



Oregon

Kate Brown, Governor

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Workers' Compensation Division
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May 25, 2018

Proposed Changes to Workers' Compensation Rules

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

The Workers' Compensation Division proposes changes to OAR 436-120, Vocational Assistance to Injured Workers

When is the hearing?

June 21, 2018, 10 a.m.

Where is the hearing?

Portland State Office Building, Room 1C (first floor)
800 NE Oregon St, Portland, OR 97232

How can I make a comment?

Come to the hearing and speak, send written comments, or do both. Send written comments to:

Email – fred.h.bruyns@oregon.gov

Fred Bruyns, rules coordinator

Workers' Compensation Division

350 Winter Street NE (for courier or in-person delivery)

PO Box 14480, Salem, OR 97309-0405

Fax – 503-947-7514

The public may also listen to the hearing or testify by telephone: Dial-in number is 1-213-787-0529; Access code is 9221262#.

The closing date for written comments is June 26, 2018.

How can I get copies of the proposed rules and view testimony?

On the Workers' Compensation Division's website –

<http://wcd.oregon.gov/laws/Pages/proposed-rules.aspx>.

Or call 503-947-7717 to get free paper copies

Questions?

Contact Fred Bruyns, 503-947-7717.

Auxiliary aids for persons with disabilities are available upon advance request.

Summary of proposed changes:

- Revised rule 0003 explains that if an eligibility decision involves OAR 436-120-0147(3)(b)(B), the director’s decisions under OAR 436-120-0008 regarding eligibility will rely on OAR 436-120-0147(3)(b)(B) in effect on the date of the director’s order.
- Revised rule 0147:
 - Requires the insurer to make a reasonable calculation of the worker’s weekly wage based on verifiable documentation available when they are unable to obtain complete information to calculate the weekly wage under section (3) of the rule if the worker provides verifiable documentation to establish wages at the time of injury.
 - Indicates that secondary jobs do not need to be subject employment.
 - Indicates volunteer work is not a job for purposes of the adjusted weekly wage calculation.
 - Describes the process for determining a worker’s weekly wage when the worker held multiple jobs at the time of injury, which reflects 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
 - Explains that, when the weekly wage calculation requires reliance on OAR 436-060-0025, it is the OAR 436-060-0025 that was in effect on the date of injury.

The agency requests public comment on whether other options should be considered for achieving the rule’s substantive goals while reducing the negative economic impact of the rule on business.

Need for the Rule(s): Rule changes are needed primarily because 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. The agency adopted temporary rule changes, effective Feb. 23, 2018, to reflect the Court’s decision. Permanent changes to the rules must be adopted by or before Aug. 21, 2018, when the temporary rule will expire. Some additional changes described in the summary above are needed to improve application of the rules governing vocational assistance, consistent with the requirements of ORS 656.340.

Documents Relied Upon, and where they are available: Rulemaking advisory committee records. These documents are 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.

Fiscal and Economic Impact: The agency projects that proposed rule changes will not substantially increase or decrease costs to the agency. Possible economic effects, if any, on other state agencies, units of local government, and the public are described below under “Statement of Cost of Compliance.”

Statement of Cost of Compliance:

1. Impact on state agencies, units of local government and the public (ORS 183.335(2)(b)(E)):

a. State agencies: The agency estimates that proposed rule changes will not increase or decrease costs to state agencies.

b. Units of local government: The agency projects proposed rule changes will have some cost impacts for units of local government that are self-insured employers or part of self-insured employer groups. These effects are described under “The public” below.

c. The public: References to “insurers” below includes self-insured employers and self-insured employer groups. The agency estimates that proposed rule changes will affect costs to the public as follows:

The insurer will find a worker ineligible for vocational assistance if the worker has the necessary physical capacities, knowledge, skills, and abilities to be employed in suitable employment. Whether employment is “suitable” may depend on wages available in the marketplace relative to the worker’s weekly wage at the time of injury. A worker with multiple jobs at the time of injury is less likely to be able to return to work at a suitable wage, and therefore more likely to be found eligible for vocational assistance. Consistent with the Court of Appeals decision in [Chu v. SAIF 290 Or App 194 \(2018\)](#), the proposed rules will require consideration of wages from all jobs at the time of injury, and therefore may increase the number of workers who will be found eligible for vocational assistance services. This will benefit affected workers. Insurers will assume the costs of increased services. Vocational services are normally facilitated by registered vocational assistance providers, and increases in vocational eligibility should provide an economic benefit for these providers. Also, increases in training provided should produce an economic benefit for training providers.

