

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION**

PROPOSED OREGON ADMINISTRATIVE RULES

**CHAPTER 436, DIVISION 120
VOCATIONAL ASSISTANCE TO INJURED WORKERS RULES**

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BEFORE THE DIRECTOR OF THE
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
OF THE STATE OF OREGON

In the Matter of the Amendment of Oregon Administrative Rules, chapter 436, division:)	
)	
001, Procedural Rules Governing Rulemaking and Hearings)	SUMMARY OF
105, Employer-at-Injury Program)	TESTIMONY AND
110, Preferred Worker Program)	AGENCY RESPONSES
120, Vocational Assistance to Injured Workers)	

This document summarizes the significant data, views, and arguments contained in the hearing record. The purpose of this summary is to provide the Director with a record of the agency conclusions about the major issues raised.

The amendment to the rules was announced in the Secretary of State’s Oregon Bulletin dated April 1, 2005. On April 22, 2005, a public rulemaking hearing was held as announced at 10 a.m. in Room F of the Labor and Industries Building, 350 Winter Street NE, Salem, Oregon 97301-3879. Fred Bruyns, Rules Coordinator, acted as presiding officer. Business Support Services audio-recorded the hearing and created a written transcript. The record was held open for written comment through April 29, 2005.

Exhibit #	Oral testimony received from:
14A	Gerald Rutherford, Workers’ Compensation Division
14B	Arin J. Carmack, Cardinal Services, Inc.
14C	Robert J. Malone, Liberty Northwest Insurance
14D	Jennifer O. Frank, Career Transitions
14E	Shirley L. Butcher, SAFECO Insurance

Exhibit #	Written testimony received from:
1	Gerald Rutherford, Workers’ Compensation Division
2	Jennifer Frank, Career Transitions
3	Robert J. Malone, Liberty Northwest Insurance Suzanne Barr, Liberty Northwest Insurance
4	Arin J. Carmack, Cardinal Services, Inc.
5	Grace Smith, Oregon Association of Rehabilitation Professionals
6	Jennifer O. Frank, Career Transitions
7	Linda Jefferson, Oregon Self-Insurers Association
8	Linda Jefferson, City of Portland
9	Carmen Jones, Legacy Health Systems
10	Lisa Wilch, SAIF Corporation
11	Lisa Wilch, SAIF Corporation
12	Shirley L. Butcher, SAFECO Insurance
13	Karlene Westerlund, SAIF Corporation

SUMMARY OF TESTIMONY AND AGENCY RESPONSES
Oregon Administrative Rules, Chapter 436, – public hearing April 22, 2005

The following is a summary of the testimony received and the agency's responses to that testimony.

OAR 436-105 (general comment) Exhibit #8, 12, 14C

Testimony: The changes recommended should make this program easier to use and administer. These rule revisions generally reflect discussions by the Management Labor Advisory Committee.

Response: Thank you for your testimony.

OAR 436-105-0500(6)(e) & (f) Exhibit #1, 14A

Testimony: In order to prevent a lapse in a continuous medical release, the medical provider should have 14 days from a missed appointment or specific end date to provide a new medical release or a statement that the previous release is still in effect. With the current rule language, only missed appointments allow the 14-day period. The division proposes the following additional amendments to rule 0500:

(e) A medical release with a specific end date or follow-up medical appointment date expires on the end date, or the follow-up appointment date, [if the worker does not return to the medical service provider for a follow-up appointment, except as provided in subsection (f) of this section; [and]
(f) If the worker misses a follow-up medical appointment, the medical release will lapse] unless, within 14 days of the **specific end date** or missed appointment, the medical service provider provides a new medical release or a signed and dated statement that the previous medical release is still in effect;

Response: The Workers' Compensation Division (WCD) has found that the wording of these two subsections in the current rules does not achieve the desired outcome, as it pertains to continuous medical releases. WCD wants the worker's medical service provider to have 14 days from a missed appointment or specific end date to provide a new medical release or statement that the previous release is still in effect to prevent a lapse in continuous medical releases. With the current rule language, only missed appointments allow the 14-day period. OAR 436-0500(6)(e) will be reworded to achieve the desired outcome and subsection (f) will be deleted.

OAR 436-105-0500(6)(g) Exhibit #13

Testimony: The proposed rules seem to require the worker to **return** to the provider to get continued work releases and **return** to the referring medical provider after completing treatment with the referral doctor. We recommend that the rules allow the worker to get an updated written work release and not force the worker to return to the doctor every time, as this could cause some unnecessary medical costs. We recommend the following changes:

(g) If the worker's medical service provider refers the worker to another medical service provider for treatment, restrictions specified in the medical release in effect at the time of the referral will not expire until the worker **obtains a continued or updated work release from the** ~~returns to the~~ attending physician, authorized nurse practitioner, or primary care physician with a managed care organization, except:

(A) The insurer may accept updated restrictions and releases from the medical service provider to whom the worker is referred except for a release to regular work, and

(B) If the worker does not ~~return~~ **obtain a continued or updated work release [to the referring] from the attending physician, authorized nurse practitioner, or primary care physician with a managed care organization** ~~medical service provider~~ within 30 days from the last referral appointment, the medical release will expire on the date of the last treatment with the referral medical service provider.

SUMMARY OF TESTIMONY AND AGENCY RESPONSES
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Response: The suggested wording changes are in keeping with the desired outcome for maintaining continuous releases without requiring the worker to return to the medical service provider. The permanent rule language will include the suggested changes.

OAR 436-105-0520(1)(a) *Exhibit #9*

Testimony: Although 66 work days may give employers a higher reimbursement, not many payroll systems are set up to calculate based on days. To calculate a daily rate, we would need to hand calculate every day for the entire 66 workdays and then determine the wages for each workday. In addition, this change does not take into consideration the employer that has varying shifts, shift differentials, varying workdays, etc. I do not believe that the intent of the EAIP program was to make the reimbursement request a lengthy process. It was to entice employers to return injured workers to work. With these changes, the process would be too cumbersome for many employers.

Response: The Management Labor Advisory Committee proposed this rule change after conducting a study of return-to-work programs. Their stated purpose was to encourage and support return to work with the employer at injury for as many workers as possible. MLAC proposed that employers be able to combine multiple periods of transitional work to receive the number of days allowed by rule in the aggregate, instead of the employer selecting the three-month period when they would get the most benefit. After considering several options the external advisory committee recommended allowing a maximum wage subsidy of 66 workdays within a two-year period. Sixty-six workdays is the same as the maximum allowed in the current rules for a worker who works five days per week for three months. The rule as proposed gives the employer a great deal of latitude in selecting which days or weeks to include in the EAIP. Of course the employer will have to provide evidence of which days were work days in a week if the employer wants fewer than 7 days counted against the 66 work-day maximum.

The division believes that the proposed rule change will benefit employers and meet MLAC's expectations.

OAR 436-105-0520(3) *Exhibit #13*

Testimony: This rule section is too specific and should allow for any materials required for the worker to participate in the skill building class or course (i.e.: videos, CD, DVD, audio etc). We recommend the following changes:

436-105-0520 (3) (a) Tuition, books, and fees, and/or materials ~~for~~ required for a class or course of instruction to **enhance an** [update] existing skill[s] or **develop a new skill** [to meet the requirements of the transitional work position] **when skills building is used as transitional work or when required to meet the requirements of the transitional work position.** Maximum reimbursement is [\$750] **\$1,000.** Tuition, books, and fees shall be provided under the following conditions:

Response: There are times when taking a class or course of instruction might require floppy disks, CDs or other required materials. The rule currently does not specifically address this but only states that books would be reimbursed. The intent of the program is to reimburse for those things necessary for taking the class or coursework. The suggested change will be incorporated in the permanent rules. OAR 436-105-0520(3)(B) will also be changed to reflect the new wording.

OAR 436-110 (general comment) *Exhibit 8, 14C*

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Testimony: These rule revisions generally reflect discussions by the Management Labor Advisory Committee.

Response: Thank you for your testimony.

OAR 436-110-0002(3) *Exhibit #10*

Testimony: We suggest the language say “The employer-at-injury may also request reemployment assistance to modify the worker’s regular employment or develop a suitable, new employment”.

Response: The rule language as proposed is written as it is to cover several types of request for services that the employer at injury can make. One request could be to modify the worker’s regular employment as you suggested, or the request might be for Premium Exemption and Wage Subsidy for the regular employment that has already been substantially modified through job-duty changes. It is certain that services for regular employment will only be provided if the job is modified or for a new job. The proposed rule language will be retained.

OAR 436-110-0320 *Exhibit #10*

Testimony: There is a statement “the rule does not apply to employer activated assistance”. How would the employer at injury know if a worker was eligible for PWP benefits? Wouldn’t the worker have to possess an identification card in order for the employer to access the program? Should you issue a card indicating there is a timeframe for the employer at injury to access the program – possibly similar to the eligibility card?

Response: The division will have no way of knowing when an injured worker is eligible for services prior to claim closure, when the worker settled the claim with a CDA, or when the claim closed with a permanent partial disability award and no Preferred Worker Card was issued because of information submitted by the insurer on the 1503 form at closure. The proposed rules for employer-at-injury use rely on the employer contacting the Preferred Worker Program when they are proposing a return to regular employment or new job for one of their injured workers who has permanent injury-caused-work restrictions. Premium Exemption and Wage Subsidy are approved at the same time with one agreement form, and no card is needed. It may help if the insurer notice to the employer at injury required in OAR 436-110-0240 includes the requirement that requests for assistance be made within 180 days of the worker’s claim closure date. That wording will be added to the permanent rules.

OAR 436-110-0326(1) *Exhibit #10*

Testimony: This rule implies the employer can develop a physically suitable position through use of the employer activated PWP benefits and the worker can refuse to accept it. If the worker refuses to sign the agreement, the employer at injury cannot access PWP benefits. Is that the intent of the rule? From our discussion at the advisory meetings, I believe the intent was to protect the worker’s independent access to their preferred worker benefits and work towards physically and monetarily suitable employment as soon as possible. Allowing the worker the option to reject a suitable position appears to be at odds with the overall intent to return the injured worker to suitable work.

Response: The division feels that Worker Benefit Fund dollars should not be spent on a job the injured worker won’t accept. Both the internal and external advisory committees agreed. Since the worker won’t be a party to the actual agreements approved for the employer-at-injury use of the Preferred Worker Program, a job offer as prescribed in 436-110-0290(4) was determined appropriate by the division.

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OAR 436-110-0326(3) & 0380(1) Exhibit #12

Testimony: Under sections 0326(3) and 0380(1) the timeframe for benefits to start is when all necessary modifications are in place. This may in fact delay some return-to-work efforts. When the modification is required to perform the entire job this makes sense. However, sometimes part of the job is within the restrictions while part needs modification. The worker may begin the suitable portion of the job and begin the rest when modifications are complete. Does this mean the wage subsidy and premium exemption are delayed also? This seems to discourage an employer from starting a worker sooner. In some cases, an Employer-at-Injury Program wage subsidy may cover the worker during this time, but other workers may be without income for a longer period under these rules.

Response: The rules you have cited were proposed after discussions with internal and external advisory committees. The consensus was that the job should be within the worker’s injury-caused limitations to activate all parts of the employer-at-injury-activated Preferred Worker Program. The requirement is also stated in OAR436-110-0290(3). Worksite modifications are only provided to allow the worker to perform job duties that are required by the employer. The division has long held the position that when regular work is being modified the modified position doesn’t start until all the modifications are completed. OAR 436-110-0380(3) of the current rules states in part that “The modifications provided must be sufficient for the worker to perform all required job duties within these restrictions.” This in effect stays a decision on whether the regular employment has been “substantially modified”, and Premium Exemption and Wage Subsidy are not started until the substantially-modified decision is made. This has actually worked well in the program and has been an incentive for workers and employers to get all the modifications completed.

OAR 436-120-0004(4) Exhibit #11

Testimony: Nowhere under the current rules is the worker advised in writing of the need to get their training plan developed within a specific time frame. Because of the emphasis on development of a training plan within 90 days of training status, we believe the notice to the worker described in (4) of this rule should contain the following statement under new letter (f):

Your counselor is required to submit a copy of your signed training plan to all parties no later than 90 days after the effective date of your training status. Your full cooperation is necessary to submit this plan in a timely manner.

Response: The substantive changes suggested by these exhibits were not presented to the advisory committees and will not, at this time, be included in the rule revision. WCD will include this suggestion in the next rule revision and advisory meetings.

OAR 436-120-0004(10)(b) Exhibit #12

Testimony: Regarding the proposed requirement: **“The notice must also inform the worker that, if the job has not begun by the hire date listed in the job offer letter, the worker can request that the vocational eligibility determination be completed.”** This is too restrictive. There needs to be flexibility because there are reasons things don’t occur ‘on schedule’ ...especially as coupled with worksite modifications. This is a moot point if there will be no Deferral Notice.

Response: We believe it is proper to revisit the offer of employment and vocational eligibility if the worker is not going to start employment as stated in the job offer letter. The worker in most cases will not have income until the job starts, therefore, we believe the worker should have the option of requesting that a vocational eligibility evaluation be completed.

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OAR 436-120-0007

Exhibit #4, 14B

Testimony: Regarding the process for calculating the adjusted weekly wage when the employee held multiple jobs at the time of injury or aggravation or held one or more jobs in addition to receiving unemployment insurance benefits.

