

# Agenda

## Rulemaking Advisory Committee

Workers' Compensation Division Rules  
OAR chapter 436, division 120, rules 0003 & 0147

Changing the General Provisions after [Chu v. SAIF, 290 Or App 194 \(2018\)](#) and addressing issues for Establishing the Adjusted Weekly Wage

<b>Type of meeting:</b>	Rulemaking advisory committee
<b>Date, time, &amp; place:</b>	April 30, 2018, 1:30 p.m., Pacific Daylight Time Durham Plaza, 16760 SW Upper Boones Ferry Rd, Tigard, Oregon 97224, Training Room (ground floor) <b>Join meeting from your computer, tablet or smartphone:</b> <a href="https://global.gotomeeting.com/join/155801389">https://global.gotomeeting.com/join/155801389</a> <b>You can also dial in using your phone:</b> United States (Toll Free): 1 866 899 4679 United States: +1 (312) 757-3117 <b>Access Code: 155-801-389</b> First GoToMeeting? Let's do a quick system check: <a href="https://link.gotomeeting.com/system-check">https://link.gotomeeting.com/system-check</a>
<b>Facilitators:</b>	Fred Bruyns and Julia Hier, Workers' Compensation Division
<b>1:30 to 1:40</b>	Welcome and introductions; meeting objectives; timeline
<b>1:40 to 3:00</b>	Review and discuss issues – <a href="#">attached</a>
<b>3:00 to 3:15</b>	Break
<b>3:15 to 3:55</b>	Discussion continued
<b>3:55 to 4:00</b>	Summing up – thank you!

Attached: [Rulemaking timeline](#)  
[Issues document](#)

**Timeline for rulemaking  
OAR 436-120**

***Actual***

Temporary rules effective .....2/23/18  
Permanent rulemaking begins (to replace temporary rules).....2/23/18  
Request for advisory committee members and agenda items .....3/5/18  
Advisory committee meeting (scheduled) .....4/30/18

***Projected (may change)***

File proposed rules with Secretary of State and publish .....mid-May 2018  
Public rulemaking hearing..... middle to end of June 2018  
Closing date for written testimony .....several days after hearing  
File final rules with Secretary of State and publish.....mid-July 2018  
Permanent rules effective (day after expiration of temporary rules).....8/22/18

**OAR 436-120-0003 &  
OAR 436-120-0147**  
**Vocational Assistance to Injured Workers**  
**General Provisions & Establishing the Adjusted Weekly Wage**  
Issues Document  
For advisory committee meeting on 4/30/18

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**GENERAL BACKGROUND**

The purpose of this rulemaking meeting is to discuss the calculation of the worker's adjusted weekly wage for the purpose of determining vocational eligibility and benefits. Of note, one of the criteria for vocational eligibility is whether the worker has the necessary physical capacities, knowledge, skills, and abilities to be employed in a job with a wage of at least 80% of the "adjusted weekly wage." If the worker is found eligible for vocational benefits, the adjusted weekly wage also becomes relevant in trying to return the worker to employment which is as close as possible to their regular employment, which includes looking at the adjusted weekly wage. It is important to recognize this adjusted weekly wage is separate from the wage which is used to calculate a worker's temporary disability benefits.

Consistent with ORS 656.340(5)(b)(B)(iii), the calculation method for determining the *adjusted* weekly wage in the vocational rules is, in part, dictated by whether or not the worker's regular employment was seasonal or temporary. It also depends on whether the worker had one job at the time of injury or aggravation, more than one job, and if they received unemployment benefits.

The chart outlined below details the different calculation methods which are described in OAR 436-120-0147.

Prior to February 23, 2018, our rule provided that when a worker held *more than one job* at the time of injury, and the worker's employment was *not seasonal or temporary*, *only the job at injury was looked at* to establish the weekly wage. In [Chu v. SAIF, 290 Or App 194 \(2018\)](#), the court found a worker's employment at the time of injury includes all jobs held at the time of injury. After the court's decision in *Chu v. SAIF*, we issued a [temporary rule](#) on February 23, 2018. This temporary rule described the process for determining a worker's weekly wage when the worker held multiple jobs at the time of injury, it clarified that the adjusted weekly wage must consider the total of all of the weekly wages from section (3) of the rule, and it clarified which version of OAR 436-060-0025 should be used when determining the weekly wage.

The temporary rule will expire on August 21, 2018. The Division must therefore implement new rules which comply with statute.