The agency has limited data with which to forecast how many additional workers will be found eligible for vocational assistance when wages for all jobs held at the time of injury are considered, i.e., how often the determination whether “suitable employment” is available will depend on whether the worker held multiple jobs. The agency does have data showing which claimants have received supplemental disability awards – four to five additional workers could have a different eligibility evaluation outcome given their secondary employment each year. In an April 2018 study, the Employment Department found that 5.7 percent of Oregonians held two or more jobs at any one time. This estimate of 5.7 percent having multiple jobs produces an estimate of five to seven additional workers who could have a different eligibility evaluation outcome given their secondary employment each year. Therefore, the two methods provide similar estimates, and four to seven additional workers could have multiple wages that now must be considered for determining eligibility for vocational assistance.

We suspect some of the four to seven workers will still be found ineligible for vocational retraining despite inclusion of their secondary employment in the eligibility evaluation. But, the number of these workers who would still be found ineligible is unclear. As such, we use the value of four to seven additional vocational retraining programs in an effort to estimate maximum fiscal impact.

If a worker is found eligible to receive vocational services there will be payments for direct worker purchases and professional rehabilitation services. The worker will also receive temporary disability benefits while engaged in vocational retraining. Our data indicates the average vocational assistance payments for direct worker purchases and professional rehabilitation services is approximately \$11,625 per eligible worker. In addition, temporary disability payments made during vocational training is, on average, about \$35,150 per eligible worker. Based on these averages, overall costs are estimated at \$187,100 to \$327,400 if the 4 to 7 additional workers who had a different eligibility evaluation were ultimately found eligible for vocational services.

This fiscal impact estimate is thought to be high since the 4 to 7 workers may not ultimately be found eligible for vocational benefits, even with the inclusion of their other employment. In addition, our data shows only 20 percent of those who are found eligible ultimately receive temporary disability benefits, suggesting some of these workers choose not to engage in vocational services. Since some of these costs may still be realized to the system due to the engagement of settlement over pursuit of vocational retraining, we erred on the side of including the temporary disability exposure for all of the additional workers who may become potentially eligible for vocational retraining in light of the recent Court decision and rule changes.

2. Cost of compliance effect on small business (ORS 183.336):

a. Estimate the number of small businesses and types of business and industries with small businesses subject to the rule:

Although workers' compensation insurers tend to be large employers and not small businesses as defined by ORS 183.310, claims costs ultimately affect premiums charged to Oregon employers to cover their workers. Oregon has more than 116,000 employers, and a substantial majority of these employers are small businesses.

Approximately 50 registered vocational providers assist workers in returning to work. We estimate that more than 80 percent of these providers are small businesses.

The agency does not have data on the size or number of businesses providing training to injured workers, but training is provided by businesses of varying size, including small businesses.

b. Projected reporting, recordkeeping and other administrative activities required for compliance, including costs of professional services:

Vocational providers and training facilities may experience increased reporting and administrative activities required for compliance; however, insurers will pay these businesses for their services.

c. Equipment, supplies, labor and increased administration required for compliance:

Vocational providers and training facilities may use additional equipment, supplies, labor, and provide increased administration required for compliance; however, insurers will pay these businesses for their services.

How were small businesses involved in the development of this rule? The agency sent a request for rulemaking advisory committee members and agenda topics to about 3,500 stakeholders, including all registered vocational providers. Many of the stakeholders on the agency's mailing list are small businesses.

Administrative Rule Advisory Committee consulted?: Yes

/s/ Louis Savage
Authorized Signer

Louis Savage
Printed name

May 25, 2018
Date

Mailing distribution: US Mail, WCD – S, U, AT, CE, EG, NM, PW, RE, VR | agency email lists



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

Proposed

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

436-120-0003 General Provisions

(1) Purpose of these rules.

The purpose of the rules in OAR 436-120 is to:

- (a) Prescribe uniform standards for determining eligibility, delivery, and payment for vocational services to injured workers;
- (b) Prescribe procedures for resolving disputes; and
- (c) Establish standards for the certification of counselors and providers.

(2) Applicability of rules.