Employers in industries as diverse as construction, agriculture, temporary services, or our school systems are being unfairly penalized. Seasonal employees should have their wages averaged over 52 weeks, as was true under older division 120 rules. Current rules require considering a school teacher's monthly wage as though it was paid over 12 months rather than nine months. The current system also tries to compensate for those who do not work year round by including unemployment earnings. Using the school teacher example again, the teacher is not eligible for unemployment compensation if he or she worked for a nonprofit or public school. If you want to ensure there is a floor for the adjusted weekly wage, use the Oregon minimum wage at the time of injury or the state average weekly wage to determine the floor as in SB 757 for Permanent Partial Disability.

Response: The proposed changes in 436-120-0007 are “housekeeping” issues that clarify the rule, and were presented as such in the external advisory committee meeting.

The substantive changes suggested by these exhibits were not presented to the advisory committees and will not, at this time, be included in the rule revision. WCD will include this suggestion in the next rule revision and advisory meetings.

OAR 436-120-0008

Exhibit #11

Testimony: We agree with the proposed change to define further “extraordinary circumstances” in assessing attorney fees.

Response: Thank you for your comments. The rule will remain as proposed.

OAR 436-120-0320(3)(b) and:

Rule 0004(2)(a)(A)&(F)

Rule 0004(10)(a)&(b)

Rule 0004(12)(f)

Rule 0005(14)(e)(A)(B)(C)&(D)

Rule 0350(4)&(17)

Exhibit # 2, 3, 7, 8, 11, 12, 14C, 14D, 14E

Testimony: Employment is not considered “suitable” for employer-at-injury activated Preferred Worker Program benefits until 12 months after the start of premium exemption, if there are no worksite modifications, or 18 months from the effective date of a worksite modification agreement. These extensive timeframes may be intended to prevent employers from abusing the program. It seems that we are treating a Preferred Worker differently with the employer at injury than we would with a new employer. We are not dealing with the problem, only creating another layer of bureaucracy to counteract the actions of a few.

The focus of the Preferred Worker Program should be to maintain the employer/employee relationship. Suitability of the position should be determined at the time the employer and employee enter into the Preferred Worker contract. At the advisory committee meeting, we discussed having suitability extended to include a 6-month period. The worker still has the option of activating the Preferred Worker Program

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with another employer. The proposed rules would make employers less likely to consider Preferred Worker benefits when offering suitable work. We recommend you amend 436-120-0005 (14)(e) (A)&(B) to the discussed length of 180 days.

All other rules state that 60 days of employment is considered suitable. I thought our discussion at the advisory meeting extended this time to 120 days, because this is a new program. We believe 120 days is more than fair to determine if the job is suitable. Insurers may have to hold reserves for the *potential* of vocational assistance for up to 18 months on a worker who is suitably employed. We do not believe this is reasonable or necessary.

The proposed rules require new notice, “Notice of Deferral of Vocational Eligibility Determination,” when the employer at injury provides suitable modified work accessing the Preferred Worker Program benefits. Since there has been no determination of eligibility made because the worker returned to work with the employer-at-injury, there is no refusal of services, so including refusal of vocational assistance because of EAI activation of PWP becomes moot. The issue, if there is one, would always default to suitability or premature end of job without cause. We recommend against requiring a “Notice of Deferral . . .” that extends employer exposure to vocational assistance 12 to 18 months in every case. “Deferral” denotes postponement with a follow-up action. “Follow-up” would occur only if the worker requested review of the suitability or premature ending of the job without cause – these do not require a Notice of Deferral to initiate review.

There is no need to treat the return-to-work situations differently by creating a separate class. This rule is discriminatory. A “new” employer is not subject to the same risks as the employer at injury. Only the employer at injury is required formally to defer vocational assistance, and the effect is to extend exposure for vocational assistance 12 to 18 months beyond the hire date of a worker in a suitable modified job. This would extend the exposure on ALL of the many suitable modified jobs we urge employers to provide for their employees each year. The extension in indemnity reserves will affect the employer’s experience modification rating and even premium costs. Oregon employers will decide not to access Preferred Worker benefits, as the risks outweigh the gains.

Rules for this should be kept in Division 110. The return-to-work and job suitability procedures are adequately covered under the existing Division 120 rules without requiring additional modification. This includes provision for bona fide job offers to be made in accordance with Division 060 rules. The Division 120 rules already contain provisions to make sure a worker has the opportunity to challenge the suitability of a job, complete with appeal rights. This process also provides the employer with the knowledge that services will be based on the injury-caused limitations. Both parties are protected. This would keep the existing criteria that the insurer is not required to determine eligibility if the worker returns to work with the EAI. Preferred Worker Program documents can inform the worker of his or her rights, including what to do if the job is not suitable or ends prematurely without cause.

The insurer is not a party to the PWP contracts. Once the worker has returned to work with the EAI and the claim is closed, there is no reason for the insurer to be involved. We don’t currently track suitable work where the employer is using the Preferred Worker Program. The intent is to provide benefits and incentives that serve both the injured worker and employer and that promote an earlier return to work for the injured worker in a suitable job. We understood the Management-Labor Advisory Committee’s intent was to increase use of Preferred Worker Program benefits. As this rule is proposed, we think employers will be less inclined to consider accessing Program benefits. We support the current dispute

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resolution process and workers' access to the Ombudsman's office as sufficient safeguards against the infrequent unscrupulous actions by employers.

Response: Testimony and responses to this proposed rule change covered two primary areas: (1) the requirement of a new notice (Notice of Deferral of Vocational Eligibility) and (2) the requirement that employment that results from the employer at injury activation of Preferred Worker Program benefits would not be considered suitable; (a) until 12 months from the effective date of the premium exemption if there are no worksite modifications, or (b) until 18 months from the effective date of the worksite modification agreement.

The rules require insurers to determine a worker's eligibility for vocational assistance within a specified time frame. Failing that, insurers could be liable for sanctions. The Notice of Deferral is to inform workers and WCD that an eligibility evaluation will not be completed because the employer at injury has activated preferred worker benefits. The notice would protect the insurer from requests for sanctions and requests for further information because the WCD data system would be showing no activity. We believe it is necessary to have a Notice of Deferral issued.

WCD proposed in the definition of suitable employment OAR 436-120-0005(14) that employers who activate preferred worker benefits retain a worker for 12 months if there is no worksite modification and 18 months if there is a worksite modification. Written and oral testimony have raised objections to those time frames offering a variety of opinions with different time frames suggested. The changes in the OAR 436-110 rules that allow the employer-at-injury to activate the preferred worker benefits provide that employer with substantial financial benefits. A worker who is eligible for vocational assistance but forgoes training in order to return to a modified job with the employer-at-injury is returning to a job that does not exist elsewhere in the labor market. If that job were to end 60 days after all modifications were in place, as under the existing rules, that worker would not be eligible for any vocational assistance.

If that eligible worker were to receive training the insurer would need to reserve for the length of the training program *and* pay all the training costs. We have, however, reviewed current data to determine whether the time frames proposed by WCD are too long. We believe 9 months where no worksite modification contract is used and 12 months when a modification contract is used is adequate.

OAR 436-120-0400

Exhibit #12

Testimony: The proposed rule requires selection of the category of service (DEP/ATP) prior to referral to vendor...this generally is simultaneous/seamless. The proposed requirement could actually delay services.

Response: The focus of this rule change is to reduce the time required for injured workers to begin receiving vocational services. The Management Labor Advisory Committee (MLAC) recommended that workers be referred "in status" thus eliminating the current 30 day period to determine the category of vocational assistance. The division supports that recommendation.

OAR 436-120-0410

Exhibit #11, 12

Testimony: You propose to eliminate the entire category of vocational evaluation. We should retain this category of vocational assistance. At the advisory meeting we discussed elimination of this as a category of services following a determination of eligibility. We still believe this category would be appropriate in the event you are evaluating a worker's permanent total disability entitlement under 656.206 (5). The proposed legislation on permanent total disability under discussion at the Management Labor Advisory

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Committee also continues to refer to a vocational evaluation. We recommend retaining the category within these rules, but make clear the intent following eligibility for services is to designate a worker eligible for either direct employment or training.

We recommend vocational evaluation be retained as a category of services but not a choice in the eligibility process. If PTD rules are going to reference this process, we need consistency.

Response: The intent of the Management Labor Advisory Committee (MLAC) was to eliminate the 45-day vocational evaluation option as an allowable category of vocational assistance. However, we agree that a description of the various activities that comprise a vocational evaluation should remain in the rules to provide guidance. Paragraph (1) will be rewritten to remove reference to vocational evaluation as a category of vocational assistance and to remove the 45-day time frame. Paragraphs (7) & (8) would be deleted. These changes will comply with MLAC's recommendation and preserve a section in the rules that provides guidance regarding vocational evaluation.

OAR 436-120-0500(3)

Exhibit #2, 3, 5, 6, 11, 12, 14C, 14D, 14E

Testimony: During the Management-Labor Advisory Committee's subcommittee process, we discussed the use of conferences with the Workers' Compensation Division to identify and remove obstacles to return-to-work plan completion and approval, for those workers not in plan status within 45/90 days respective to the plan type. I attended those meetings and we did not agree on the mandatory meetings. This was discussed and there were opinions on both sides of this issue. The intent was to better integrate the process, and certainly not to sanction the insurers over this matter. Sanctions were never discussed.

Consider requiring a PLAN DELAY summary. This would include what has been done, where the case is headed, and specific time frames when the plan can be expected. If the division does not find the reason for the delay acceptable, it can contact the parties involved (by phone). This makes the process more approachable, open, and "if necessary", and does not micromanage the case. We need to resolve the plan delay reason at the lowest level, and in the least amount of time.

We refer as many as 200 cases a year, of which 100-150 would not have an approved plan within 90 days of referral. Less than 25% of these are contentious. Where the insurer and worker agree on the obstacles to plan and the efforts to overcome those obstacles, a conference would not be required. Mandatory conferences would place a workload burden on the Workers' Compensation Division. This is especially true because we often refer 4-6 months before an anticipated medically stationary date, and many of these cases require more than 90 days to develop a suitable return-to-work plan.

At the advisory meeting, we discussed the *option* of involving the Workers' Compensation Division in situations where the claim is stalled and no plan is forthcoming. This would be optional at the request of the counselor, the injured worker, his or her representative, or the insurer. We strongly oppose making this mandatory.

Mandatory conferences would give counselors less time than they have traditionally had for plan development. Factors to consider include: testing must occur; multiple barriers to employment such as brain injury, inability to speak English, etc.; many insurers require submittal of a plan within two weeks of the start date (thus compressing the timeframe down to 75 days); and the counselor may not have done the eligibility evaluation and would have to meet the worker, schedule testing, and develop a plan all within approximately 75 days.

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The rules do not explain whether these meetings will be in-person or done by phone. In addition, the rules don't outline what happens if concurrence cannot be reached; will the division issue an order in this event?

We support the concept, but the conference should be optional, not mandatory, because mandatory conferences would restrict the process flow. The original goal around the idea of the conference is to insure a speedier process, so workers can get back on time-loss. Giving any concerned stakeholder the *option* of calling a conference has the advantage of moving workers to plan more quickly. The process only becomes cumbersome when it is made *mandatory*.

Response: The respondents providing testimony agree on the need for a conference with the Rehabilitation Review Unit (RRU), however disagree as to whether that conference should be mandatory or optional. Under current rules there exists an optional system, either party can now contact RRU with concerns about the provision of vocational services. RRU is rarely contacted to help with cases where there is difficulty getting injured workers into training plans. The Management-Labor Advisory Committee (MLAC), when reviewing vocational assistance, wanted to find ways to shorten timeframes and move the process along so workers were not in situations where there were periods of time without income. Given those objectives, they recommended requiring a meeting when the worker was not in a training plan within 90 days or a direct employment plan within 45 days. Having said that, we realize that the parties may be satisfied with the progress of plan development even if it extends beyond the established time frames. The proposed rule provides for the parties to agree and postpone the conference for 30 days. RRU has no interest in reviewing a plan development process if the parties are in agreement. We will change the 30 day language to: **“The conference may be postponed for a period of time agreeable to the parties”** or similar language.

The role of RRU in this process is not to issue orders or “take over” the process but to bring a “fresh set of eyes” to the process and assist with removing the obstacles to the completion of the plan development process.

OAR 436-120-0710(10) *Exhibit #11*

Testimony: If you retain vocational evaluation as a category of vocational assistance as described under 436-120-0410, we suggest you retain the ability to pay a living expense during a vocational evaluation.

Response: We agree. Since 0410 has now been retained, 0710(10) will also be retained.

OAR 436-120-0720 *Exhibit #12*

Testimony: You need to update the reference to the date of the fee schedule. Why is the chart included in the rules, when the rules instead could refer to the chart in the bulletin?

Response: We realize the chart in the rules will be out of date after the first of July and that this can cause confusion if a person is not aware of the changes, which occur every July 1st. The chart is placed in the rules because the division has made an effort to remove prescriptive language from bulletins and place them in the rules. Your comment concerning the date of the chart is noted and we will make changes to the chart to make it more clear as to where the most current costs can be found. A note will be placed, in bold, at the bottom of the chart with language that states:

NOTE: Spending limits listed in this chart are adjusted annually, effective each July 1st, and are published in Bulletin 124.

SUMMARY OF TESTIMONY AND AGENCY RESPONSES
Oregon Administrative Rules, Chapter 436, – public hearing April 22, 2005

Language in OAR 436-120-0720(1) would be changed to delete the sentence: The amounts in section (3) do not include the adjustment effective July 1, 2005.

When the rules are next opened for revision, we will revisit your concerns and look for a better solution.

Having reviewed and considered all data, views and arguments presented, I hereby submit this report as a summary of statements given and exhibits received. I recommend the adoption of the amendments to the rules consistent with the above responses.

Dated this 1st day of July, 2005.

