>2</sup> and, as such, directed the self-insured employer to recalculate her average weekly wage (AWW) and temporary total disability (TTD) rate. We took that action to consider the employer's motion for reconsideration, which asserts that it included claimant's differential pay in the calculation of her AWW and TTD rate for hours she actually worked for the period in question, but properly excluded her earnings based on accrued benefits during that period, *i.e.*, vacation, sick, and bereavement leave. In response, claimant does not dispute that the employer included her differential pay for the hours she actually worked. She contends, however, that the employer was required to calculate her AWW and TTD rate based on her total earnings during the period in question, rather than the hours she actually worked. Having received the parties' arguments, we proceed with our reconsideration.

After conducting our reconsideration, we are persuaded that, consistent with the applicable version of OAR 436-060-0025(5)(a)(B)(i), claimant's differential pay for hours actually worked was included in the employer's calculation of her AWW. We reason as follows.

At the time of her injury, claimant earned an hourly base pay of \$17.30. She earned \$25.95 for holiday pay and differential pay of \$1.25 for evening hours and \$2.25 for night hours. An AWW calculation spreadsheet, submitted by the

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<sup>1</sup> Board Chair Somers was a member of the initial reviewing panel. However, Board Chair Somers is no longer a member of the Board.

<sup>2</sup> OAR 436-060-0025(5), including subsection (5)(a)(B)(i), was amended on January 1, 2017. However, we apply the version of the rule in effect at the time of claimant's injury. *Robert J. Marsh*, 69 Van Natta 408, 414 n 6 (2017).

employer, demonstrates its calculation of claimant's AWW for the 52-week period preceding the injury. (Ex. 2; Hearing File). The actual hours claimant worked under each pay code (including holiday pay and night and evening differential pay) are listed for that period. The total hours for each pay code were divided by 52 weeks, and then multiplied by the respective wages for that pay code. Accordingly, the final AWW calculation of \$488.26 includes claimant's differential pay for the hours she actually worked.<sup>3</sup>

We turn to the employer's contention that it properly excluded pay earned based on accrued benefits during the 52-week period, *i.e.*, vacation and sick leave, rather than hours actually worked during that period, from the calculation of claimant's AWW under *former* OAR 436-060-0025(5)(a)(B)(i). Based on the following reasoning, we conclude that the employer's calculation was appropriate under the former rule.

At the time of claimant's injury, *former* OAR 436-060-0025(5)(a) provided the method for calculating the AWW for those employees who, like claimant, were paid on an hourly basis. Under that provision, "[i]nsurers must use the worker's average weekly earnings with the employer at injury for the 52 weeks prior to the injury." *Former* OAR 436-060-0025(5)(a)(B)(i) in turn provided that where there had 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, "insurers must use the worker's average weekly hours worked for the 52 week period \* \* \* multiplied by the wage at injury to determine the worker's average weekly earnings."<sup>4</sup>

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<sup>3</sup> The employer's AWW calculation of \$488.26 also includes claimant's overtime pay. (Hearing File). The ALJ concluded that claimant's proper AWW, as calculated by the employer, was \$488.26. The employer did not contest that determination on review. In its initial order, the majority opinion noted agreement with the ALJ's *exclusion* of overtime pay from the calculation of claimant's AWW. Yet, as previously explained, the ALJ *included* claimant's overtime pay in claimant's AWW calculation and the employer did not contest that calculation on Board review.

Under such circumstances, on reconsideration, we withdraw the prior comment regarding the "overtime pay" component of the employer's calculation of claimant's AWW (as well as the previous interpretation of the ALJ's determination regarding that component). Instead, we do not alter the ALJ's conclusion concerning the employer's calculation of claimant's AWW, which included overtime pay.

<sup>4</sup> OAR 436-060-0025(3) and (4) now provide the method for calculating the AWW and TTD rate for workers paid on an hourly basis. Those rules provide that the worker's AWW must be based on the wage at the time of injury and the weekly average of the worker's total earnings for the period up to 52 weeks before the date of injury.

In *Donald L. Ivie*, 61 Van Natta 1037, 1041-42 (2009), we concluded that the carrier improperly calculated the claimant's AWW under OAR 436-060-0025(5)(a)(B)(i) because it "did not average the *weekly hours worked* for the relevant period and then multiply that number by the wage at injury; rather, it appears that the employer divided claimant's *total earnings* over the relevant period."

Here, the parties agree that there was a change to claimant's wage earning agreement due to a pay raise in the 52 weeks prior to the injury. Thus, *former* OAR 436-060-0025(5)(a)(B)(i) controls the calculation of claimant's AWW. Accordingly, consistent with the *Ivie* rationale, the employer properly calculated claimant's AWW and TTD rate using the *average weekly hours worked* for the 52 week period. Including earnings based on claimant's accrued benefits, rather than on hours worked, would be inconsistent with our conclusion in *Ivie* that the employer miscalculated the claimant's AWW under the rule by using his *total earnings* rather than his *hours worked* for the relevant period.

Therefore, in lieu of our previous determination, we conclude that the employer properly calculated claimant's AWW and TTD rate pursuant to *former* OAR 436-060-0025(5)(a)(B)(i). Furthermore, because claimant's temporary disability compensation has not been increased, her counsel is not entitled to the \$13,000 attorney fee award previously granted under ORS 656.383(2).

Accordingly, on reconsideration, as supplemented and modified herein, we republish our April 14, 2017 order. The parties' rights of appeal shall begin to run from the date of this order.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on July 3, 2017

Member Lanning concurring.

I concur with today's decision, but write separately to clarify my position.

The majority's initial opinion noted its agreement with the ALJ's *exclusion* of claimant's overtime pay from the calculation of her AWW. I dissented from that portion of the majority opinion, asserting that claimant's overtime pay should have been included in the AWW calculation.

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However, as explained in today's opinion, the employer's AWW calculation of \$488.62 included claimant's overtime pay and the ALJ found that calculation to be correct. Furthermore, the employer did not contest that calculation on Board review. Under such circumstances, although I continue to believe that claimant's "overtime pay" should be included in the calculation of her AWW (even if the issue was contested on review), I concur with today's opinion that, considering the employer's absence of an objection to the ALJ's AWW determination (with "overtime pay" as a component), it is unnecessary for that issue to be substantially addressed.