

In the Matter of the Compensation of
CRYSTAL M. BALL, Claimant

WCB Case No. 16-01419

ORDER ON REVIEW

Alana C Diccio Law, Claimant Attorneys
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Reviewing Panel: Members Johnson, Lanning, and Somers. Member Lanning concurs in part and dissents in part.

Claimant requests review of Administrative Law Judge (ALJ) Brown's order that: (1) found that the self-insured employer had properly calculated the rate of claimant's temporary total disability (TTD) benefits; (2) authorized the employer to offset an overpayment of TTD benefits that it had initially paid at a higher rate; and (3) declined to award penalties and attorney fees for allegedly unreasonable claim processing. On review, the issues are TTD rate, offset, penalties, and attorney fees. We affirm in part and reverse in part.

FINDINGS OF FACT

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

Claimant worked as a Certified Nursing Assistant when she was compensably injured. (Tr. 5). She was paid an hourly base rate with differential pay for overtime hours, evening, night, swing, and holiday shifts. (Ex. 10). She was also eligible to receive an annual bonus dependent on patient satisfaction and other goals set by the employer. (Tr. 8, 16, 20-22). In the 52 weeks before her injury, claimant's base pay rate was increased to \$17.30 per hour. (Ex. 10).

The employer calculated claimant's average weekly wage (AWW) pursuant to OAR 436-060-0025(5)(a)(B)(i). In calculating the AWW, the employer used only claimant's base hourly pay rate, not including her differential pay, bonus, or overtime.

Claimant requested a hearing, challenging the employer's calculation of her TTD benefits and requesting a penalty and attorney fee award.

CONCLUSIONS OF LAW

The ALJ concluded that the employer had correctly calculated claimant's AWW and TTD benefits. In doing so, the ALJ reasoned that claimant's overtime and differential pay were not part of her "wage at injury" for purposes of OAR

436-060-0025(5)(a)(B)(i). The ALJ further determined that claimant's bonus was properly excluded from the AWW calculation under OAR 436-060-0025(5)(g). Given those conclusions, the ALJ did not award penalties and attorney fees.

On review, claimant contends that her AWW calculation should include her shift differential pay and overtime pay because they were part of her "wage at injury" for purposes of the rule. She also asserts that her AWW calculation should include her annual bonus. Finally, she argues that she is entitled to a penalty and related attorney fee under ORS 656.262(11)(a) based on the employer's unreasonable claim processing.

We agree with the ALJ's determination that claimant's overtime pay and annual bonus should not be included in calculating her AWW. *See* OAR 436-060-0025(5)(f), (g).¹ However, we conclude that claimant's shift differential pay should be included as part of her "wage at injury" under OAR 436-060-0025(5)(a)(B)(i). We reason as follows.

OAR 436-060-0025(5)(a) provides the method for calculating the AWW for employees who, like claimant, are paid on an hourly basis. OAR 436-060-0025(5)(a)(B)(i) specifically provides that:

"where there has been a change in the wage earning agreement due to only 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."

Claimant received differential pay for working evening, night, swing, and holiday shifts. The record establishes that, in the 52 weeks before her injury, the vast majority of claimant's hours were subject to the shift differential pay. (Exs. 1,

¹ We also agree with the ALJ's reasoning that claimant's two-week employment gap was not an "extended gap" for purposes of OAR 436-060-0025(5)(a)(A). Under that rule, the determination of whether a gap is extended must be made in light of its length and the circumstances of the individual employment arrangement itself, including whether the parties contemplated that such gaps would occur when they formed the relationship.

Here, when she was hired, claimant informed the employer that she would be taking time off to care for her sick child. (Tr. 13, 14). In March, 2014, she took two weeks off from work for that reason. (Ex. 1B-2; Tr. 11, 12). In such circumstances, we agree with the ALJ's conclusion that claimant's two week employment gap was not an "extended gap" for purposes of OAR 436-060-0025(5)(a)(A). *See William T. Monsoor*, 62 Van Natta 2430, 2433 (2010) (gap in employment was not an "extended gap" where it was contemplated by the parties at the time of hire); *Gerardo Alanis*, 54 Van Natta 2050, 2052 (2002) (concluding that one and two week employment gaps were not "extended"). As such, we adopt the ALJ's conclusion that claimant's AWW should be calculated based on the 52 weeks before her injury.

1A, 1B). Accordingly, we conclude that the differential pay for particular shifts was a regular part of her wages. Under such circumstances, we find that claimant's differential pay should be included as part of her "wage at injury" under OAR 436-060-0025(5)(a)(B)(i).

We turn to claimant's overtime and bonus pay. We have concluded that the calculation of a worker's AWW under OAR 436-060-0025(5)(a) "includes more than a straightforward application of his hourly rate; it also encompasses consideration of additional forms of compensation such as [the worker's] overtime at [the] overtime rate [and] bonus pay * * * OAR 436-060-0025(5)(f)-(h)." *Bradley K. Stevens*, 56 Van Natta 110, 111 (2004). Accordingly, we turn to those subsections to determine whether claimant's overtime and annual bonus should be included in her AWW calculation.