WORKERS' COMPENSATION DIVISION

/s/ Fred Bruyns

Fred Bruyns, Rules Coordinator
Policy Section
Workers' Compensation Division

Secretary of State
NOTICE OF PROPOSED RULEMAKING HEARING

A Statement of Need and Fiscal Impact accompanies this form.

Dept of Consumer and Business Services, Workers' Compensation Division		OAR CHAPTER 436	
Agency and Division		Administrative Rules Chapter Number	
Fred Bruyns		(503) 947- 7717 Fax (503) 947-7581	
Rules Coordinator		Telephone	
PO Box 14480, Salem, OR 97309-0405; 350 Winter Street NE, Rm 27, Salem, OR 97301-3879			
Address			
		Room F (basement, Labor & Industries Building	
April 22, 2005	10:00 a.m..	350 Winter Street NE, Salem, Oregon	Fred Bruyns
Hearing date	Time	Location	Hearings Officer

NOTE: The hearing will begin at 10:00 a.m. and end when all present who wish to testify have done so. Written testimony will be accepted through April 29, 2005.

**The site of the hearing is accessible for individuals with mobility impairments.
Auxiliary aids for persons with disabilities are available upon advance request.**

RULEMAKING ACTION

ADOPT: OAR 436-110-0290, 436-110-0326, 436-110-0327, 436-110-0336, 436-110-0337, 436-110-0346, 436-110-0347, 436-110-0351, 436-110-0352

AMEND: OAR 436-001-0265, and chapter 436, divisions 105, 110, and 120

REPEAL: OAR 436-120-0410

ORS 656.283, 656.340, 656.622, 656.704, 656.726(4)

Stat. Auth.

ORS 183.335; OAR 137-001; OAR 436-001

Other Authority

ORS chapter 656; ORS 656.340, 656.622

Stats. Implemented

RULE SUMMARY

The agency proposes to amend OAR 436-001-0265, "Attorney Fees." This proposed rule:

- Clarifies that extraordinary circumstances, for the purpose of determining attorney fees, are not established by merely exceeding eight professional hours or exceeding a benefit to the worker of \$6000. This proposed rule change is consistent with changes to OAR 436-010-0008, proposed January 14, 2005, and to OAR 436-120-0008, proposed March 9, 2005 (see below).

The agency proposes to amend OAR 436-105, "Employer-at-Injury Program." These proposed rules:

- Allow the insurer to request that reimbursement be based on the rules in effect on the date an individual Employer-at-Injury Program began; otherwise the rules in effect at the time of the request apply;
- Clarify that Employer-at-Injury Program benefits are available for "own motion" claim openings under ORS 656.278;
- Extend benefits to include a "skills building," class or course taken to enhance an existing skill or develop a new skill;
- Allow the insurer to accept updated restrictions and releases from a medical service provider treating the worker on a referral basis, with the exception of a regular work release;
- Do not require payroll records to show hours worked each day unless the worker has hourly restrictions;
- Provide that if the insurer or the Workers' Compensation Division disallows wage subsidy reimbursement for part of a payroll period, and payroll records do not show individual dates and hours worked, the gross wages will be divided by the number of days in the payroll period, and the prorated value of each day will be multiplied by the number of eligible days to determine the reimbursement amount for the payroll period – currently all reimbursement may be disallowed;
- Provide for the compilation of up to 66 days of wage subsidy during a 24-month period, due to gaps in transitional work;
- Disallow reimbursement for any day during which the worker exceeds his or her injury-caused limitations -- currently this terminates Employer-at-Injury Program benefits; however, if an employer uses a time clock, up to 30 minutes per day will be allowed for the worker to get to and from the time clock and the worksite without exceeding hourly restrictions;
- Allow the insurer or employer to get clarification about the medical worker's release any time prior to submitting the reimbursement request;
- Increase the maximum reimbursement from \$750 to \$1,000 for tuition, books, and fees for a class or course of instruction; provide that accredited on-line or accredited self-study courses qualify for reimbursement; and

SUMMARY OF TESTIMONY AND AGENCY RESPONSES

Oregon Administrative Rules, Chapter 436, – public hearing April 22, 2005

- Allow reimbursement if the employer in good faith paid for the costs of a class or course after the worker agreed to take part in the training and then refused to attend.

The agency proposes to amend OAR 436-110, “Preferred Worker Program.” These proposed rules:

- Increase access to Preferred Worker Program benefits by allowing the employer at injury to request reemployment assistance for modified regular employment or a new job offered to its worker – up to \$25,000 for a worksite modification, up to six months of wage subsidy, and obtained employment purchases;
- Redefine “hire date” such that requests for reemployment assistance received more than 30 days after the hire date can be processed – the hire date is 12:01 AM the day following the request if the request is sent to the division more than 30 days after the start-work date;
- Delete the requirement that workers submit requests for premium exemption and wage subsidy within 90 days of the hire date and clarify how the effective dates will be determined.
- Clarify that Preferred Worker Program benefits are available for “own motion” claim openings under ORS 656.278;
- Provide that if the worker is not eligible under the most recent disabling claim or claim opening, eligibility may be based on the most recent disabling claim closure where injury-caused permanent restrictions prevented the worker from return to regular employment; and
- Provide that worksite modification may also include the means to protect modifications purchased by the Preferred Worker Program in an amount not to exceed \$2,500.

The agency proposes to amend OAR 436-120, “Vocational Assistance to Injured Workers.” These proposed rules:

- Combine vocational evaluation with eligibility evaluation for vocational assistance, thus shortening the vocational preparation time by up to 45 days;
- Require that if the insurer does not approve a return-to-work plan within 90 days of determining the worker is entitled to a training plan, or within 45 days of determining the worker is entitled to a direct employment plan, the insurer must schedule a conference with the Workers’ Compensation Division, Rehabilitation Review Unit. The insurer or worker may also request a conference when any other delays in the vocational rehabilitation process occur;
- Clarify the process for calculating the adjusted weekly wage when the worker held multiple jobs at the time of injury or aggravation, or held one or more jobs in addition to receiving unemployment insurance benefits;
- Clarify that extraordinary circumstances, for the purpose of determining attorney fees, are not established by merely exceeding eight professional hours or exceeding a benefit to the worker of \$6000; This proposed rule change is consistent with changes to OAR 436-001-0265, proposed March 9, 2005 (see above), and to OAR 436-010-0008, proposed January 14, 2005.
- Require that if the employer at injury has activated Preferred Worker benefits, the insurer must send the worker notice of “deferral of vocational assistance eligibility determination,” to inform the worker that the insurer will not complete the vocational eligibility process;
- Provide that modified or new employment that results from an employer activated use of the preferred worker program, under OAR 436-110, will not be considered “suitable” until: (a) one year from the date of the premium exemption if there are no worksite modifications, or (b) eighteen months from the date the division approves a worksite modification contract – with two exceptions: 1) the worker is terminated for cause; 2) the worker voluntarily resigns for a reason unrelated to the work injury; and
- Require that the notice of eligibility also include a notice of entitlement that informs the worker which type of assistance will be provided, direct employment or training.

Request for public comment:

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

Address questions to: Fred Bruyns, Rules Coordinator; phone 503-947-7717; fax 503-947-7581; e-mail fred.h.bruyns@state.or.us Proposed rules are available on the Workers’ Compensation Division’s Web site: <http://wcd.oregon.gov/policy/rules/rules.html#proprules> or from WCD Publications at 503-947-7627 or fax 503-947-7630.

April 29, 2005
Last Day for Public Comment

/s/ John L. Shilts 3/9/05
Authorized Signer and Date
John L. Shilts, Administrator, Workers’ Compensation Division
Printed name

*The *Oregon Bulletin* is published on the 1st of each month and updates the rule text found in the Oregon Administrative Rules Compilation. Notice forms must be submitted to the Administrative Rules Unit, Oregon State Archives, 800 Summer Street NE, Salem, Oregon 97310 by 5:00 pm on the 15th day of the preceding month unless this deadline falls on a Saturday, Sunday or legal holiday when Notice forms are accepted until 5:00 pm on the preceding workday.

Distribution: WCD-ID, S, T, U, AT, CE, EG, IA, LU, LL, NM, CI, ML, VR, PW, RE, S0, S3, S5, S6, S8

Secretary of State
STATEMENT OF NEED AND FISCAL IMPACT

A Notice of Proposed Rulemaking Hearing or a Notice of Proposed Rulemaking accompanies this form.

Department of Consumer and Business Services,
Workers' Compensation Division

OAR CHAPTER 436

Agency and Division

Administrative Rules Chapter Number

In the Matter of)	
The Amendment of:)	Statutory Authority,
OAR 436-001, Procedural Rules Governing Rulemaking)	Statutes Implemented,
and Hearings)	Statement of Need,
OAR 436-105, Employer-at-Injury Program)	Principal Documents Relied Upon,
OAR 436-110, Preferred Worker Program)	Statement of Fiscal Impact
OAR 436-120, Vocational Assistance to Injured Workers)	

Statutory Authority: ORS 656.704, 656.726(4)

Other Authority: ORS 183.335; OAR 137-001; OAR 436-001

Statutes Implemented: ORS chapter 656; ORS 656.340, 656.622

Need for the Rule(s):

The proposed amendments will increase access to return-to-work assistance by Oregon employers and injured workers. The Employer-at-Injury and Preferred Worker programs are funded by the Workers' Benefit Fund (WBF). Both workers and employers pay into the WBF through payroll deductions. Changes to the vocational assistance rules will expedite training and direct employment services to eligible workers. Minor revisions to OAR 436-001-0265 will make the attorney fee provisions of this rule consistent with OAR 436-010 and 436-120.

The Management-Labor Advisory Committee (established under ORS 656.790) recommended several of the proposed rule changes.

Documents Relied Upon: Rulemaking advisory committee meeting records and issues documents. These records are available for public inspection in the Administrator's Office, Workers' Compensation Division, 350 Winter Street NE, Salem, Oregon 97301-3879, upon request and between the hours of 8:00 a.m. and 5:00 p.m., Monday through Friday. Please call (503) 947-7717 to request copies.

Fiscal and Economic Impact:

Oregon injured workers, employers, and insurers should benefit economically from these changes. Our research shows that workers who use reemployment assistance program benefits have more income over time than workers who are eligible but do not use the available assistance. Early return to work lowers claim costs, and program benefits such as wage subsidies and worksite modifications inject WBF dollars into Oregon businesses. Purchases for tools, clothing, and other items needed in order for a worker to begin a job are a direct benefit to injured workers, who otherwise would have to purchase the items out-of-pocket in order to take the job.

It is not possible to estimate dollar benefits that will result if the proposed rule changes are made permanent, in part because each reemployment program influences the others. However, we do project that benefits will be substantial. There will be increased demands placed on the WBF, but the Fund has adequate reserves to support the proposed changes.

Statement of Need and Fiscal Impact

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We project no net negative fiscal impact to any party, including the Department of Consumer and Business Services, if the proposed changes are made permanent.

Administrative Rule Advisory Committee consulted: Yes, 1/7/2005, 1/18/2005, & 1/20/2005

/s/ John L. Shilts

3/9/05

Signature and Date

John L. Shilts, Administrator, Workers' Compensation Division

Printed name

Administrative Rules Unit, Archives Division, Secretary of State, 800 Summer Street NE, Salem, Oregon 97310.

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

**PROPOSED
OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 120**

436-120-0001 Authority for Rules

The director has adopted OAR 436-120 by the director's authority under ORS 656.283(2), 656.340, and 656.726 (4).

Stat. Auth.: ORS 656.340(9), 656.726(4)

Stat. Impltd.: ORS 656.262(6), 656.268, 656.283(2), 656.313, 656.331(1)(b), 656.340, 656.447, 656.740, 656.745, ORS Ch. 183, and section 15, chapter 600, Oregon Laws 1985

Hist: Filed 12/30/73 as WCD Admin. Order 6-1973, eff. 1/11/74
Amended 11/5/74 as WCD Admin. Order 45-1974, eff. 11/5/74 (Temporary)
Amended 2/6/75 as WCD Admin. Order 4-1975, eff. 2/26/75
Amended 3/29/76 as WCD Admin. Order 1-1976, eff. 4/1/76
Amended 9/29/77 as WCD Admin. Order 3-1977, eff. 10/4/77 (Temporary)
Amended 2/1/78 as WCD Admin. Order 1-1978, eff. 2/1/78
Amended 5/22/80 as WCD Admin. Order 6-1980, eff. 6/1/80
Amended 12/29/82 as WCD Admin. Order 11-1982, eff. 1/1/83 (Temporary)
Amended 6/30/83 as WCD Admin. Order 2-1983, eff. 6/30/83
Amended 12/14/83 as WCD Admin. Order 5-1983, eff. 1/1/84
Renumbered from OAR 436-61-003, 5/1/85
Amended 12/12/85 as WCD Admin. Order 7-1985, eff. 1/1/86
Amended 12/17/87 as WCD Admin. Order 11-1987, eff. 1/1/88
Amended 10/31/94 as WCD Admin. Order 94-058, eff. 1/1/95
Amended 4/13/01 as WCD Admin. Order 01-053, eff. 5/15/01

436-120-0002 Purpose of Rules

The purpose of these rules is to prescribe uniform standards for determining eligibility, delivery and payment for vocational services to injured workers, procedures for resolving disputes, and to establish standards for the certification of vocational counselors and providers.

