In the Matter of the Compensation of
SCOTT R. PLUMMER, Claimant
WCB Case No. 05-06223, 04-02534, 04-00006
ORDER ON REVIEW
Swanson Thomas & Coon, Claimant Attorneys
James B Northrop, SAIF Corporation, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Brazeau's order that did not increase the rate of claimant's temporary disability benefits. On review, the issue is rate of temporary disability. We reverse.

FINDINGS OF FACT

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

Claimant worked for the employer as a heavy construction worker when he was compensably injured on April 15, 2002. Although claimant had not been "guaranteed" continued employment before this injury, he had worked continuously for the employer from July 2001 until the injury. (Tr. 17).

Since July 2001, claimant worked on several construction projects. For each, he had a separate "Wage and Travel Agreement." (Tr. 20). On the first project, claimant worked four 10-hour days and overtime when required. (Tr. 11). On the second, beginning around April 1, 2002, under a new "Wage and Travel Agreement," he received a different wage, working four 12-hour days and overtime when required. (Tr. 12). At the time of his injury, claimant's wage was $26.43 per hour. (Tr. 13).

The SAIF Corporation based claimant's temporary disability rate on his average weekly wage from the 52 weeks before his injury. Claimant requested a hearing to contest the temporary disability rate.

CONCLUSIONS OF LAW AND OPINION

The ALJ determined that SAIF properly calculated claimant's time loss rate based on his variable wages and hours. *See* OAR 436-060-0025(5)(a)(A). On review, claimant contends that his temporary disability rate should be based on his

"at injury" wages. Alternatively, he asserts that his temporary disability rate is governed by "the intent of the most recent wage earning agreement." We agree with claimant's latter argument, reasoning as follows.

In general, the rate of temporary disability compensation "shall be based on the wage of the worker at the time of injury." ORS 656.210(2)(d)(A); OAR 436-060-0025(1).[1] However, if a worker is "regularly employed, but paid on other than a daily or weekly basis, or employed with unscheduled, irregular, or no earnings," the rate of compensation shall be determined pursuant to OAR 436-060-0025(5).[2]

Claimant first asserts that OAR 436-060-0025(1), rather than OAR 436-060-0025(5), governs determination of his temporary disability rate. For the following reasons, we disagree.

OAR 436-060-0025(5)(a) provides the method for determining temporary disability when a worker is employed "with varying hours, shifts, or wages." Here, for each construction project, claimant had a separate "Wage and Travel Agreement" with the employer. (Tr. 20). On the first project, he worked four 10-hour days and overtime when required. (Tr. 11). On the second project, under a new "Wage and Travel Agreement," claimant received a different wage, working four 12-hour days and overtime when required. *Id.*

Consequently, this record establishes that claimant's wages and hours varied according to his assigned construction project. Accordingly, OAR 436-060-0025(5)(a) governs.

We next address whether subsection (5)(a)(A) or (5)(a)(B) controls the determination of claimant's time loss rate. OAR 436-060-0025(5)(a)(A) provides in pertinent part:

> "Insurers shall use the worker's average weekly earnings with the employer at injury for the 52 weeks prior to the date of injury * * * For workers employed less than

[1] More recent amendments to the rule do not affect our analysis. Accordingly, we continue to refer to the version of the rule that was in effect at the time claimant was injured. *See Tye v. McFetridge,* 342 Or 61, 67 n 5 (2006).

[2] Whether claimant was "regularly employed" as contemplated by ORS 656.210 and OAR 436-060-0025 is not in dispute.

> 52 weeks or where extended gaps exist, insurers shall use the actual weeks of employment (excluding any extended gaps) with the employer at injury or all earnings, if the worker qualifies pursuant to ORS 656.210(2)(b) and OAR 436-060-0035, up to the previous 52 weeks."

OAR 436-060-0025(5)(a)(B)(i) applies when there is 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." (Emphasis added). OAR 436-060-0025(5)(a)(B)(ii) applies when there is "change in the wage earning agreement due to a change of hours worked * * * with or without a pay increase or decrease, during the 52 weeks prior to the date of injury." OAR 436-060-0025(5)(a)(B)(iii) applies when: (1) a wage earning agreement has changed pursuant to subparagraphs (5)(a)(B)(i) or (ii); *and* (2) the worker is "employed less than four weeks" under that changed wage earning agreement.[3]

The court has provided guidance on how to interpret and apply the aforementioned rules. In *Alanis v. Barrett Business Services*, 179 Or App 79, 83 (2002), the court explained that OAR 436-060-0025(5)(a)(A) "provides the general *method* for calculating the benefits" of workers employed seasonally, on call, paid hourly, paid by piece work or with varying hours, shifts or wages. (Emphasis in original).

In contrast, the subparagraphs under (5)(a)(B) "modify that method when there has been *a change in the wage earning agreement*." *Id.* at 84 (emphasis added). The court explained that each subparagraph under (5)(a)(B) "describes a different type of change in the wage earning agreement and explains how the calculation of the average weekly wage described in subparagraph (5)(a)(A) is to be adjusted." *Id.*; *see also Concrete Cutting Co. v. Clevenger*, 191 Or App 157, 162-163 (2003) (in addition to the general principle under OAR 436-060-0025(1), subsection (5) of the rule "also sets forth variations of this formula to be applied to a number of defined situations (*i.e.*, where there has been a change in the wage earning agreement during the 52-week period)").