To begin, subsection (5)(g) provides that "[e]nd-of-the-year or other one time bonuses paid at the employer's discretion shall not be included in the calculation of compensation." Claimant contends that her annual bonus should be included in the calculation of her AWW under subsection (5)(g) because it was paid as part of her union contract. We disagree.

Claimant and the employer's representative testified that payment of the bonus was dependent on the employee meeting certain goals set by the employer. (Tr. 8, 16, 20-22). Further, the record does not demonstrate that the bonus was paid as part of a union contract. Under such circumstances, we conclude that claimant's bonus was discretionary. Consequently, the employer appropriately excluded claimant's bonus from the AWW and TTD rate calculation.

Turning to claimant's overtime pay, we find subsection (5)(f) to be applicable. That subsection provides:

"Insurers shall consider overtime hours only when the worker worked the overtime on a regular basis. Overtime earnings must be included in the computation at the overtime rate. For example, if the worker worked one day of overtime per month, use 40 hours at a regular wage and two hours at the overtime wage to compute the weekly rate. If overtime varies in hours worked per day or week, use the averaging method described in subsection (a)."

In the year leading up to her injury, claimant worked overtime in only seven of the 12 months preceding the injury, for a total of 2.25 hours of overtime. (Ex. 1). Under such circumstances, we conclude that claimant did not work overtime on a

regular basis for purposes of the rule. Accordingly, we conclude that claimant's overtime pay is not part of her "wage at injury" under OAR 436-060-0025(5)(a)(B)(i).

Finally, claimant seeks a penalty under ORS 656.262(11)(a) because the employer's interpretation of OAR 436-060-0025(5)(a) was unreasonable. ORS 656.262(11)(a) provides for a penalty if a carrier unreasonably delays or unreasonably refuses to pay compensation. *See Ronald E. Sullivan*, 61 Van Natta 108, 113-14 (2009) (penalty awarded under ORS 656.262(11)(a) for carrier's unreasonable delay in claim processing).

Here, as reflected by the ALJ's order, the employer's position that claimant's annual bonus, differential pay, and overtime pay should not be included in the TTD rate calculation was not unreasonable. *See Steven R. Holmes*, 62 Van Natta 2040, 2041 (2010) (the carrier's conduct was not unreasonable where its interpretation of the applicable rule provided it with legitimate doubt regarding claimant's entitlement to temporary disability benefits). We therefore conclude that claimant is not entitled to a penalty under ORS 656.262(11)(a).

Claimant's counsel is entitled to an assessed fee for services at the hearing level and on review regarding the temporary disability issue. ORS 656.383(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services at the hearing level and on review concerning the aforementioned issue is \$13,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by the hearing record, claimant's appellate briefs, her counsel's submission, and the employer's objection), the complexity of the issue, the value of the interest involved, the risk that counsel may go uncompensated, and the contingent nature of the practice of workers' compensation law.

ORDER

The ALJ's order dated July 21, 2016 is affirmed in part and reversed in part. The claim is remanded to the employer to recalculate claimant's AWW and temporary disability rate based on this order. For services at the hearing level and on review concerning the temporary disability issue, claimant's attorney is awarded \$13,000, payable by the employer. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on April 14, 2017

Member Lanning concurring in part and dissenting in part.

I agree with that part of the majority opinion that finds that claimant's differential pay for specific shifts should be included as part of her "wage at injury" under OAR 436-060-0025(5)(a)(B)(i). However, I would conclude that: (1) claimant's overtime pay and annual bonus should also be included as part of her "wage at injury"; and (2) her two-week employment gap was an "extended gap" under OAR 436-060-0025(5)(a)(A). Consequently, I respectfully dissent in part.

Wages are defined in ORS 656.005(29) as "the money rate at which the service rendered is recompensed under the *contract of hiring* in force at the time of the accident." (Emphasis added). Based on that definition, I conclude that the term "wage" as used in OAR 436-060-0025(5)(a)(B)(i) includes any compensation included in a worker's union contract at the time of the work-related injury.

Here, claimant and the employer representative testified that claimant's pay was controlled by the union contract. (Tr. 5, 6, 22). Claimant testified that her wages and other benefits, including raises and overtime, were controlled by the union contract. (Tr. 5, 6). Based on that testimony, I would find that claimant's overtime was part of her regular wage. Consequently, I would conclude that claimant's overtime was part of her "wage at injury" under OAR 436-060-0025(5)(a)(B)(i).

Turning to the annual bonus, claimant testified that she received the bonus each year she worked for the employer. (Tr. 8). In such circumstances, I would find that the annual bonus was included in her contract of hiring at the time of the injury as a "past practice." Accordingly, I would conclude that the bonus was also part of claimant's "wage at injury" for purposes of OAR 436-060-0025(5)(a)(B)(i).

Finally, I would conclude that claimant's two-week employment gap to care for her sick child was an extended gap for purposes of OAR 436-060-0025(5)(a)(A). Because the majority concludes otherwise, I respectfully dissent in part.