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In the Matter of the Compensation of  
**RICHARD POLAND, Claimant**  
WCB Case No. 17-02589  
ORDER ON REVIEW  
Wellstone Law Group, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Curey and Ousey.

Claimant requests review of Administrative Law Judge (ALJ) Marshall's order that: (1) declined to direct the SAIF Corporation to recalculate his rate of temporary total disability (TTD) benefits; and (2) declined to award penalties and related attorney fees for SAIF's allegedly unreasonable claim processing. On review, the issues are TTD rate, penalties, and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation.

The ALJ declined to adjust claimant's TTD rate. Finding that SAIF properly calculated claimant's TTD rate based on his average weekly earnings in the 52 weeks prior to his February 2, 2017 injury pursuant to OAR 436-060-0025(4),<sup>1</sup> the ALJ declined to assess a penalty and related attorney fee for SAIF's allegedly unreasonable claims processing.

On review, claimant reiterates his argument that the January 2017 amendments to OAR 436-060-0025 are invalid because they exceed the Director's statutory authority. In doing so, he asserts that the amended rule contravenes the legislature's intent that the rate of TTD benefits be based on the "wage of the worker at the time of injury" pursuant to ORS 656.210(2)(d)(A). Alternatively,

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<sup>1</sup> Although the ALJ's order referred to *former* OAR 436-060-0025(5), we refer to the applicable version of the rules (WCD Admin. Order 16-055 (eff. January 1, 2017)) in effect when claimant was injured on February 2, 2017. ORS 656.202(2); OAR 436-060-0003(2); *Tye v. McFetridge*, 342 Or 61, 67 n 5 (2006); *Donald L. Ivie*, 61 Van Natta 1037, 1041 n 7 (2009).

OAR 436-060-0025(4) provides:

"Rate of compensation, irregular wages. If a worker receives irregular wages, or receives earnings that are not based on wages alone, the insurer must calculate the worker's rate of compensation under section (3) of this rule based on the weekly average of the worker's total earnings for the period up to 52 weeks before the date of injury or verification of disability caused by occupational disease."

claimant contends that SAIF's calculation of his average weekly wage (AWW) based on his earnings from February 4, 2016, through February 1, 2017, amounted to 51.6 weeks, rather than 52 weeks. Thus, he requests that SAIF recalculate his AWW/TTD rate based on "a full 52 weeks," and that a penalty and penalty-related attorney fee for allegedly unreasonable claim processing be assessed. For the following reasons, we disagree with claimant's contentions and deny his requests for relief.

Claimant has the burden of proving the extent of his temporary disability. ORS 656.266(1); *Donald L. Vanwormer*, 64 Van Natta 1591, 1592 (2012). For workers employed in one job at the time of injury, the weekly wage shall be ascertained by multiplying the wage the worker was receiving by the number of days per week that the worker was regularly employed. ORS 656.210(2)(a)(A). Under ORS 656.210, "[t]he benefits of a worker who incurs an injury shall be based on the wage of the worker at the time of injury." ORS 656.210(2)(d)(A).

ORS 656.210(2)(e) provides:

"As used in this subsection, 'regularly employed' means actual employment or availability for such employment. For workers not regularly employed and for workers with no remuneration or whose remuneration is not based solely upon daily or weekly wages, the Director of the Department of Consumer and Business Services, by rule, may prescribe methods for establishing the worker's weekly wage."

In *Hadley v. Cody Hindman Logging*, 144 Or App 157 (1996), the court explained that ORS 656.210(2)(e) (*former* ORS 656.210(2)(c)) delegates to the Director broad authority to prescribe by rule "methods" for approximating the wage amount at the time of injury "for workers not regularly employed and for workers with no remuneration or whose remuneration is not based solely upon daily or weekly wages." 144 Or App at 160. Moreover, the phrase "wage \* \* \* at the time of injury" as used in ORS 656.210 is an "inexact term," meaning that the "legislature has expressed its meaning completely, but that meaning remains to be spelled out in the agency's rule or order." *Id.* at 161. Finally, the court concluded that ORS 656.210(2)(d)(A) (*former* ORS 656.210(2)(b)(A)) contained a "clear expression of legislative policy to pay injured workers benefits based on the wage of the worker at the time of injury." *Id.*

An administrative agency may not, by its rules, amend, alter, enlarge, or limit the terms of the statute. *Cook v. Workers' Comp. Dep't*, 306 Or 134, 138 (1988). In our review capacity, we must determine whether the agency's rule is within the range of discretion allowed by the general policy of the statute. *Hadley*, 144 Or App at 160-61; *Dennis W. Erickson*, 61 Van Natta 523, 525-26 (2009). That is, we must determine whether the method described in OAR 436-060-0025(4) for calculating the rate of TTD benefits for a worker who receives irregular wages "based on the weekly average of the worker's total earnings for the period up to 52 weeks before the date of injury" is consistent with the legislative intent of ORS 656.210(2)(d)(A) to provide such benefits "based on the wage of the worker at the time of injury."<sup>2</sup> *Id.*