Currently, our [temporary rule](#) provides the following methods for calculating the worker's weekly wage, which is then adjusted under (4) of the rule:

<b><u>Regular employment</u></b>	<b><u>Seasonal or temporary</u></b>	<b><u>Not seasonal or temporary</u></b>
<b>One job at injury, no unemployment benefits</b>	Same as wage upon which temporary disability is based	Use the weekly wage upon which temporary disability was based
<b>One job at aggravation, no unemployment benefits</b>	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	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
<b>More than one job at injury, no unemployment benefits</b>	Divide the worker’s earned income by the number of weeks the worker worked during the 52 weeks before the date of injury	For each job use 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 <b>Note:</b> The last permanent rule (i.e. prior to <i>Chu v. SAIF</i> ) only looked at the weekly wage upon which temporary disability was based.
<b>More than one job at aggravation, no unemployment benefits</b>	Divide the worker’s earned income by the number of weeks the worker worked during the 52 weeks before the date of aggravation	For each job use 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
<b>One or more jobs at injury or aggravation , w/ unemployment benefits</b>	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	Unemployment insurance payments are not included in the wage calculation when the job at injury or aggravation is not seasonal or temporary.  For one job at injury: use the weekly wage upon which temporary disability was based.  For more than one job at injury, or for one or more jobs at aggravation, use 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.

## **ISSUE #1**

**Rule:** 120-0147(3)(c)

**Issue:** If a worker’s work at the time of injury is not seasonal or temporary, and the worker is employed in more than one job at the time of injury, what should we use as the calculation method for their average weekly wage? Under the temporary rule, for each of the jobs we use 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.

### **Options:**

- Adopt the general calculation methods which are currently being used in the temporary rule.
- Other

**Fiscal Impacts, including cost of compliance for small business:**

### **Recommendation:**

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## **ISSUE #2**

**Rule:** 120-0147(1)(d)  
120-0147(3)

**Issue:** When looking at the statute relating to the *rate of temporary disability*, it allows a worker to receive supplemental disability benefits for earnings the worker was receiving from all “subject employment.” ORS 656.210(2)(a)(B). But, in reviewing the statute relating to *vocational benefits*, it references “regular employment” as the employment the worker held at the time of injury or claim for aggravation. ORS 656.340(5). This means a worker may be denied supplemental disability benefits because their secondary job was not “subject employment”, but that secondary job should be looked at when analyzing entitlement to vocational benefits. To avoid confusion, should our vocational rules clarify, where applicable, that earnings from non-subject employment should be looked at when analyzing entitlement to vocational benefits?

### **Options:**

- Clarify in the rule that earnings from non-subject employment from secondary jobs does get included in the calculation
- Do not provide this clarification in the rule
- Other

**Fiscal Impacts, including cost of compliance for small business:**

**Recommendation:**

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**ISSUE #3**

**Rule:** 120-0147(3)

**Issue:** Statute indicates “suitable employment” means “employment that produces a weekly wage within 20 percent of that currently being paid for employment that was the worker’s regular employment...” Consistent with that definition, we define the “job at aggravation” to mean “the job or jobs the worker held on the date of the aggravation claim...” We also state that volunteer work does not constitute a job under that subsection of the rule. Should we similarly articulate in the rule that, when analyzing jobs at injury, and other jobs held at the time of injury, volunteer work is not included in the calculation of the worker’s weekly wage?

**Options:**

- Articulate in the rule that, when analyzing jobs at injury, and other jobs held at the time of injury, volunteer work is not included in the calculation of the worker’s weekly wage
- Other

**Fiscal Impacts, including cost of compliance for small business:**

**Recommendation:**

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**ISSUE #4**

**Rule:** 120-0147(3)(a)

**Issue:** Under ORS 656.340(6)(b)(B)(iii), if the worker’s regular employment was seasonal or temporary, the worker’s wage shall be averaged based on a combination of the worker’s earned income and any unemployment insurance payments. In [Chu v. SAIF, 290 Or App 194 \(2018\)](#) the court found 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.

Our prior permanent rule articulated calculation methods for seasonal or temporary employment under OAR 436-120-0147(3)(a). The rule explained, “[w]hen the job at injury or the job at aggravation was seasonal or temporary, calculate the worker’s average weekly wage as follows...” Should we add additional language to clarify that these

calculation methods also apply if the other paid jobs held at the time of injury were seasonal or temporary?

**Options:**

- Clarify that the seasonal/temporary calculation methods apply when other paid jobs held at the time of injury are seasonal or temporary
- Other

**Fiscal Impacts, including cost of compliance for small business:**

**Recommendation:**

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**ISSUE #5**

**Rule:** 120-0147(3)  
120-0147(2)(i)

**Issue:** *Chu v. SAIF* found 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 job at injury, on an injury claim, is the job on which the worker originally sustained the compensable injury. If the worker has an occupational disease, it 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. This may or may not be the same date as the date of injury.

Given the opinion in *Chu v. SAIF*, should we amend the rule to require the insurer to not only look at the nature of the job at injury, but also look at the nature of any other paid jobs held at the time of injury? Should we also continue to define what “time of injury” means, as we did in the temporary rule? The temporary rule explains “‘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.”