Here, claimant's wage earning agreement changed during the 52 week period preceding the date of injury. Specifically, some two weeks before his injury, claimant's wages were increased to $26.43 per hour, and his weekly work schedule changed to four 12-hour days. (Ex. A; Tr. 20, 22). Under these

[3] Only the first three subparagraphs under subsection (5)(a)(B) are possibly applicable here because subparagraph (5)(a)(B)(iv) involves an occupational disease claim, not an injury claim.

circumstances, OAR 436-060-0025(5)(a)(B)(i) does not apply because, in addition to a change in claimant's pay, his hours changed. Instead, we find that such changes in wages and hours implicate OAR 436-060-0025(5)(a)(B)(ii), which contemplates both a change in hours and in pay.

However, claimant only worked under this changed wage earning agreement for two weeks. (Tr. 10, 31). As previously noted, OAR 436-060-025(5)(a)(B)(iii) applies where the wage earning agreement has changed under subparagraph (5)(a)(B)(i) or (ii) and the worker is employed less than four weeks. It further directs that, when the worker is "employed less than four weeks" under that changed wage earning agreement, a worker's average weekly wage is based on "the intent of the most recent wage earning agreement as confirmed by the employer and the worker."

Here, under the "most recent" wage earning agreement effective April 1, 2002, the employer increased claimant's hourly wage to $26.43. (Ex. A). Both claimant and the employer testified that, under this agreement, claimant was paid $26.43 per hour. (Tr. 11, 32). In addition, claimant testified, and the employer corroborated, that it was their understanding and agreement that claimant would work four 12-hour days (*i.e.*, 48 hours per week) on the second construction project. (Tr. 11, 33). Under these facts, we conclude that claimant's time loss rate must be based on $26.43 per hour, working 48 hours per week.

SAIF acknowledges that claimant signed a "new wage and travel agreement with each project," at varying hourly wages. Nonetheless, SAIF argues that OAR 436-060-0025(5)(a)(B) does not apply because "the overall wage earning agreement—*i.e.*, the understanding that claimant would be paid the prevailing wage under the Davis-Bacon Act—remained the same." (Resp. Br., p. 3). However, as noted above, subparagraph (5)(a)(B)(ii) applies to "changes" in "hours worked" with or without a pay increase or decrease. Here, there was a change in "hours worked" and a "pay increase." Furthermore, (5)(a)(B)(iii) applies because the circumstances in subparagraph (5)(a)(B)(ii) are present *and* claimant was "employed less than four weeks" under that changed wage earning agreement. Accordingly, we reject SAIF's assertion that OAR 436-060-0025(5)(a)(B) does not apply.

Finally, we distinguish *Garcia v. SAIF*, 194 Or App 504 (2004). In *Garcia*, the court applied OAR 436-060-0025(5)(a)(A) to the issue of whether the claimant's separate employment agreements gave rise to "new" employment, and whether there were "extended gaps" as contemplated by subparagraph (5)(a)(A). *Id.* at 509.

The court determined that signing different agreements did not constitute "new" employment such that the claimant worked for the employer for fewer than two weeks before his injury. *Id.* The court also determined that the "gaps" in the claimant's employment were not "extended gaps" such that the calculation of the claimant's temporary disability rate should be based on the actual weeks worked rather than on an average based on the 52 weeks prior to the date of injury. *Id.* at 509.

Unlike *Garcia*, the issue here is not whether the changed wage-earning agreement was a "new" agreement such that the "less than 52 weeks or where extended gaps exist" language under subparagraph (5)(a)(A) applied. Instead, the issue is whether a change in the wages and hours of claimant's wage earning agreement two weeks before his compensable injury implicate OAR 436-060-0025(5)(a)(B)(ii) and (iii). As explained above, the changes in claimant's wages and hours two weeks before his injury satisfy both the "change of hours worked * * * with [] a pay increase" consistent with OAR 436-060-0025(5)(a)(B)(ii), as well as the "employed less than four weeks under a changed wage earning agreement" condition of (5)(a)(B)(iii). We, therefore, do not find *Garcia* controlling.

In sum, pursuant to OAR 436-060-0025(5)(a)(B)(ii) and (iii), we conclude that claimant's temporary disability rate must be based on a rate of $26.43 per hour and 48 hours per week. Accordingly, we reverse this portion of the ALJ's order. Because our order results in increased compensation, claimant's counsel is entitled to an "out-of-compensation" attorney fee equal to 25 percent of the increased temporary disability compensation created by this order, not to exceed $5,000, payable directly to claimant's counsel. ORS 656.386(2); OAR 438-015-0055(1).

ORDER

The ALJ's order dated January 26, 2007, as reconsidered on March 16, 2007, is reversed in part and affirmed in part. Claimant's rate of temporary disability shall be based on an hourly rate of $26.43 and 48 hours per week. For services at hearing and on review, claimant's attorney is awarded 25 percent of the increased compensation resulting from this order, not to exceed $5,000, payable directly to claimant's counsel. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on April 22, 2008