- (a) These rules govern vocational assistance under the workers' compensation law on or after the effective date of these rules except as OAR 436-120 otherwise provides.
- (b) [Except as outlined below, the director's decisions under OAR 436-120-0008 regarding eligibility will be based on the rules in effect on the date the insurer issued the notice. If an eligibility decision involves the weekly wage under OAR 436-120-0147\(3\)\(b\)\(B\), the director's decisions under OAR 436-120-0008 regarding eligibility will rely on OAR 436-120-0147\(3\)\(b\)\(B\) in effect on the date of the director's order.](#) The director's decisions regarding the nature and extent of assistance will be based on the rules in effect at the time the assistance was provided. If the director orders future assistance, such assistance must be provided in accordance with the rules in effect at the time assistance is provided.
- (c) Under these rules a claim for aggravation or reopening a claim to process a newly accepted condition is considered a new claim for purposes of vocational assistance eligibility and vocational assistance, except as otherwise provided in these rules.

(3) Director's discretion.

- (a) The director may waive procedural rules as justice requires, unless otherwise obligated by statute.
- (b) If the worker has returned to work with the employer at injury, the director reserves the right to verify whether the employment is suitable.

(4) Submitting documents or information, calculating time.

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- (a) Documents or information required under these rules to be submitted to the division may be submitted in any of the following ways:
- (A) Mailed to the division's mailing address with sufficient postage and placed in the custody of the U.S. Postal Service;
 - (B) Physical delivery to the division's Salem office;
 - (C) Faxed, if the document transmitted indicates it has been delivered by fax, is sent to the correct fax number, and indicates the date it was sent; or
 - (D) Any other method authorized by the director.
- (b) Timeliness of any document required by these rules to be submitted to the division is determined as follows:
- (A) If a document is mailed, it will be considered submitted on the date it is postmarked.
 - (B) If a document is faxed, it must be received by 11:59 p.m. Pacific Time to be considered submitted on that date.
 - (C) If a document is delivered, it must be delivered during regular business hours and marked as received to be considered submitted on that date.
- (c) Time periods allowed under these rules are calculated in calendar days. The first day is not included. The last day is included unless it is a Saturday, Sunday, or legal holiday. In that case, the period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday. Legal holidays are those listed in ORS 187.010 and 187.020.

(5) Availability of forms.

The forms and bulletins referenced in these rules are available on the division's website at wcd.oregon.gov.

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

Statutes implemented: ORS 656.206, 656.340

Hist: Amended 10-3-2012 as Admin. Order 12-059, eff. 11-1-2012

Amended 11/28/16 as Admin. Order 16-058, eff. 1/1/17

[Amended xx/xx/xx as Admin. Order 18-XXX, eff. xx/xx/xx](#)

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

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.

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(d) If the insurer is unable to obtain complete information to calculate the weekly wage under section (3) of this rule, but the worker does provide verifiable documentation to establish wages at the time of injury, the insurer must make a reasonable calculation of the worker's weekly wage based on the verifiable documentation available.

(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.
- (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. The job does not need to be subject employment. Volunteer work ~~does not constitute~~ is not 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. Volunteer work is not a job for purposes of this subsection.
- (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.

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(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 paid jobs held at the time of injury, or the job or jobs at aggravation. The method the insurer uses to determine the nature of the job(s) must include but may not be limited to ~~by~~ contacting the employer or employers to verify the worker's employment status.

(a) When the job at injury or any other paid 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 insurance benefits during the 52 weeks before the injury, ~~the worker's average weekly wage is~~ use the same ~~as the~~ wage upon which temporary disability ~~is~~ was 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~~ use the same methods used to calculate temporary disability as described ~~in~~ under OAR 436-060-0025 that was in effect on the date of injury.

(C) ~~If~~ When 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 in those jobs during the 52 weeks before the date of injury or aggravation.

(D) ~~If~~ When 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 in those jobs and received unemployment insurance payments during the 52 weeks before the date of the injury or aggravation.

(b) When subsection (a) of this rule does not apply, calculate the worker's 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 ~~the job at injury was not seasonal or temporary~~, use the weekly same wage upon which temporary disability was

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based, ~~and then convert the weekly wage to the adjusted weekly wage as described in section (4) of this rule.~~

(B) When the worker's regular employment is the **job at injury** and the worker held **more than one job** at the time of injury, use the same methods used to calculate temporary disability as described under OAR 436-060-0025 that was in effect on the date of injury. The job does not need to be subject employment. Volunteer work is not a job for purposes of this paragraph.

(C) ~~(e)~~ When the worker's regular employment is the **job at aggravation**, ~~When the job at **aggravation** was **not seasonal or temporary**,~~ the worker's average weekly wage is calculated using ~~use~~ the same methods used to calculate temporary disability as described ~~in~~ under 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) of this rule, 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) of this rule by any percentage increase or decrease;
- (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) of this rule 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) of this rule 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) of this rule 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

Amended xx/xx/xx as Admin. Order 18-XXX, eff. xx/xx/xx

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