Stat. Auth.: ORS 656.340(9), 656.726(4)

Stat. Impltd.: ORS 656.012(2)(c), 656.258, 656.268(1), 656.283, 656.340, and section 15, chapter 600, Oregon Laws 1985

Hist: Filed 12/29/82 as WCD Admin. Order 11-1982, eff. 1/1/83 (Temporary)
Filed 6/30/83 as WCD Admin. Order 2-1983, eff. 6/30/83
Amended 12/14/83 as WCD Admin. Order 5-1983, eff. 1/1/84
Renumbered from OAR 436-61-008, 5/1/85
Amended 12/12/85 as WCD Admin. Order 7-1985, eff. 1/1/86
Amended 12/17/87 as WCD Admin. Order 11-1987, eff. 1/1/88
Amended 10/31/94 as WCD Admin. Order 94-058, eff. 1/1/95
Amended 4/27/00 as WCD Admin. Order 00-055, eff. 6/1/00

436-120-0003 Applicability of Rules

(1) These rules govern vocational assistance pursuant to the Workers' Compensation Law on or after the effective date of these rules except as OAR 436-120 otherwise provides.

(2) 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. 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 shall be provided in accordance with the rules in effect at the time assistance is provided.

(3) Under these rules a claim for aggravation or reopening a claim to process a newly accepted condition will be considered a new claim for purposes of vocational assistance eligibility and vocational assistance, except as otherwise provided in these rules.

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(4) The requirement for the director's advance approval of services eligible for claims cost reimbursement pursuant to OAR 436-120-0720(7) shall apply to any actions taken after the effective date of these rules.

(5) Applicable to this chapter, the director may, unless otherwise obligated by statute, in the director's discretion waive procedural rules as justice so requires.

Stat. Auth.: ORS 656.340(9), 656.726(4)

Stat. Impltd.: ORS 656.283(2), 656.340

Hist: Filed 3/29/76 as WCD Admin. Order 1-1976, eff. 4/1/76
Amended 9/26/77 as WCD Admin. Order 3-1977, eff. 10/4/77 (Temporary)
Amended 2/1/78 as WCD Admin. Order 1-1978, eff. 2/1/78
Amended 5/22/80 as WCD Admin. Order 6-1980, eff. 6/1/80
Amended 12/4/81 as WCD Admin. Order 4-1981, eff. 1/1/82
Amended 12/29/82 as WCD Admin. Order 11-1982, eff. 1/1/83 (Temporary)
Amended 6/30/83 as WCD Admin. Order 2-1983, eff. 6/30/83
Amended 12/14/83 as WCD Admin. Order 5-1983, eff. 1/1/84
Renumbered from OAR 436-61-004, 5/1/85
Amended 12/12/85 as WCD Admin. Order 7-1985, eff. 1/1/86
Amended 12/17/87 as WCD Admin. Order 11-1987, eff. 1/1/88
Amended 10/31/94 as WCD Admin. Order 94-058, eff. 1/1/95
Amended 2/2/96 as Admin. Order 95-074, eff. 3/1/96
Amended 4/27/00 as WCD Admin. Order 00-055, eff. 6/1/00
Amended 4/13/01 as WCD Admin. Order 01-053, eff. 5/15/01
Amended 5/30/02 as WCD Admin. Order 02-057, eff. 7/1/02
Amended 3/4/04 as WCD Admin. Order 04-056, eff. 4/1/04

436-120-0004 Notices and Reporting Requirements

(1) The insurer shall inform a worker with a compensable injury of the employment reinstatement rights and responsibilities of the worker under ORS chapter 659A and this rule. This information shall be given:

(a) At the time of claim acceptance, pursuant to ORS 656.262(6);

(b) At the time of contact of the worker under OAR 436-120-0320 about the need for vocational assistance, pursuant to ORS 656.340(2); and

(c) Within five days of receiving knowledge of the attending physician's release of the worker to return to work, pursuant to ORS 656.340(3), the insurer shall inform the worker about the opportunity to seek reemployment or reinstatement under ORS 659A.043 and 659A.046, and inform the employer about the worker's reemployment rights.

(2) All notices and warnings to the worker issued pursuant to OAR 436-120 shall be in writing, signed and dated, and state the basis for the decision, the effective date of the action, the relevant rule(s), the worker's appeal rights required pursuant to this rule, and the telephone number of the Ombudsman for Injured Workers. However, the insurer's response does not need to be in writing when the insurer approves a worker's request for a particular vocational service. All notices and warnings are subject to the following conditions:

(a) The following headings shall be used for the following notices. Should one notice be used for multiple actions, all appropriate headings shall be listed:

(A) Eligibility.[.] **This notice must inform the worker which category of vocational assistance will be provided: NOTICE OF ELIGIBILITY FOR VOCATIONAL ASSISTANCE and NOTICE OF ENTITLEMENT TO TRAINING (or) NOTICE OF ENTITLEMENT TO DIRECT EMPLOYMENT SERVICES, EFFECTIVE (date)**

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(B) Ineligibility: NOTICE OF INELIGIBILITY FOR VOCATIONAL ASSISTANCE, EFFECTIVE (date)

(C) Selection or change of provider: SELECTION OF (OR CHANGE OF) VOCATIONAL ASSISTANCE PROVIDER, EFFECTIVE (date)

[(D) Category of assistance: NOTICE OF VOCATIONAL EVALUATION TO BEGIN (date) or NOTICE OF ENTITLEMENT TO TRAINING, EFFECTIVE (date) or NOTICE OF ENTITLEMENT TO DIRECT EMPLOYMENT SERVICES, EFFECTIVE (date)]

(D)[**(E)**] End of training: NOTICE OF TRAINING END, EFFECTIVE (date)

(E)[**(F)**] End of eligibility: NOTICE OF END OF ELIGIBILITY FOR VOCATIONAL ASSISTANCE, EFFECTIVE (date)

(F) Deferral of vocational assistance eligibility determination: NOTICE OF DEFERRAL OF VOCATIONAL ASSISTANCE ELIGIBILITY DETERMINATION, EFFECTIVE (date)

(b) Warning letters do not require specific language in the headings but should include a heading clearly indicating the purpose of the warning.

(c) The insurer shall simultaneously send a copy to the worker's representative. Failure to send a copy of the notice to the worker's representative stays the appeal period until the worker's representative receives actual notice.

(d) All notices and warnings **except** those notifying a worker of eligibility,² [or] entitlement to training **or deferral of vocational assistance eligibility** shall contain the worker's appeal rights in bold type, as follows:

"If you disagree with this decision, you should contact (person's name and insurer) within five days of receiving this letter to discuss your concerns.

If you are still dissatisfied, you must contact the Workers' Compensation Division within 60 days of receiving this letter or you will lose your right to appeal this decision. A consultant with the division can talk with you about the disagreement and, if necessary, will review your appeal. The address and telephone number of the division are: (address and telephone number of the Workers' Compensation Division)."

(3) If the insurer is unable to determine eligibility or make a decision regarding a particular vocational service because of insufficient data, the insurer shall explain what information is necessary and when it expects to determine eligibility or make a decision.

(4) Notice of Eligibility for vocational assistance **and Notice of Entitlement to Training (or) Notice of Entitlement for Direct Employment Services** shall include the following:

(a) Selection of the category of vocational assistance. **When direct employment services are selected, the notice must state the worker is not entitled to training and must include the appeal rights language in OAR 436-120-0004(2)(d)** [², if known];

(b) The worker's rights and responsibilities;

(c) Procedures for resolving dissatisfaction with an action of the insurer regarding

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vocational assistance;

(d) The current list of vocational assistance providers, and an explanation of the worker's participation in the selection of a vocational assistance provider. This notice shall include the following language in bold type:

"If you have questions about the vocational counselor selection process, contact (use appropriate reference to the insurer). If you still have questions contact the Workers' Compensation Division's toll free number (use appropriate telephone number)."

(e) Information about potential reemployment assistance under OAR 436-110.

(5) Notice of Ineligibility for vocational assistance is subject to the following conditions:

(a) The notice shall be sent to the worker by both regular and certified mail.

(b) The notice shall include information about services which may be available at no cost from the Employment Department or the Office of Vocational Rehabilitation Services, and reemployment assistance under OAR 436-110.

(c) If the notice is based on a finding of "no substantial handicap," it shall list some suitable occupations.

(d) If the insurer is not required to determine eligibility pursuant to OAR 436-120-0320(2), no Notice of Ineligibility is required unless the worker or worker's representative requested a determination of eligibility. When the ineligibility is due to no permanent disability award, the notice must inform the worker of entitlement to an eligibility determination upon a final order granting permanent disability.

(6) Notice of Denial of Vocational Service shall be given by the insurer.

[(7) Notice of Selection of Category of Vocational Assistance shall be given by the insurer. When direct employment services are selected, the notice shall state the worker is not entitled to training.]

(7)^[(8)] The approved, denied or amended return-to-work plan shall be sent to the worker. Notification of Denial of Return-to-Work Plan shall identify any components of the plan that the insurer did not approve.

(8)^[(9)] Notice of End of Training shall state whether the worker is entitled to further training. The effective date of the end of training letter shall be the worker's last date of attendance.

(9)^[(10)] Notice of End of Eligibility for vocational assistance shall be sent by both regular and certified mail to the worker.

(10) Notice of Deferral of Vocational Assistance Eligibility Determination is subject to the following conditions:

(a) The notice must be sent to the worker by both regular and certified mail.

(b) The notice must inform the worker that the insurer will not complete the vocational eligibility process because the employer at injury has activated preferred worker benefits and the worker has chosen to accept the job offer from the employer at

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injury. The notice must also inform the worker that, if the job has not begun by the hire date listed in the job offer letter, the worker can request that the vocational eligibility determination be completed.

(c) This notice must include the following language in bold type:

"If you have questions about the deferral of the vocational eligibility process, contact (use appropriate reference to the insurer). If you still have questions contact the Workers' Compensation Division's toll free number (use appropriate telephone number). "

(11) Warnings to the worker shall state what the worker must do within a specified time to avoid ineligibility or the ending of eligibility or training.

(12) The insurer shall simultaneously send a copy of the following notices to the department:

- (a) Notice of Eligibility;
- (b) Notice of Ineligibility;
- (c) Approved Return-to-Work Plan and any amendments;
- (d) Notice of End of Training; [and]
- (e) Notice of Ending of Eligibility for Vocational Assistance; **and**[.]

(f) Notice of Deferral of Vocational Assistance Eligibility Determination

(13) The insurer shall file a closing status report with the division for each eligible worker within 30 days after eligibility ends. The insurer shall report the following information:

(a) The date and reason for ending of eligibility, return-to-work and vocational assistance provider information.

(b) For post-1985 injuries, the insurer shall also report cost information for eligibility determination and vocational services provided under these rules as required by the director.

Stat. Auth.: ORS 656.340(9), 656.726(4), and 192.410 through 192.505

Stat. Impltd.: ORS 656.340(5), 656.340(7)

Hist: Filed 12/17/87 as WCD Admin. Order 11-1987, eff. 1/1/88
 Amended 10/31/94 as WCD Admin. Order 94-058, eff. 1/1/95
 Amended 2/2/96 as WCD Admin. Order 95-074, eff. 3/1/96
 Amended and Renumbered from OAR 436-120-0600, -0610, and -0620, as WCD Admin. Order 00-055, eff. 6/1/00
 Amended 5/30/02 as WCD Admin. Order 02-057, eff. 7/1/02.
 Amended 3/4/04 as WCD Admin. Order 04-056, eff. 4/1/04
Amended xx/xx/xx as WCD Admin. Order xx-xxx, eff. xx/xx/xx

436-120-0005 Definitions

Except where the context requires otherwise, the construction of these rules is governed by the definitions given in the Workers' Compensation Law and as follows:

(1) "Administrative approval" means approval of the director.

(2) "Cost-of-living matrix" is a chart issued annually by the director in Bulletin 124 or in an addendum to Bulletin 124 which publishes the conversion factors, effective July 1 of each year, used to adjust for changes in the cost-of-living rate from the date of injury to the date of

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calculation. The conversion factor is based on the annual percentage increase or decrease in the average weekly wage, as defined in ORS 656.211.

(3) "Division" refers to the Workers' Compensation Division of the Department of Consumer and Business Services.

(4) "Employer at injury" means an employer in whose employ the worker sustained the compensable injury, or occupational disease.

(5) "Insurer" means the State Accident Insurance Fund, an insurer authorized under ORS chapter 731 to transact workers' compensation insurance in Oregon, or a self-insured employer. A vocational assistance provider acting as the insurer's delegate may provide notices and warnings required by OAR 436-120.

(6) "Job analysis" means a detailed description of the physical and other demands of a job based on direct observation of the job.

(7) "Labor market survey" means employment information obtained from direct contact with employers, other actual labor market information, or from other surveys completed within 90 days of the report date.

(a) A labor market survey is needed when standard labor market reference materials do not have adequate information upon which to base a decision or there are questions about a worker's specific limitations, training and skills, which must be addressed with employers to determine if a reasonable labor market exists.

(b) The person providing the information must have hiring responsibility or direct knowledge of the job's requirements and the job must exist at the firm contacted.

(c) The labor market survey report must include, but is not limited to, the date of contact; firm name, address and telephone number; name and title of person contacted; the qualifications of persons recently hired; physical requirements; wages paid; condition of hire (full-time, part-time, seasonal, temporary); date and number of last hire(s); and available and anticipated openings.

(d) Specific openings found in the course of a labor market survey are not, in themselves, proof a reasonable labor market exists.

(8)⁽⁶⁾ "Permanent employment" is a job with no projected end date or a job which had no projected end date at time of hire. Permanent employment may be year-round or seasonal.

(9)⁽⁷⁾ "Physical Demand Characteristics of Work" Strength Rating: The physical demands strength rating reflects the estimated overall strength requirements of the job, which are considered to be important for average, successful work performance. The following definitions are used: "occasionally" is an activity or condition that exists up to 1/3 of the time; "frequently" is an activity or condition that exists from 1/3 to 2/3 of the time; "constantly" is an activity or condition that exists 2/3 or more of the time.