**Options:**

- Adopt the language in the temporary rule on this issue, therefore clarifying the need to look at the nature of any other paid jobs held at the time of injury, while also defining what time of injury means
- Other

**Fiscal Impacts, including cost of compliance for small business:**

**Recommendation:**

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## ISSUE #6

**Rule:** 436-120-0147(3)(b)

**Issue:** The last permanent rule states the following:

When the job at **injury** was **not seasonal or temporary**, 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.

Given the opinion in *Chu v. SAIF*, we plan to add a rule for when the job at injury was not seasonal or temporary and the worker held more than one job at the time of injury. Should we therefore add to the quoted material above clarification that this applies when the worker did not hold more than one job at the time of their injury?

### Options:

- Add to the quoted material above clarification that this applies when the worker did not hold more than one job at the time of their injury
- Other

### Fiscal Impacts, including cost of compliance for small business:

### Recommendation:

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## ISSUE #7

**Rule:** 120-0147(3)(a)(C) and (D)

**Issue:** OAR 436-120-0147(a)(C) and (D) currently provides the following for worker's who have seasonal or temporary employment:

(C) If the worker held **more than one job** at the time of 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 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.

Earned income is defined in our rule, and it is for specified consideration “from all employers for services performed from all jobs held at the time of injury or aggravation.” OAR 436-120-0147(2)(c).

When applying these rules, we combine a worker’s 52 weeks of earned income from the jobs held at the time of injury or aggravation, and add that to payments from unemployment insurance. If the worker held other jobs in the 52 weeks before the injury or aggravation, but those jobs were not held *at the time* of the injury or aggravation, neither the income *nor weeks worked* in that position should be included in the calculation. Should we clarify the portion of our rule which talks about dividing by the number of weeks worked in the 52 weeks before the date of injury or aggravation so it is clarified it is only the weeks the worker worked in the job held at the time of injury or aggravation?

**Options:**

- Clarify the portion of our rule which talks about dividing by the number of weeks worked in the 52 weeks before the date of injury or aggravation, instead stating something similar to the following: “the number of weeks the worker worked *in those jobs* during the 52 weeks before the date of injury aggravation.” (Emphasis added).
- Other
- No change

**Fiscal Impacts, including cost of compliance for small business:**

**Recommendation:**

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**ISSUE #8**

**Rule:** 120-0147(3)(a) through (d)

**Issue:** OAR 436-120-0147(3)(a) provides four separate methods for calculating the worker’s weekly wage when the job(s) at injury or aggravation were seasonal or temporary. The methods of calculation are broken in paragraphs (A) through (D) depending on the following: (A) if 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; (B) if 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 injury; (C) 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; and (D) if the worker held one or more jobs at the time of injury or aggravation and received unemployment insurance payments during the 52 weeks before the date of injury or aggravation.

OAR 436-120-0147 (3)(b) through (d) provide three separate methods for calculating the worker's weekly wage when the job(s) at injury or aggravation were not seasonal or temporary. There are no paragraphs to (b) through (d). Should we amend the rule to create consistency in these two sections?

**Options:**

- Create paragraphs under (b) to result in consistency between the structure of (a) and (b)
- Remove (a)(A), (a)(B), (a)(C), and (a)(D), and instead move those into subsections
- No change to structure
- Other

**Fiscal Impacts, including cost of compliance for small business:**

**Recommendation:**

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**ISSUE #9**

**Rule:** 120-0147(3)  
120-0147(4)

**Issue:** When multiple jobs are held at the time of the job at injury or aggravation, the rule provides methods for calculating the wage, but it does not clarify that this should be done for each of the jobs separately, with the wages then added together and adjusted under (4). Should we amend the rules to clarify that the calculation is done for each job, the total of all of those wages is then adjusted under (4)?

**Options:**

- Amend the rules to clarify that the calculation is done for each job, the total of all of those wages is then adjusted under (4)
- Other

**Fiscal Impacts, including cost of compliance for small business:**

**Recommendation:**

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**ISSUE #10**

**Rule:** 120-0147(3)

**Issue:** Under OAR 436-120-0147(3) our rules require, in some scenarios, that the worker's average weekly wage be calculated using the same methods used to calculate temporary disability as described in OAR 436-060-0025. But, the rule does not articulate which version of OAR 436-060-0025 should be used. In looking at applicability, OAR 436-060-0025 applies based on the date of injury, but the vocational rules are generally under the workers' compensation law in effect at the time of the vocational assistance. Should we permanently amend the rules to state that the version of OAR 436-060-0025 which should be used is the version which was in effect on the date of injury?

