



Oregon

Kate Brown, Governor

Department of Consumer and Business Services
Workers' Compensation Division
350 Winter St. NE
P.O. Box 14480
Salem, OR 97309-0405
1-800-452-0288, 503-947-7810
www.wcd.oregon.gov

Feb. 22, 2018

Notice of Temporary Changes to Workers' Compensation Rules

Caption: Vocational assistance eligibility; weekly wage determination if multiple jobs held at time of injury

The Workers' Compensation Division has adopted temporary changes to OAR 436-120, Vocational Assistance, to be **effective** Feb. 23, 2018 through Aug. 21, 2018.

Summary of changes:

Revised rule 0147:

- Describes the process for determining a worker's weekly wage when the worker held multiple jobs at the time of injury, to reflect the Court of Appeal's decision in [Chu v. SAIF 290 Or App 194 \(2018\)](#);
- Clarifies that the adjusted weekly wage must consider the total of all of the weekly wages from section (3) of the rule; and
- Clarifies which version of OAR 436-060-0025 should be used when determining the weekly wage.

Need for the Temporary Rule(s): Temporary rules are needed because the Court of Appeals found that certain provisions in OAR 436-120-0147 are inconsistent with statute.

Documents Relied Upon, and where they are available: [Chu v. SAIF 290 Or App 194 \(2018\)](#). This document is available on the Oregon Judicial Department's website. It is also available for public inspection upon request to the Workers' Compensation Division, 350 Winter Street NE, Salem, Oregon 97301-3879. Please contact Fred Bruyns, rules coordinator, 503-947-7717, fred.h.bruyns@oregon.gov.

Justification of Temporary Rule(s): Failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned. The Court of Appeals found parts of OAR 436-120-0147 to be inconsistent with statute, and specifically that a worker's regular employment at the time of injury includes all jobs held at the time of injury, not just the job where the injury occurred. Until the rule is revised to reflect the Court's findings, insurers and other stakeholders are likely to apply the existing rule and therefore fail to provide some vocational services required under ORS 656.340. Also, application of the existing rule would probably result in litigation, as workers would dispute insurers' vocational eligibility determinations that ignored income from other jobs held at the time of injury.

The agency finds that issuing temporary rules under ORS 183.335(5) is appropriate because the Court of Appeals decision has immediate effect, and parts of OAR 436-120-0147 are now inconsistent with ORS 656.340.

The agency finds that issuing permanent rules under ORS 183.335(2) and (3) is not appropriate because during the time required to promulgate a permanent rule, OAR 436-120-0147 would remain in conflict with ORS 656.340. Continued application of the current rule could result in harm to workers who hold multiple jobs at the time of injury, as well as increased litigation regarding vocational eligibility determinations that ignored income from other jobs held at the time of injury.

/s/ *Louis Savage*
Authorized Signer

Louis Savage
Printed name

Feb. 22, 2018
Date



Vocational Assistance to Injured Workers Temporary Oregon Administrative Rules Chapter 436, Division 120

Effective Feb. 23, 2018

Summary of changes effective Feb.23, 2018:

Revised rule 0147:

- Describes the process for determining a worker's weekly wage when the worker held multiple jobs at the time of injury, to reflect the Court of Appeal's decision in [Chu v. SAIF 290 Or App 194 \(2018\)](#);
- Clarifies that the adjusted weekly wage must consider the total of all of the weekly wages from section (3) of the rule; and
- Clarifies which version of OAR 436-060-0025 should be used when determining the weekly wage.

NOTE: Revisions are marked as follows: [new text](#) | ~~deleted text~~.

436-120-0147 Establishing the Adjusted Weekly Wage

(1) General provisions.

- (a) To determine a suitable wage the insurer must first establish the adjusted weekly wage as described in this rule.
- (b) The insurer must calculate the adjusted weekly wage whenever determining or redetermining a worker's eligibility for vocational assistance.
- (c) All figures used in determining a weekly wage by this method must be supported by verifiable documentation such as the worker's state or federal tax returns, payroll records, or reports of earnings or unemployment insurance payments from the Oregon Employment Department.

(2) Definitions.

For the purposes of this rule, the following definitions apply:

- (a) "Adjusted weekly wage" is the wage currently paid as calculated under this rule.
- (b) "Cost-of-living adjustments" or "collective bargaining adjustments" are increases or decreases in the wages of all workers performing the same or similar jobs for a specific employer. These adjustments are not variations in wages based on skills, merit, seniority, length of employment, or number of hours worked.

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
VOCATIONAL ASSISTANCE TO INJURED WORKERS**

(c) "Earned income" means gross wages, salary, tips, commissions, incentive pay, bonuses, and the reasonable value of other consideration (such as housing, utilities, and food) received from all employers for services performed from all jobs held at the time of injury or aggravation. Earned income also means gross earnings from self-employment after deductions of business expenses excluding depreciation. Earned income does not include fringe benefits such as medical, life, or disability insurance, employer contributions to pension plans, or reimbursement of the worker's employment expenses such as mileage or equipment rental.

(d) "Job at aggravation" means the job or jobs the worker held on the date of the aggravation claim or, for a worker not employed at the time of aggravation, the last job or concurrent jobs held before the aggravation. Volunteer work does not constitute a job for purposes of this subsection.