(a) Sedentary Work (S): Exerting up to 10 pounds of force occasionally and/or a negligible amount of force frequently to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are

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required only occasionally and all other sedentary criteria are met.

(b) Light Work (L): Exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly to move objects. Physical demand requirements are in excess of those for Sedentary Work. Even though the weight lifted may be only a negligible amount, a job should be rated Light Work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling of arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible. NOTE: The constant stress and strain of maintaining a production rate pace, especially in an industrial setting, can be and is physically demanding of a worker even though the amount of force exerted is negligible.

(c) Medium Work (M): Exerting 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects. Physical demand requirements are in excess of those for Light Work.

(d) Heavy Work (H): Exerting 50 to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently, and/or 10 to 20 pounds of force constantly to move objects. Physical demand requirements are in excess of those for Medium Work.

(e) Very Heavy (VH): Exerting in excess of 100 pounds of force occasionally, and/or in excess of 50 pounds of force frequently, and/or in excess of 20 pounds of force constantly to move objects. Physical demand requirements are in excess of those for Heavy Work.

(10)⁽⁸⁾ "Reasonable cause" may include, but is not limited to, a medically documented limitation in a worker's activities due to illness or medical condition of the worker or the worker's family, financial hardship, or circumstances beyond the reasonable control of the worker. "Reasonable cause" for failure to provide information or participate in activities related to vocational assistance will be determined based upon individual circumstances of the case.

(11)⁽⁹⁾ "Reasonable labor market": An occupation can be said to have reasonable employment opportunities if competitively qualified workers can expect to find equivalent jobs in the occupation within a reasonable period of time. A reasonable period of time, for workers in the majority of occupations, would be the six months that they could collect regular unemployment insurance benefits, if they were entitled to them. (*Oregon Occupational Projections Handbook, 2002-2008*)

(12)⁽¹⁰⁾ "Regular employment" means the employment the worker held at the time of the injury or at the time of the claim for aggravation, whichever gave rise to the potential eligibility for vocational assistance; or, for a worker not employed at the time of aggravation, the employment the worker held on the last day of work prior to the aggravation claim. If the basis for potential eligibility is a reopening to process a newly accepted condition, "regular employment" is the employment the worker held at the time of the injury; when the condition arose after claim closure, "regular employment" is determined as if it were an aggravation claim.

(13)⁽¹¹⁾ "Substantial handicap to employment", **as determined under OAR 436-120-0340**, means the worker, because of the injury or aggravation, lacks the necessary physical capacities, knowledge, skills and abilities to be employed in suitable employment. "Knowledge,"

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"skills," and "abilities" have meanings as follows:

- (a) "Knowledge" means an organized body of factual or procedural information derived from the worker's education, training and experience.
- (b) "Skills" means the demonstrated mental and physical proficiency to apply knowledge.
- (c) "Abilities" means the cognitive, psychological, and physical capability to apply the worker's knowledge and skills.

(14)⁽¹²⁾ "Suitable employment" or "suitable job" means employment or a job:

- (a) For which the worker has the necessary physical capacities, knowledge, skills and abilities;
- (b) Located where the worker customarily worked, or within reasonable commuting distance of the worker's residence. A reasonable commuting distance is no more than 50 miles one-way modified by other factors including, but not limited to:
 - (A) Wage of the job. A low wage may justify a shorter commute;
 - (B) The pre-injury commute;
 - (C) The worker's physical capacities, if they restrict the worker's ability to sit or drive for 50 miles;
 - (D) Commuting practices of other workers who live in the same geographic area; and
 - (E) The distance from the worker's residence to the nearest cities or towns which offer employment opportunities;
- (c) Which pays or would average on a year-round basis a suitable wage as defined in section **(15)**⁽¹³⁾ of this rule; [and]
- (d) Which is permanent. Temporary work is suitable if the worker's job at injury was temporary; and the worker has transferable skills to earn, on a year-round basis, a suitable wage as defined in section **(15)**⁽¹³⁾ of this rule; **and**[.]

(e) Modified or new employment that results from an employer at injury activated use of the Preferred Worker Program, under OAR 436-110, will be considered "suitable":

(A) One year from the effective date of the premium exemption if there are no worksite modifications, or

(B) Eighteen months from the effective date of the worksite modification agreement, or

(C) If the worker is terminated for cause, or

(D) If the worker voluntarily resigns for a reason unrelated to the work injury.

(15)⁽¹³⁾ "Suitable wage" means:

- (a) For the purpose of determining eligibility for vocational assistance, a wage at least 80 percent of the adjusted weekly wage as defined in OAR 436-120-0007.

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(b) For the purpose of providing and/or ending vocational assistance, a wage as close as possible to 100 percent of the adjusted weekly wage. This wage may be considered suitable if less than 80 percent of the adjusted weekly wage, if the wage is as close as possible to the adjusted weekly wage.

(16)⁽¹⁴⁾ "Transferable skills" means the knowledge and skills demonstrated in past training or employment which make a worker employable in suitable new employment. More general characteristics such as aptitudes or interests do not, by themselves, constitute transferable skills.

(17)⁽¹⁵⁾ "Vocational assistance" means any of the services, goods, allowances and temporary disability compensation under these rules to assist an eligible worker return to work. This does not include activities for determining a worker's eligibility for vocational assistance.

(18)⁽¹⁶⁾ "Vocational assistance provider" means an insurer or other public or private organization, authorized under these rules to provide vocational assistance to injured workers.

Stat. Auth.: ORS 656.340(9), 656.726(4)

Sta. Impltd.: ORS 656.340

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Amended 12/14/01 as WCD Admin. Order 01-066, eff. 1/2/02 (Temporary)
Amended 5/30/02 as WCD Admin. Order 02-057, eff. 7/1/02
Amended xx/xx/xx as WCD Admin. Order xx-xxx, eff. xx/xx/xx

436-120-0006 Administration of Rules

(1) At any time, the director may order the insurer to determine eligibility or provide specified vocational assistance to achieve compliance with ORS chapter 656 and these rules. The order may be appealed as provided by statute.

(2) Orders issued by the division in carrying out the director's authority to administer and to enforce ORS chapter 656 and these rules are considered orders of the director.

Stat. Auth.: ORS 656.340(9), 656.726(4)

Stat. Impltd.: ORS 656.283(2), 656.313

Hist: Amended and Renumbered from OAR 436-120-001 and 210, 10/31/94 as WCD Admin. Order 94-058, eff. 1/1/95
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436-120-0007 Establishing the Adjusted Weekly Wage to Determine Suitable Wage

To determine a suitable wage as defined in OAR 436-120-0005 **(15)**⁽¹³⁾, the insurer shall first establish the adjusted weekly wage as described in this rule. The insurer must calculate the "adjusted weekly wage" whenever determining or redetermining a worker's eligibility.

(1) 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 (housing, utilities, food, etc.) received from **all** ^[an] 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 time of aggravation, the last job or concurrent jobs held prior to 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, 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 shall be 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.

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

(h) "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.

(2) The insurer shall determine the nature of the job at injury or the job or jobs at aggravation by contacting the employer or employers to verify the worker's employment status. All figures used in determining a weekly wage by this method shall 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 Employment Department. The insurer shall calculate the worker's adjusted weekly wage as described by this rule.

(3) When the job at injury or the job at aggravation was temporary or seasonal, calculate

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the worker's average weekly wage as follows, then convert to the adjusted weekly wage as described in section (6) 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 prior to 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 prior to the aggravation, the worker's average weekly wage is calculated using the same methods used to calculate temporary disability as described in OAR 436-060-0025.

(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 prior to the date of the injury or aggravation, combine the earned income the worker received from all jobs the worker held at the time of the injury or aggravation, then divide the total by the number of weeks the worker worked during the 52 weeks prior to 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 prior to the date of the injury or aggravation, combine the earned income the worker received from all jobs held at the time of the injury or aggravation 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 prior to the date of the injury or aggravation.

[When the worker held more than one job at the time of injury or aggravation and/or received unemployment insurance benefits, the worker's average weekly wage is determined by combining the worker's earned income and any unemployment insurance payments received during the 52 weeks prior to the injury or aggravation. The total shall be divided by 52 weeks, or if the worker worked less than 52 weeks by the number of weeks worked plus the number of weeks the worker received unemployment benefits. Extended gaps from all jobs are not included as weeks worked.]

(4) When the job at injury was other than as described in section (3) of this rule, 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 (6) of this rule.

(5) When the job at aggravation was other than as described in section (3) of this rule, the worker's average weekly wage is calculated using the same methods used to calculate temporary disability as described in OAR 436-060-0025, and then convert to the adjusted weekly wage as described in section (6) of this rule.

(6) Adjusted weekly wage: After arriving at the weekly wage pursuant to 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 prior to aggravation, to the date of calculation, as follows:

(a) Contact the employer at injury or aggravation regarding any cost-of-living or collective bargaining adjustments for workers performing the same job. When the worker held

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two or more jobs at aggravation, contact the employer for whom the worker worked the most hours. Adjust the worker's weekly wage by any percentage increase or decrease;

(b) If the employer at injury or aggravation 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 worker's weekly wage by the percentage increase or decrease; or

(c) If the employer at injury or aggravation is no longer in business or does not currently employ workers in the same job category, adjust the worker's weekly wage by the appropriate factor from the cost-of-living matrix.

Stat. Auth.: ORS 656.340(9), ORS 656.726(3)

Stat. Impltd.: ORS 656.340(5) and (6)

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436-120-0008 Administrative Review and Contested Cases

(1) **Administrative review of vocational assistance matters:** Under ORS 656.283(2) and 656.340(4), a worker wanting review of any vocational assistance matter must apply to the director for administrative review. Also, under ORS 656.340(11) and OAR 436-120-0320 **11** [(10)] when the worker and insurer are unable to agree on a vocational assistance provider, the insurer shall apply to the director for administrative review. Because effective vocational assistance is best realized in a nonadversarial environment, the first objective of the administrative review is to bring the parties to resolution through alternative dispute resolution procedures, including mediation conferences, whenever possible and appropriate. When a dispute is not resolved through mutual agreement or dismissal, the director shall close the record and issue a Director's Review and Order as described in subsections (f) and (g) of this section. A worker need not be represented to request or to participate in the administrative review process, which is as follows:

(a) The worker's request for review must be mailed or otherwise communicated to the department no later than the 60th day after the date the worker received written notice of the insurer's action; or, if the worker was represented at the time of the notice, within 60 days of the date the worker's representative received actual notice. Issues raised by the worker where written notice was not provided may be reviewed at the director's discretion.

(b) The worker, insurer, employer at injury, and vocational assistance provider shall supply needed information, attend conferences and meetings, and participate in the administrative review process as required by the director. Upon the director's request, any party to the dispute shall provide available information within 14 days of the request. The insurer shall promptly schedule, pay for, and submit to the director any medical or vocational tests, consultations, or reports required by the director. The worker, insurer, employer at injury, or vocational assistance provider shall simultaneously send copies to the other parties to the dispute when sending material to the director. If necessary, the director will assist an unrepresented worker in sending copies to the appropriate parties. Failure to comply with this subsection may

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result in the following:

(A) If the worker fails to comply without reasonable cause, the director may dismiss the administrative review as described in subsection (d); or, the director may decide the issue on the basis of available information.

(B) If the insurer, vocational assistance provider, or employer at injury fails to comply without reasonable cause, the director may decide the issue on the basis of available information.

(c) At the director's discretion, the director may issue an order of deferral to temporarily suspend administrative review. The order of deferral will specify the conditions under which the review will be resumed.

(d) The director may issue an order of dismissal under appropriate conditions.

(e) The director shall issue a letter of agreement when the parties resolve a dispute within the scope of these rules. Any agreement may include an agreement on attorney fees, if any, to be paid to the worker's attorney. The agreement will become **effective** [final] on the 10th day after the letter of agreement is issued unless the agreement specifies otherwise. Once the agreement becomes final, the director may reconsider approval of the agreement upon the director's own motion or upon a motion by a party. The director may revise the agreement or reinstate the review only under one or more of the following conditions:

(A) One or both parties fail to honor the agreement;

(B) The agreement was based on misrepresentation;

(C) Implementation of the agreement is not feasible because of unforeseen circumstances; or

(D) All parties request revision or reinstatement of the review.

(f) After the parties have had the opportunity to present evidence, and any meetings or conferences deemed necessary by the director have been held, the director shall issue a final order, including the notice of record contents. The parties will have 60 days from the issuance of the order to request a contested case hearing before the director.

(g) The director may on the director's own motion reconsider or withdraw any order that has not become final by operation of law. A party also may request reconsideration of an administrative order upon an allegation of error, omission, misapplication of law, incomplete record, or the discovery of new material evidence which could not reasonably have been discovered and produced during the review. The director may grant or deny a request for reconsideration at the director's sole discretion. A request for reconsideration must be mailed before the administrative order becomes final, or if appealed, before the contested case order is issued.

(h) During any reconsideration of the administrative review order, the parties may submit new material evidence consistent with this rule and may respond to such evidence submitted by others.

(i) Any party requesting reconsideration or responding to a reconsideration request shall simultaneously notify all other interested parties of their contentions and provide them with

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copies of all additional information presented.

(j) A request for reconsideration does not stay the 60-day time period within which the parties must request a contested case hearing.