Consistent with the rationale and reasoning expressed in *Hadley*, we conclude that the method described in OAR 436-060-0025(4) is within the range of discretion allowed by the general policy of ORS 656.210(2)(e) and is not contrary to legislative intent. That is, it is within the Director's rule-making authority under ORS 656.210(2)(e) to prescribe methods for establishing the weekly wage of workers whose remuneration is not based solely upon daily or weekly wages. Moreover, the methods prescribed in OAR 436-060-0025(4) fall within the ambit of the purpose of ORS 656.210(2)(d)(A) to provide temporary disability benefits to a worker at a rate based on the worker's wage at the time of injury. *Id.*

Thus, we do not find that, by enacting such a rule, the Director has amended, altered, enlarged, or limited the terms of ORS 656.210. *Id.*; *Cook*, 306 Or at 138. Therefore, we reject claimant's request that we find OAR 436-060-0025(4) invalid, and we conclude that the rule was properly followed in this matter.

We turn to claimant's contention that SAIF incorrectly and unreasonably calculated his AWW based on his earnings in the 51.6 weeks before his February 2, 2017 injury, rather than 52 weeks. *See* OAR 436-060-0025(4). As explained below, we disagree with claimant's contention.

The record establishes that SAIF's claim auditor calculated claimant's AWW based on his total earnings for the period from Thursday, February 4, 2016, through (and including) Wednesday, February 1, 2017. (Ex. 5; Tr. 19-21). Consistent with

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<sup>2</sup> The parties do not dispute, and the record establishes, that claimant's hourly rates of pay changed and that he did not work the same number of hours each pay period. (Exs. 1, 2, 3, 7; Tr. 6-10). Therefore, his "remuneration is not based solely upon daily or weekly wages," and OAR 436-060-0025(4) for determining the rate of compensation for "irregular wages" applies. *See* ORS 656.210(2)(e); *see also* OAR 436-060-0005(16)(a) (definition of "irregular wage" includes workers who are paid hourly).

OAR 436-060-0025(4), which requires the calculation of a worker's TTD rate to be based on the weekly average of the worker's total earnings for the period up to 52 weeks *before* the date of injury, claimant's earnings on the date of injury (*i.e.*, February 2, 2017) were *not* included in that calculation. (Tr. 21).

Claimant argues that the 52 weeks before his date of injury would include Tuesday, February 2, 2016, and Wednesday, February 3, 2016.<sup>3</sup> However, each full week before his Thursday, February 2, 2017 date of injury runs from a Thursday through a Wednesday. Counting *backwards* from claimant's February 2, 2017 date of injury, the 52nd full week would begin on Thursday, February 4 and end on Wednesday, February 10, 2016. Therefore, the period from February 4, 2016, to (but excluding the date of injury of) February 2, 2017, as used by SAIF, equals exactly 52 weeks.<sup>4</sup>

In sum, based on the foregoing reasoning, SAIF properly calculated claimant's AWW for the purposes of determining his TTD rate. As such, we do not find SAIF's claim processing conduct to be unreasonable, and a penalty and related attorney fee award is not warranted. Consequently, we affirm.

### ORDER

The ALJ's order dated October 6, 2017 is affirmed.

Entered at Salem, Oregon on February 8, 2018

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<sup>3</sup> Despite claimant's counsel's references to "365 days" and "a full year" in questioning SAIF's claim auditor's calculations (Tr. 19, 20), the relevant time period is "52 weeks," as noted above. In any event, we note that 52 weeks equals 364 days (52 weeks multiplied by 7 days per week), and that 2016 was a leap year. *Introduction to Calendars*, United States Naval Observatory.

<sup>4</sup> In *Robert J. Marsh*, 69 Van Natta 408, 414 (2017), we applied another section of OAR 436-060-0025 (section (5)(a), which has since been amended), and rejected the claimant's contention that in calculating his AWW for purposes of determining a TTD rate for a worker who worked less than 52 weeks for the employer before injury, such a calculation must begin with his first day of employment and end with the day of his injury. Rather, we determined that, where the claimant was paid on an hourly basis and had worked less than 52 weeks prior to his injury, under OAR 436-060-0025(5)(a)(A) and (B)(i) (WCD Admin. Order 11-52, eff. April 1, 2011), the carrier was required to apply the claimant's hourly wage at injury to the actual weeks of employment prior to the date of injury, which included both the work week in which he was injured and the work week in which he started working. Because *Marsh* applied a different section of OAR 436-060-0025 (section (5)(a), which has since been amended), our reasoning here does not conflict with that in *Marsh*.