(e) "Job at injury" is the job on which the worker originally sustained the compensable injury. For an occupational disease, the job at injury is the job the worker held at the time there is medical verification that the worker is unable to work because of the disability caused by the occupational disease.

(f) "Permanent employment" is a job with no projected end date or a job that had no projected end date at the time of hire. Permanent employment may be year-round or seasonal.

(g) "Permanent, year-round employment" is permanent employment in which the worker worked or was scheduled or projected to work in 48 or more calendar weeks a year. Paid leave is counted as work time. Permanent year-round employment includes trial service. It does not include employment with an annual salary set by contract or self-employment.

(h) "Temporary disability" means wage loss replacement for the job at injury.

(i) "Time of injury" means, in the case of an injury, the date of injury or, in the case of an occupational disease, the time there is medical verification that the worker is unable to work because of the disability caused by the occupational disease.

~~(j)~~ (j) "Trial service" is employment designed to lead automatically to permanent, year-round employment subject only to the employee's satisfactory performance during the trial service period.

(3) Determining weekly wage.

The insurer must determine the nature of the job at injury and any other jobs held at the time of injury, or the job or jobs at aggravation, by contacting the employer or employers to verify the worker's employment status.

(a) When the job at injury or any other jobs held at the time of injury, or the job at aggravation was seasonal or temporary~~temporary or seasonal~~, calculate the worker's average weekly wage as follows, then convert to the adjusted weekly wage as described in section (4) of this rule:

(A) When the worker's regular employment is the job at **injury** and the worker did not hold more than one job at the time of injury, and did not receive unemployment

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
VOCATIONAL ASSISTANCE TO INJURED WORKERS**

insurance benefits during the 52 weeks before the injury, the worker's average weekly wage is the same as the wage upon which temporary disability is based.

(B) When the worker's regular employment is the job at **aggravation** and the worker did not hold more than one job at the time of aggravation, and did not receive unemployment insurance benefits during the 52 weeks before the aggravation, the worker's average weekly wage is calculated using the same methods used to calculate temporary disability as described in [the version of OAR 436-060-0025 that was in effect on the date of injury](#).

(C) If the worker held **more than one job** at the time of ~~the~~ injury or aggravation, and did not receive unemployment insurance payments during the 52 weeks before the date of the injury or aggravation, divide the worker's earned income by the number of weeks the worker worked during the 52 weeks before the date of injury or aggravation.

(D) If the worker held **one or more jobs** at the time of ~~the~~ injury or aggravation, and received unemployment insurance payments during the 52 weeks before the date of the injury or aggravation, combine the earned income with the unemployment insurance payments and divide the total by the number of weeks the worker worked and received unemployment insurance payments during the 52 weeks before the date of the injury or aggravation.

(b) When the job at **injury** was **not seasonal or temporary** [and the worker did not hold more than one job at the time of injury](#), use the weekly wage upon which temporary disability was based, and then convert the weekly wage to the adjusted weekly wage as described in section (4) of this rule.

[\(c\) When the job at injury was not seasonal or temporary and the worker held more than one job at the time of injury and the job\(s\) were also not seasonal or temporary, the worker's average weekly wage for each of those jobs is calculated using the same methods used to calculate temporary disability as described in the version of OAR 436-060-0025 that was in effect on the date of injury, and then converting to the adjusted weekly wage as described in section \(4\) of this rule.](#)

[\(ed\)](#) When the job at **aggravation** was **not seasonal or temporary**, the worker's average weekly wage [for each job at aggravation](#) is calculated using the same methods used to calculate temporary disability as described in [the version of OAR 436-060-0025 that was in effect on the date of injury-OAR 436-060-0025](#), and then converting to the adjusted weekly wage as described in section (4) of this rule.

(4) Adjusted weekly wage.

After arriving at the worker's weekly wage under section (3), establish the adjusted weekly wage by determining the percentage increase or decrease from the date of injury or aggravation, or last day worked before aggravation, to the date of calculation, as follows:

(a) Contact the employer at injury regarding any cost-of-living or collective bargaining adjustments for workers performing the same job. Adjust the [total of all of the](#) weekly wages [from section \(3\)](#) by any percentage increase or decrease;

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
VOCATIONAL ASSISTANCE TO INJURED WORKERS**

(b) If the employer at injury is no longer in business and the worker's job was covered by a union contract, contact the applicable union for any cost-of-living or collective bargaining adjustments. Adjust the [total of all of the](#) weekly wages [from section \(3\)](#) by the percentage increase or decrease;

(c) If the employer at injury is no longer in business or does not currently employ workers in the same job category, adjust the [total of all of the](#) weekly wages [from section \(3\)](#) by the appropriate factor from the cost-of-living matrix in Bulletin 124;

(d) If the worker's regular employment was the employment the worker held at the time of aggravation, adjust the [total of all of the](#) weekly wages [from section \(3\)](#) by the appropriate factor from the cost-of-living matrix in Bulletin 124.

Statutory authority: ORS 656.340(9), ORS 656.726(4)

Statutes implemented: ORS 656.340(5) and (6)

Hist: Amended and renumbered 11/28/16 from 436-120-0007, as Admin. Order 16-058, eff. 1/1/17

[Amended 2/22/18 as Admin. Order 18-051, eff. 2/23/18](#)

See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.