(2) Attorney fees: In any dispute in which a represented worker prevails after a proceeding has commenced before the director, the director **will** [shall] award an attorney fee to be paid by the insurer or self-insured employer as provided in ORS 656.385 (§2, ch. 756, OL 2003). The attorney fee will be proportionate to the benefit to the injured worker. Primary consideration **will** [shall] be given to the results achieved and the time devoted to the case. Absent extraordinary circumstances or agreement by the parties, the fee may not exceed \$2000, nor fall outside the ranges for fees as provided in the following matrix:

Estimated Benefit Achieved	Professional Hours Devoted				
	1-2 hours	2.1-4 hours	4.1-6 hours	6.1-8 hours	[8.1-12] over 8 hours
\$1-\$2000	\$100-400	\$200-700	\$300-750	\$600-1000	\$800-1250
\$2001-\$4000	\$200-500	\$400-800	\$600-900	\$800-1300	\$1050-1500
\$4001-\$6000	\$300-700	\$600-1000	\$800-1250	\$1000-1450	\$1300-1750
Over \$6000[1-\$10000]	\$400-900	\$800-1300	\$1050-1600	\$1350-1800	\$1550-2000

(a) An attorney must submit the following to the director in order to be awarded an attorney fee:

(A) A current, valid retainer agreement, and

(B) A statement of hours spent on the case if greater than two hours. In the absence of such a statement, the director **will** [shall] assume the time spent on the case was 1-2 hours.

(b) In determining the value of the results achieved, the director may consider, but is not limited to the following:

(A) Where there is a return-to-work plan that includes the disputed service(s), the assumed value is the cost of the disputed service(s) as projected in the plan;

(B) Where the service(s) have not been incorporated in an existing return-to-work plan, the assumed value is the actual or projected cost of the service(s) up to the amount allowed in the fee schedule provided in OAR 436-120-0720;

(C) For the purposes of applying the matrix, the value of an eligibility determination is assumed to be the maximum allowed in the fee schedule provided in OAR 436-120-0720 for completing an eligibility evaluation; the value of vocational assistance or a training plan, unless determined to be otherwise, is assumed to fall within the highest category provided in the above matrix; or

(D) A written agreement between the parties regarding the value of the benefit to the worker submitted to the director prior to the issuance of an order.

(c) If any party believes extraordinary circumstances exist that justify a fee outside of the

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ranges provided in the above matrix or above \$2000, they may submit a written or faxed statement of the extraordinary circumstances to the director. **Extraordinary circumstances are not established by merely exceeding eight hours or exceeding a benefit of \$6000.**

(d) In order to provide parties an opportunity to inform the director of agreements, or submit statements of extraordinary circumstances or professional hours for consideration in determining the attorney fee, the director will provide the parties notice by phone or fax at least 3 business days in advance that an order or other written resolution of the dispute will be issued. Any information or statements provided to the director must simultaneously be provided to all other parties to the dispute.

(e) An assessed attorney fee **will** [shall] be paid within 30 days of the date the order authorizing the fee becomes final.

(3) Contested cases regarding the director's administrative review: Under ORS 656.283, orders issued under subsection (1) (f) of this rule and dismissals issued under subsection (1)(d) of this rule may be appealed to the director for a contested case hearing as follows:

(a) The party must send the request for hearing in writing to the administrator of the Workers' Compensation Division and shall simultaneously send a copy of the request to the other party(ies). The request must specify the grounds upon which the order is contested.

(b) The party must mail the request to the division within 60 days of the date of the order.

(c) The hearing will be conducted in accordance with the rules governing contested case hearings in OAR 436-001.

(4) Contested cases regarding jurisdiction or reimbursement of costs: Under ORS 183.310 through 183.550 and ORS 656.704(2), a worker may appeal an order of dismissal based on lack of jurisdiction under subsection (1)(d) of this rule, or, under ORS 183.310 through 183.550 and ORS 656.704(2), an insurer may appeal department denial of reimbursement for vocational assistance costs under OAR 436-120-0730, as follows:

(a) The party must send the request for hearing to the administrator of the Workers' Compensation Division. The party must also simultaneously send a copy of the request to the other party(ies). The request must specify the grounds upon which the denial is contested.

(b) The party must mail the request to the division no later than the 30th day after the party received the dismissal or written denial.

(c) The hearing will be conducted in accordance with the rules governing contested case hearings in OAR 436-001.

(5) Contested case hearings of civil penalties: Under ORS 656.740 an insurer or an employer may appeal a proposed order or proposed assessment of civil penalty pursuant to ORS 656.745 and OAR 436-120-0900 as follows:

(a) The insurer or employer must send the request for hearing in writing to the administrator of the Workers' Compensation Division. The request must specify the grounds upon which the proposed order or assessment is contested.

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(b) The party must file the request with the division within 60 days after the mailing date of the notice of the proposed order or assessment.

(c) The division shall forward the request and other pertinent information to the Hearings Division of the Workers' Compensation Board.

(d) The Hearings Division shall conduct the hearing in accordance with ORS 656.740 and ORS chapter 183.

(6) **Contested case hearings of sanctions and denials of certification or authorization** by the director: Under ORS 183.310 through 183.550, an insurer sanctioned pursuant to ORS 656.447 and OAR 436-120-0900, a vocational assistance provider or certified individual sanctioned pursuant to ORS 656.340(9)(b) and OAR 436-120-0915, a vocational assistance provider denied authorization pursuant to ORS 656.340(9)(a) and OAR 436-120-0800, or an individual denied certification pursuant to ORS 656.340(9)(a) and OAR 436-120-0810 may appeal as follows:

(a) The party must send the request for administrative review in writing to the administrator of the Workers' Compensation Division. The request must specify the grounds upon which the action is contested.

(b) The party must mail the request to the division no later than the 60th day after the party received notification of the action, unless the director determines there was good cause for delay or that substantial injustice may otherwise result.

(c) The hearing will be conducted in accordance with the rules governing contested case hearings in OAR 436-001.

Stat. Auth.: ORS 656.704(2), 656.726(4)

Stat. Impltd.: ORS 183.310 through 183.555, 656.283(2), 656.340, 656.447, 656.740, 656.745

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436-120-0320 Determining Eligibility for Vocational Assistance and Selection of Vocational Assistance Provider

(1) Unless one of the provisions in section (2) below applies, the insurer shall contact a worker with an accepted disabling claim or claim for aggravation to begin the eligibility determination within five days of **any of** the following:

(a) The insurer's receipt of a request for vocational assistance from the worker. If the insurer does not know the worker's permanent limitations, the insurer shall contact the attending

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physician within 14 days of receiving the request for vocational assistance. The insurer shall notify the worker if the eligibility determination is postponed until permanent restrictions are known or can be projected.

(b) The insurer's receipt of a medical or investigative report sufficient to document a need for vocational assistance, including medical verification of projected or actual permanent limitations due to the injury.

(c) The insurer's knowledge that the claim qualifies for closure because the worker is medically stationary. If the claim qualifies for closure under ORS 656.268(1)(b) or (c), the insurer may postpone the determination until the worker is medically stationary or until permanent restrictions are known or can be projected, whichever occurs first.

(d) The worker is granted a permanent disability award.

(2) The insurer is not required to determine eligibility if:

(a) Eligibility has previously been determined under the current opening of the claim and there are no newly accepted conditions;

(b) The worker has returned to regular or other suitable employment with the employer at injury or aggravation; or

(c) The worker's claim was closed with no permanent disability award. The following by themselves do not make a worker ineligible for vocational assistance:

(A) A finding that a worker is not entitled to an additional award of permanent disability on aggravation, or

(B) A finding that a worker is not entitled to a permanent disability award because of an offset of permanent disability from a prior claim, or

(C) The worker disposes of permanent disability through a claim disposition agreement (CDA).

(3) The insurer must defer the determination of vocational assistance eligibility when the employer at injury activates preferred worker benefits under OAR 436-110 and the worker agrees to accept the new or modified regular job in writing.

(a) There must be a written job offer which includes the following information:

(A) The start date;

(B) That the job does not begin until the modifications are in place;

(C) Wage and hours;

(D) Job site location; and

(D) Description of job duties.

(b) The insurer must send the worker a Notice of Deferral of Vocational Assistance Eligibility Determination within 14 days of the workers signature accepting the job offer.

(c) If preferred worker benefits cannot modify the job to accommodate the worker's

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restrictions, as verified by the division, or the employer, the worker, or division terminate the agreement, the insurer must complete the eligibility determination process within 30 days from the date of a determination that preferred worker benefits will not be provided.

(4)[(3)] If the insurer receives a request for vocational assistance from the worker or the worker's representative and the insurer is not required to determine eligibility under section (2), the insurer shall notify the worker in writing, within 14 days of the request and provide:

- (a) The reasons the insurer is not required to determine eligibility,
- (b) The circumstance which would require the insurer to determine eligibility, and
- (c) The appropriate telephone number of the division, with instructions to contact the division with questions about vocational assistance eligibility requirements and procedures.

(5)[(4)] Nothing in these rules prevents the insurer from finding a worker eligible and providing vocational assistance at any time.

(6)[(5)] The insurer shall complete the eligibility determination within 30 days of the contact required in section (1) or if the eligibility determination was postponed within 30 days of receipt of verification of projected or actual permanent limitations. **An eligibility evaluation may include a vocational evaluation that determines the category of assistance as defined in OAR 436-120-0400. The notice required under OAR 436-120-0004 (2)(a)(A) must inform the worker which category of assistance will be provided.**

(7)[(6)] A vocational counselor certified under OAR 436-120 shall determine if a worker meets eligibility criteria.

(8)[(7)] The insurer shall provide the vocational counselor with all existing relevant medical information regarding the worker's physical capacities and limitations.

(9)[(8)] After the worker's permanent limitations are known or can be projected, the worker shall, upon written request from the insurer, provide vocationally relevant information needed to determine eligibility within a reasonable time set by the insurer.

(10)[(9)] A worker entitled to an eligibility evaluation is eligible for vocational services if all the following additional conditions are met:

- (a) The worker is authorized to work in the United States.
- (b) The worker is available in Oregon for vocational assistance. The insurer shall consider the worker available in Oregon if the worker lives within commuting distance of Oregon or documents, in writing, willingness to relocate to or within commuting distance of Oregon within 30 days of being found eligible. The worker is responsible for costs associated with being available in Oregon. The requirement that the worker be available in Oregon for vocational assistance does not apply if the Oregon subject worker did not work and live in Oregon at the time of the injury.
- (c) As a result of the limitations caused by the injury or aggravation, the worker:
 - (A) Is not able to return to regular employment;
 - (B) Is not able to return to any other suitable and available work with the employer at injury or aggravation; and

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(C) Has a substantial handicap to employment and requires assistance to overcome that handicap.

(d) None of the reasons for ineligibility under OAR 436-120-0350 applies under the current opening of the claim.

(11)^[(10)] Upon determining the worker eligible, the insurer and worker shall jointly select a vocational assistance provider. No later than 20 days from the date the insurer determined the worker eligible, the insurer shall either notify the worker of the selection of vocational assistance provider, or if the parties are unable to agree, refer the dispute to the director. The worker and insurer shall follow the same procedure to select a new vocational assistance provider.

(12)^[(11)] Unless all parties otherwise agree in writing, vocational assistance will be due at any given time with respect only to one claim of the worker. If the worker is eligible for vocational assistance under two or more claims, and there is a dispute about which claim gives rise to the need for vocational assistance pursuant to these rules, the director will select the claim for the injury which results in the most severe vocational impact. If services are provided under more than one claim at a time pursuant to a written agreement of all parties, time and fee limits may extend beyond the limits otherwise imposed in these rules.

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436-120-0340 Determining Substantial Handicap

(1) A certified vocational counselor shall perform a substantial handicap evaluation as part of the eligibility determination unless the insurer finds that the worker has a substantial handicap to employment.

(2) To complete the substantial handicap evaluation the vocational counselor shall submit a report documenting the following information:

- (a) Relevant work history for at least the preceding five years;
- (b) Level of education, proficiency in spoken and written English or other languages, where relevant, and achievement or aptitude test data if it exists;
- (c) Adjusted weekly wage as determined under OAR 436-120-0007 and suitable wage as defined by OAR 436-120-0005**(15)**^[(13)];
- (d) Permanent limitations due to the injury;
- (e) An analysis of the worker's transferable skills, if any;

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(f) A list of physically suitable jobs for which the worker has the knowledge, skills and abilities, which pay a suitable wage, and for which a reasonable labor market is documented to exist as described in subsection (g) below;

(g) An analysis of the worker's labor market utilizing standard labor market reference materials including but not limited to Employment Department (OED) information such as Oregon Wage Information (OWI), Oregon Comprehensive Analysis File and other publications of the Occupational Program Planning System (OPPS) and material developed by the division. When using the OWI data, the presumed standard shall be the 10th percentile unless there is sufficient evidence that a higher or lower wage is more appropriate. When such data is not sufficient to make a decision about substantial handicap, the vocational counselor shall perform individual labor market surveys as described in OAR 436-120-~~0005(6)~~^[0410(6)]; and

(h) Consideration of the vocational impact of any limitations which existed prior to the injury.

Stat. Auth.: ORS 656.726(4)

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436-120-0350 Ineligibility and End of Eligibility for Vocational Assistance

A worker is ineligible or the worker's eligibility ends when any of the following conditions apply:

(1) The worker does not or no longer meets the eligibility requirements as defined in OAR 436-120-0320. The insurer must have obtained new information which did not exist or which the insurer could not have discovered with reasonable effort at the time the insurer determined eligibility.

(2) The worker is determined not to have permanent disability after a finding of eligibility.

(3) The worker's lack of suitable employment is not due to the limitations caused by the injury or which existed before the injury.

(4) The worker has been employed at least for 60 days in suitable employment after the injury or aggravation and any necessary worksite modification is in place, unless OAR 436-120-0350(17) applies.