**Options:**

- Use the version of OAR 436-060-0025 which should be used is the version which was in effect on the date of injury
- Other

**Fiscal Impacts, including cost of compliance for small business:**

**Recommendation:**

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**ISSUE #11**

**Rule:** 120-0147(1)(c)

120-0147(3)

**Issue:** If the worker had more than one job at the time of injury or aggravation they may need to provide payroll information for the other job(s) to allow for the calculation of their weekly wage. But what happens if the worker is unable to supply this information? According to the Fair Labor Standards Act, payroll records must be kept for at least three years. Presumably, there would be relevant payroll information from the employer at injury, since the records would be needed to calculate the worker's weekly wage for temporary disability benefits. But, it is less clear if relevant records would be available from a secondary employer. Should our rule provide a calculation method in the event the records are not available?

In making this determination, it is important to recognize our current rule requires that all figures used in determining a weekly wage 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. OAR 436-120-0147(1)(c). This language appears to stem from ORS 656.340(6)(b)(B)(iii), which explains that, for worker’s whose regular employment was seasonal or temporary, the worker’s wage shall be based on a combination of their earned income and any unemployment insurance payments; and only earned income evidenced by verifiable documentation such as federal or state tax returns shall be used in the calculation.

**Options :**

- Allow the insurer to make a reasonable calculation of the weekly wage based on the information available
- Allow exclusion of the reported wage if there is no verifiable information offered
- Require that the calculation be made based on a combination of the verifiable documentation (such as tax returns) and the Oregon Labor Market Information System (OLMIS)
- A combination of the options outlined above
- Other

**Fiscal Impacts, including cost of compliance for small business:**

**Recommendation:**

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**ISSUE #12**

**Rule:** 120-0147(2)  
120-0147(3)

**Issue:** According to ORS 656.340(6)(b)( B)(iii), “If the worker’s regular employment was *seasonal or temporary*, the worker’s wage shall be averaged based on a combination of the worker’s earned income and any unemployment insurance payments.” (Emphasis added). Our administrative rule then goes on to provide calculation methods depending on if the job was “seasonal or temporary” or if the job was “not seasonal or temporary.” But, the term “seasonal or temporary” is not directly defined in the rule. Instead, under the definitions, our rule offers the following relevant definitions:

(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.

We are interested in discussing the use of the terminology “permanent employment,” “permanent, year-round employment”, and “seasonal or temporary” to see if further clarity can or should be offered.

**Options :**

- Specifically define seasonal or temporary work in the rule
- Rather than referencing seasonal or temporary work, reference work which is not permanent, year-round employment
- No change
- Other

**Fiscal Impacts, including cost of compliance for small business:**

**Recommendation:**

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**ISSUE #13**

**Rule:** 120-0003(2)(b)

**Issue:** Director's decisions under OAR 436-120-0008 regarding eligibility are based on the rules in effect on the date the insurer issued the notice. But, our prior rule did not account for more than one job at the time of injury when the worker did not perform seasonal or temporary work. The court in *Chu v. SAIF* concluded this part of the rule was not valid. As a result, if a worker falls in this category, it would be inappropriate to base their eligibility determination on the rules in effect on the date the insurer issued the notice. Should we therefore add a provision similar to the following: “If an eligibility decision involves[*insert rule which is applicable to Chu v. SAIF scenario*], the director’s decisions under OAR 436-120-0008 regarding eligibility will be based on the rules in effect on the date of the director’s order.”

**Options :**

- Add a provision similar to the following: “If an eligibility decision involves[*insert rule which is applicable to Chu v. SAIF scenario*], the director’s decisions under OAR 436-120-0008 regarding eligibility will be based on the version of [*insert rule which is applicable to Chu v. SAIF scenario*] which was in effect on the date of the director’s order.”
- Other

**Fiscal Impacts, including cost of compliance for small business:**

**Recommendation:**

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**HOUSEKEEPING FOR OAR 436-120-0147(3):**

1. Revise reference to “temporary or seasonal” to say “seasonal or temporary” for consistency in the rule and terminology in statute
2. Remove the word “the” when referencing “time of the injury”
3. Create consistency between paragraphs and subsections:
  - a. Under (a)(A), change “is based” to “was based”
  - b. Make the following change under (a)(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...”
  - c. Make the following change under (a)(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...”
  - d. Make the following change under (a)(C) and (D): “~~If~~ **When** the worker held...”
  - e. Create an introduction paragraph in (b), similar to the introduction paragraph in (a) by stating “When paragraph (a) of this rule does not apply, calculate the worker’s average weekly wage as follows, then convert to the adjusted weekly wage as described in section (4) of this rule.”;
  - f. Move (b), (c), and (d) into (b)(A), (b)(B), and (b)(C) (similar to the current structure under (a));
  - g. Create consistency in the structure of the newly created (b)(A), (b)(B), and (b)(C) by stating “When the worker’s regular employment is the [*insert “job at aggravation” or insert “job at injury and the worker [insert either “held” or “did not hold”] more than one job at the time of injury”*], use...”