(5) The worker, prior to beginning an authorized return-to-work plan, refused an offer of suitable employment, or left suitable employment after the injury or aggravation for a reason unrelated to the limitations due to the compensable injury. If the employer-at-injury offers employment to a non-medically stationary worker, the offer must be made in accordance with OAR 436-060.

(6) The worker, prior to beginning an authorized return-to-work plan, refused or failed to make a reasonable effort in available light-duty work intended to result in suitable employment.

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Prior to finding the worker ineligible or ending eligibility, the insurer shall document the existence of one or more suitable jobs which would have been available for the worker upon successful completion of the light-duty work. If the employer-at-injury offers such employment to a non-medically stationary worker, the offer must be made in accordance with OAR 436-060.

(7) The worker, after completing an authorized training plan, refused an offer of suitable employment.

(8) The worker has declined or has become unavailable for vocational assistance for reasonable cause. If the insurer does not believe the worker had reasonable cause, the insurer shall warn the worker prior to finding the worker ineligible or ending the worker's eligibility under this section. **Declining vocational assistance to accept modified or new employment that results from an employer at injury activated use of the Preferred Worker Program, under OAR 436-110, will be considered reasonable cause.**

(9) The worker has failed, after written warning, to participate in the vocational assistance process, or to provide relevant information. No written warning is required if the worker refuses a suitable training site after the vocational counselor and worker have agreed in writing upon a return-to-work goal.

(10) The worker has failed, after written warning, to comply with the return-to-work plan. No written warning is required if the worker fails to attend 2 consecutive training days and fails, without reasonable cause, to notify the vocational counselor or the insurer.

(11) The worker's lack of suitable employment cannot be resolved by providing vocational assistance. This includes circumstances in which the worker cannot benefit from, or participate in, vocational assistance because of medical conditions unrelated to the injury.

(12) The worker has misrepresented a matter material to evaluating eligibility or providing vocational assistance.

(13) The worker has refused, after written warning, to return property provided by the insurer or reimburse the insurer after the insurer has notified the worker of the repossession; or the worker has misused funds provided for the purchase of property or services. No vocational assistance shall be provided under the current or subsequent openings of the claim until the worker has returned the property or reimbursed the funds.

(14) The worker physically abused any party to the vocational process, or after written warning, has continued to sexually harass or threaten to physically abuse any party to the vocational process. This section does not apply if such behavior is the result of a documented medical or mental condition. In such a situation, eligibility should be ended under section (11) of this rule.

(15) The worker has entered into a claim disposition agreement (CDA) which disposes of vocational assistance eligibility. The parties may agree in writing to suspend vocational services pending approval by the Workers' Compensation Board (Board). The insurer shall end eligibility when the Board approves the CDA. No notice regarding the end of eligibility is required.

(16) The worker has received maximum direct employment services and is not entitled to other categories of vocational assistance.

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(17) The worker has been suitably employed in modified or new employment that results from employer at injury activation of preferred worker benefits as provided in OAR 436-120-0005(14)(e).

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Stat. Impltd.: ORS 656.340

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436-120-0360 Redetermining Eligibility for Vocational Assistance

If a worker was previously found ineligible or the worker's eligibility ended for any of the reasons specified in sections (1) through (8), or any of the conditions described in sections (9) through (11) exists, the insurer shall redetermine eligibility upon notification of a change of circumstances. The insurer shall complete the eligibility evaluation within 35 days of the following:

(1) The worker, for reasonable cause, declined or was not available for vocational assistance, or the barrier causing the worker's lack of suitable employment could not be resolved by providing vocational assistance, and those circumstances have changed. The insurer may require the worker to provide documentation the barrier no longer exists, including medical or psychological reports relating to noncompensable conditions. **If the worker declined vocational assistance to accept modified or new employment that resulted from an employer at injury activated use of the preferred worker benefits, under OAR 436-110, and the job was not suitable, the worker must request redetermination within 30 days of termination of the employment for which preferred worker benefits were provided.**

(2) The worker was not available in Oregon, and the worker becomes available. The worker must request redetermination within six months of the worker's receipt of the insurer's notice.

(3) The worker's claim was denied, and the claim is later accepted and all appeals exhausted.

(4) The worker was not awarded permanent disability and the worker is later awarded permanent disability.

(5) The worker was not authorized to work in the United States, and the worker is now authorized to work in the United States. The time limit set in this section applies to any worker found ineligible or whose eligibility ended because the worker was not authorized to work in the United States regardless of the date the notice of ineligibility or end of eligibility was issued. Within six months of the date of the worker's receipt of the insurer's notice of ineligibility or end of eligibility, the worker must:

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(a) Request redetermination; and

(b) Submit evidence to the insurer that the worker has applied for authorization to work in the United States and is awaiting a decision by the United States Immigration and Naturalization Service (INS). The worker shall promptly provide the insurer with a copy of any decision by the INS. The insurer shall redetermine eligibility upon receipt of documentation of the worker's authorization to work in the United States.

(6) The worker was unavailable for vocational assistance due to short-term incarceration for a matter unrelated to the worker's claim and is now available. Within six months of the date of the worker's receipt of the insurer's notice of ineligibility or end of eligibility, the worker must:

(a) Request redetermination; and

(b) Submit evidence to the insurer that the worker is now available to participate in vocational assistance.

(7) The worker returned to work prior to the worker becoming medically stationary, and the physician later rescinded the release.

(8) The worker returned to work prior to becoming medically stationary, and the worker requests a redetermination within 60 days of the mailing date of the Notice of Closure.

(9) Prior to claim closure a worker's limitations due to the injury became more restrictive.

(10) Prior to claim closure the insurer accepts a new condition which was not considered in the original determination of the worker's eligibility.

(11) The worker's temporary disability compensation is redetermined and increased. The worker must make a written request to the insurer to redetermine vocational eligibility within 60 days of receiving notification of the increase in temporary disability compensation.

Stat. Auth.: ORS 656.340(9), 656.726(4)

Stat. Impltd.: ORS 656.340

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436-120-0400 Selection of Category of Vocational Assistance

(1) The insurer shall select the category of vocational assistance **prior to referral to a vocational assistance provider** [within 30 days of the date of the insurer's referral to a vocational assistance provider, but no later than 50 days after the determination of eligibility]. The insurer shall notify the worker and document the reason for its decision.

(2) The insurer shall select one of the following categories of assistance:

[a) **A vocational evaluation**, if the insurer lacks sufficient information to choose between training and direct employment services or

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to determine if the worker can benefit from vocational assistance.]

(a)[(b)] Direct employment services, if the worker has the necessary transferable skills to obtain suitable new employment.

(b)[(c)] Training, if the worker needs training in order to return to employment which pays a wage significantly closer to 100 percent of the adjusted weekly wage. "Significantly closer" may vary depending on several factors, including, but not limited to, the worker's wage at injury, adaptability, skills, geographic location, limitations and the potential for the worker's income to increase with time as the result of training.

(3) The insurer shall reconsider the category of vocational assistance within 30 days of the insurer's knowledge of a change in circumstances including, but not limited to, the following:

- (a) A change in the worker's permanent limitations;
- (b) A change in the labor market; or
- (c) The category of vocational assistance proves to be inappropriate.

Stat. Auth.: ORS 656.340(9), 656.726(4)

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[436-120-0410 Vocational Evaluation

(1) When the insurer selects this category of vocational assistance, a certified vocational counselor shall complete the evaluation and report within 45 days, and provide a copy to all parties.

(a) **Vocational testing** shall be administered by an individual certified to administer the test.

(b) A work evaluation shall be performed by a Certified Vocational Evaluation Specialist (CVE), certified by the Commission on Certification of Work Adjustment and Vocational Evaluation Specialists.

(2) **On-the-job evaluations** shall evaluate a worker's work traits, aptitudes, limitations, potentials and habits in an actual job environment.

(a) First, the vocational counselor shall perform a job analysis to determine if the job is within the worker's capacities. The insurer shall submit the job analysis to the attending physician if there is any question about the appropriateness of the job.

(b) The evaluation should normally be no less than five hours daily for four consecutive days and should normally last no longer than 30 days.

(c) The evaluation does not establish any employer-employee relationship.

(d) A written report shall evaluate the worker's performance in the areas originally identified for assessment.

(3) **Situational assessment** is a procedure that evaluates a worker's aptitude or work behavior in a particular learning or work setting. It may focus on a worker's overall vocational functioning or answer specific questions about certain types of work behaviors.

(a) The situational assessment requires these steps: planning and scheduling observations; observing, describing and recording work behaviors; organizing, analyzing and interpreting data; and synthesizing data including behavioral data from other pertinent sources.

(b) The assessment should normally be no less than five hours daily for four consecutive days and should normally last no longer than 30 days.

(4) **Work adjustment** is work-related activities that assist workers in understanding the meaning, value, and demands of work. It may include the assistance of a job coach.

(5) **Job analysis** is a detailed description of the physical and other demands of a job based on direct observation of the job.

(6) **Labor market surveys** are obtained from direct contact with employers, other actual labor market information, or from other surveys completed within 90 days of the report date.

(a) A labor market survey is needed when standard labor market reference materials do not have adequate information upon which to

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base a decision, or there are questions about a worker's specific limitations, training and skills, which must be addressed with employers to determine if a reasonable labor market exists.

(b) The person giving the information must have hiring responsibility or direct knowledge of the job's requirements; and the job must exist at the firm contacted.

(c) The labor market survey report shall include, but is not limited to, the date of contact; firm name, address and telephone number; name and title of person contacted; the qualifications of persons recently hired; physical requirements; wages paid; condition of hire (full-time, part-time, seasonal, temporary); date and number of last hire(s); and available and anticipated openings.

(d) Specific openings found in the course of a labor market survey are not, in themselves, proof a reasonable labor market exists.

(7) **The vocational evaluation report** shall include an analysis of all vocational information, and a recommendation of the category of vocational assistance needed for the worker to obtain suitable employment. The report must include the worker's signature indicating the worker has read and received a copy of the report. The signature does not imply the worker's agreement with the conclusions of the evaluation. The worker may attach written comments to the evaluation report.

(8) Upon receipt of the vocational evaluation report, the insurer shall notify the worker within 10 days whether the worker will receive direct employment services or training, or that the worker is unable to benefit from vocational assistance.]

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436-120-0430 Direct Employment

(1) The insurer shall provide an eligible worker with four months of direct employment services dating from the date the insurer approves a direct employment plan or the completion date of an authorized training plan. Direct employment services include, but are not limited to, the following:

[a) Vocational evaluation, if needed.]

(a)[b) Employment counseling.

(b)[c) Job search skills instruction, which teaches workers how to write resumes, research the job market, locate suitable new employment, complete employment applications, interview for employment, and develop other skills related to looking for suitable new employment.

(c)[d) Job development, which assists the worker to contact appropriate prospective employers, and with related return-to-work activities.

(d)[e) Job analysis.

(2) The insurer shall provide return-to-work follow-up for at least 60 days after the worker becomes employed to ensure the work is suitable and to provide any necessary assistance which enables the worker to continue the employment.

(3) Direct employment services are available for more than four months if the worker was unable to participate for reasonable cause.

Stat. Auth.: ORS 656.340(9), 656.726(4)

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436-120-0440 Training

(1) Training services include [a vocational evaluation if needed,] plan development, training, monthly monitoring of training progress, and job placement services as necessary.

(2) Training is limited to an aggregate of 16 months, subject to extension to 21 months by the director for a worker with an exceptional disability resulting from the compensable condition(s) and any limitations which existed prior to the injury or an exceptional loss of earning capacity.

(a) "Exceptional disability" is defined as disability equal to or greater than the complete loss, or loss of use, of both legs. Exceptional disability also includes brain injury which results in impairment equal to or greater than Class III as defined in OAR 436-035.

(b) An "exceptional loss of earning capacity" exists when no suitable training plan of 16 months or less is likely to eliminate the worker's substantial handicap to employment. The extension must allow the worker to obtain a wage "significantly closer," as described in OAR 436-120-0400(2)(b)(c), to the worker's adjusted weekly wage and at least 10 percent greater than could be expected with a shorter training program.

(3) A worker enrolled and actively engaged in training shall receive temporary disability compensation subject to OAR 436-060, and payment of awards of permanent disability are suspended. At the insurer's discretion, training costs may be paid for periods longer than 21 months, but in no event shall temporary disability compensation be paid for a period longer than 21 months.

(4) The selection of plan objectives and kind of training shall attempt to minimize the length and cost of training necessary to prepare the worker for suitable employment. Notwithstanding OAR 436-120-0320(10)(9)(b), the director may order the insurer, or the insurer may elect, to provide training outside Oregon if such training would be more timely, appropriate or cost effective than other alternatives. The plan must be developed and monitored by a vocational assistance provider certified pursuant to these rules.

(5) Training status continues during the following breaks:

(a) A regularly scheduled break of not more than six weeks between fixed school terms;
(b) A break of not more than two weeks between the end of one kind of training and the start of another for which the starting date is flexible; and

(c) A period of illness or recuperation which does not prevent completion of the training by the planned date.

(6) On-the-job training prepares the worker for permanent, suitable employment with the

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training employer and for employment in the labor market at large. On-the-job training shall be considered first in developing a training plan. The following conditions apply:

(a) Training time is limited to a duration of 12 months.

(b) The on-the-job training contract between the training employer, the insurer, and the worker shall include, but is not limited to, the worker's name; the employer's legal business name, Workers' Compensation Division Employer Registration number, and the name of the individual providing the training; the training plan start and end dates; the job title, the job duties, and the skills to be taught; the base wage and the terms of wage reimbursement; and an agreement that the employer will pay all taxes normally paid on the entire wage and will maintain workers' compensation insurance for the trainee. If the training prepares a worker for a job unique to the training site, the contract must acknowledge that the training may not prepare the worker for jobs elsewhere.

(c) The insurer shall not reimburse the training employer 100 percent of the wages for the entire contract period.

(d) The insurer shall pay temporary disability compensation as provided in ORS 656.212.

(e) The worker's schedule shall be the same as for a regular full-time employee. The schedule may be modified to accommodate the worker's documented medical condition or class schedule.

(7) Skills training is offered through a community college, based on predetermined curriculum, at the training employer's location. Skills training is subject to the following conditions:

(a) Training is limited to 12 months.

(b) Training does not establish any employer-employee relationship with the training employer. The activity is primarily for the worker's benefit. The worker does not receive wages. The training employer makes no guarantee of employing the worker when the training is completed.

(c) The training employer has a sufficient number of employees to accomplish its regular work and the training of the worker, and the worker does not displace an employee.

(d) The worker's schedule shall be the same as for a regular full-time employee. The schedule may be modified to accommodate the worker's documented medical condition or class schedule.

(8) Rehabilitation facilities training provides evaluation, training and employment for severely disabled individuals.

(9) Basic education may be offered, with or without other training components, to raise the worker's education to a level to enable the worker to obtain suitable employment. It is limited to six months.

(10) Formal training may be offered through a vocational school licensed by an appropriate licensing body, or community college or other post-secondary educational facility which is part of a state system of higher education. Courseload shall be consistent with the

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worker's abilities, limitations and length of time since the worker last attended school. Courses shall relate to the vocational goal.

(11) The worker is entitled to job placement assistance after completion of training.

(12) When the worker returns to work following training, the insurer shall monitor the worker's progress for at least 60 days to assure the suitability of employment before ending eligibility.

(13) Training ends and the plan shall be re-evaluated when any of the following occurs:

(a) A change in the worker's limitations which renders the training inappropriate.

(b) The worker's training performance is unsatisfactory and training is not likely to result in employment in that field. In an academic program, the worker fails to maintain at least a 2.00 grade point average for at least two grading periods or to complete the minimum credit hours required under the training plan. The vocational counselor shall report any unsatisfactory performance and the insurer shall give the worker a written warning of the possible end of training at the first indication of unsatisfactory performance.

(14) The insurer shall not provide any further training to a worker who has completed one training plan unless the worker has sustained a compensable aggravation or newly accepted condition which renders the worker incapable of obtaining suitable employment, or the previous plan was inadequate to prepare the worker for suitable employment because of an error or omission by the insurer.

(15) Training shall end if any of the following applies:

(a) The worker has successfully completed training; [or]

(b) **The worker's eligibility has ended under OAR 436-120-0350; or**

(c)[(b)] The worker is not enrolled and actively engaged in the training. However, none of the following will be considered as ending the worker's training status:

(A) A regularly scheduled break of not more than six weeks between fixed school terms;

(B) A break of not more than two weeks between the end of one kind of training and the start of another for which the starting date is flexible; or

(C) A period of illness or recuperation which does not prevent completion of the training by the planned date.

Stat. Auth.: ORS 656.340(9), 656.726(4)

Stat. Impltd.: ORS 656.340

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436-120-0455 Optional Services

(1) Optional services are services provided to an ineligible worker or services provided to an eligible worker in excess of those described in these rules. Such services are at the discretion of an insurer.

(2) The insurer shall not use optional services to circumvent the intent of these rules.

Stat. Auth.: ORS 656.283, 656.340, 656.704, 656.726

Stat. Impltd.: ORS 656

Hist: Amended and renumbered from OAR 436-120-0910, 4/27/00 as WCD Admin. Order 00-055, eff. 6/1/00

436-120-0500 Return-to-Work Plans: Development and Implementation

(1) A return-to-work plan should be a collaborative effort between the vocational counselor and the injured worker, and should include all the rights and responsibilities of the worker, the insurer, and the vocational counselor. Prior to submitting the plan to the insurer, the vocational counselor shall review the plan and plan support with the worker. Certain information may be excluded, as allowed by OAR 436-010. The injured worker must be given the opportunity to review the plan with the worker's representative prior to signing it. The vocational assistance provider shall confirm the worker's understanding of and agreement with the plan by obtaining the worker's signature. The counselor shall submit copies signed by the vocational counselor and the worker to all parties no later than 30 days after the selection of direct employment or 60 days after the selection of training. Circumstances beyond the insurer's and worker's control may necessitate an extension of this time frame.

(2) Within 14 days of receipt of the signed return-to-work plan, the insurer shall approve or reject the plan and notify the parties. If the insurer lacks sufficient information to make a decision, the insurer shall advise the parties what information is needed and when it expects to make a decision.

(3) If the insurer does not approve a return-to-work plan within 90 days of determining the worker is entitled to a training plan, or within 45 days of determining the worker is entitled to a direct employment plan, the insurer must contact the division within five days to schedule a conference. The purpose of the conference will be to identify and remove all obstacles to return-to-work plan completion and approval. The insurer, the worker, the plan developer, and any other parties involved in the return-to-work process must attend the conference. The conference may be postponed for up to 30 days if the parties agree. The insurer or the worker may request a conference with the division if other delays in the vocational rehabilitation process occur.

(4) [3] If, during development of a return-to-work plan, an employer offers the worker a job, the insurer shall perform a job analysis, obtain approval from the attending physician, verify the suitability of the wage, and confirm the offer is for a bona fide, suitable job as defined in OAR 436-120-0005**(14)**⁽¹²⁾. If the job is suitable, the insurer shall help the worker return to work with the employer. The insurer shall provide return-to-work follow-up during the first 60 days after the worker returns to work. If return to work with the employer is unfeasible or, during the 60-day follow-up the job proves unsuitable, the insurer shall immediately resume development of the return-to-work plan.

(5) [4] If the vocational goal or category of assistance is later changed, the insurer shall

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amend the plan. All amendments to the plan shall be initialed by the insurer, vocational assistance provider, and the worker.

Stat. Auth.: ORS 656.340(9), 656.726(4)

Stat. Impltd.: ORS 656.340(9)

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436-120-0510 Return-to-Work Plan Support

(1) The injured worker and vocational counselor shall work together to develop a return-to-work plan that includes consideration of the following:

- (a) The injured worker's transferable skills;
- (b) The injured worker's physical and mental capacities and limitations;
- (c) The injured worker's vocational interests;
- (d) The injured worker's educational background and academic skill level;
- (e) The injured worker's pre-injury wage; and
- (f) The injured worker's place of residence and that labor market.

(2) Return-to-work plan support shall contain, but is not limited to, the following:

- (a) Specific vocational goal(s) and projected return-to-work wage(s).
- (b) A description of the worker's current medical condition, relating the worker's permanent limitations to the vocational goals.
- (c) A description of the worker's education and work history, including job durations, wages, Dictionary of Occupational Titles codes or other standardized job titles and codes, and specific job duties.

(d) If a direct employment plan, a description of the worker's transferable skills which relate to the vocational goals and a discussion of why training will not bring the worker a wage significantly closer to 100 percent of the adjusted weekly wage at the time of injury.

(e) If a training plan, a discussion of why direct employment services will not return the worker to suitable employment.

(f) A summary of the results of any evaluations or testing. If the results do not support the goals, the vocational assistance provider shall explain why the goals are appropriate.

(g) A summary of current labor market information which shows the labor market supports the vocational goals and documents that the worker has been informed of the condition

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of the labor market.

(h) A labor market survey as prescribed in 436-120-~~0005(7)~~ [0410(6)], if needed.

(i) If the labor market information does not support the goals, the vocational assistance provider shall explain why the goals are appropriate. The worker and worker's representative, if any, shall acknowledge in writing an awareness of the poor labor market conditions and a willingness to proceed with the plan in spite of these conditions. In the case of a training plan, this acknowledgment shall include an understanding the insurer will provide no additional training should the worker be unable to find suitable employment because of the labor market.

(j) A job analysis prepared by the vocational assistance provider, signed by the worker and by the attending physician or a qualified facility designated by the attending physician, and based on a visit to a worksite comparable to what the worker could expect after completing training. If the attending physician is unable or unwilling to address the job analysis and does not designate a facility as described above, the insurer may submit the job analysis to a qualified facility of its choice. The insurer shall submit the resulting information to the attending physician for concurrence. If the attending physician has not responded within 30 days of the date of request for concurrence, the plan may proceed.

(k) A signed on-the-job training contract, if applicable.

(l) A description of the curriculum, which must be term by term if the curriculum is for formal training.

(m) If material pertinent to a return-to-work plan is contained in a previous eligibility [or vocational evaluation,] the insurer may attach a copy of the evaluation to the plan.

Stat. Auth.: ORS 656.340(9), 656.726(4)

Stat. Impltd.: ORS 656.340

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436-120-0520 Return-to-Work Plan: Responsibilities of the Eligible Worker and the Vocational Assistance Provider

(1) The worker shall participate and maintain contact with the vocational counselor throughout plan development and as required in the plan, and shall inform the vocational counselor of anything which might affect the worker's participation in or successful completion of the plan. If the worker stops attending training for any reason, the worker must notify the vocational counselor by the close of the next working day.

(2) Vocational counselors are responsible for the following:

(a) During plan development, the vocational counselor shall provide resource materials about jobs, training programs (if appropriate), labor markets and other pertinent information to help the worker select a vocational goal; direct information gathering; and otherwise help the worker analyze and evaluate options.

(b) The vocational counselor shall help the worker plan the curriculum and help the

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worker enroll. The vocational assistance provider shall contact the worker, trainers and training facility counselors to the extent necessary to assure the worker's participation and progress.

Stat. Auth.: ORS 656.340(9), 656.726(4)

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436-120-0530 Return-to-Work Plan Review

The director may review return-to-work plans and supporting information. If the director finds a return-to-work plan or its supporting information does not conform to these rules:

(1) The director shall notify the insurer and vocational assistance provider in writing of the preliminary finding of nonconformance. The notification must inform the insurer of changes or information required to bring the plan into conformance.

(2) The insurer shall, within 30 days of notification, make appropriate changes, supply additional information requested by the division, or explain why no change(s) should be made.

(3) If the insurer does not respond timely or is unable to bring the plan into conformance, the director will return the plan to the parties with notification that the plan does not conform to OAR 436-120 and may order the insurer to develop a plan that conforms to the rules.

Stat. Auth.: ORS 656.340(9), 656.726(4)

Stat. Impltd.: ORS 656.340

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436-120-0700 Direct Worker Purchases

(1) The insurer shall provide direct worker purchases as necessary for an eligible worker's participation in vocational assistance and to meet the requirements of a suitable job. A worker is no longer eligible for these purchases once eligibility ends unless the purchases are necessary to complete a plan. Direct worker purchases include partial purchase, lease, rental and payment.

(2) Direct worker purchases shall not include purchases of real property; payment of fines or other penalties; or payment of additional driver's license costs, increased insurance costs or any other costs attributable to problems with the worker's driving record.

(3) In making its decision regarding a direct worker purchase, the insurer may choose the least expensive, adequate alternative. If the worker wants a direct worker purchase which is more expensive than that authorized by the insurer, the worker may select that alternative, and the worker shall pay the difference in cost.

(4) Within 14 days of its receipt of a request for a direct worker purchase, the insurer shall approve the purchase or notify the worker of its denial.

(5) The insurer shall pay for approved direct worker purchases in time to prevent delay in

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the provision of services.

(6) The worker may pay for mileage, child or senior care, or for purchases such as clothing, books and supplies or the worker may request an advance of any of these costs based on documentation of need.

(a) The insurer shall reimburse costs within 28 days of receiving the written request from the worker and any required supporting documentation.

(b) The insurer shall return denied requests for reimbursement to the worker within 28 days of the insurer's receipt with an explanation of the reason for nonpayment.

(7) The insurer shall assign to the worker right and title to the nonexpendable direct worker purchases paid by the insurer as follows:

(a) The insurer shall make such assignment no later than the 60th day of continuous employment unless the worker remains eligible and the suitability of the employment is in question.

(b) The insurer may repossess nonexpendable property if the worker no longer requires the property for training or employment.

(c) The insurer may require repayment of advancements or reimbursements if the worker misrepresented information material to the purchase decision or if the worker used the funds for something other than the approved purchase.

Stat. Auth.: ORS 656.340(9), 656.726(4)

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436-120-0710 Direct Worker Purchases: Kinds

The insurer shall provide the direct worker purchases described in sections (1) through (12) of this rule without regard to the worker's pre- or post-injury income. The insurer may not require the worker to submit a financial statement in order to qualify for direct worker purchases listed in sections (1) through (12). In determining the necessity of direct worker purchases described in sections (13) through (18), the insurer shall consider, among all factors, the worker's pre-injury net income as compared with the worker's post-injury net income. Permanent partial disability award payments shall not be considered as income. For the insurer to find the purchase necessary, the worker's pre-injury net income, as adjusted by the cost-of-living matrix, must be greater than the worker's post-injury net income, unless the worker can establish financial hardship. The insurer may require the worker to provide information about expenditures or family income when the worker claims a financial hardship.

(1) **Tuition, fees, books and supplies for training or studies.** Payment is limited to those items identified as mandatory by the instructional facility, trainer or employer. The insurer shall pay the cost in full, and shall not require the worker to apply for grants to pay for tuition, books or other expenses associated with training.

(2) **Wage reimbursement for on-the-job training.** The amount shall be stipulated in a contract between the training employer and the insurer.

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(3) **Travel expenses for transportation, meals and lodging required for participation** in vocational assistance. For the purposes of this section, "participation in vocational assistance" includes, but is not limited to job search, required meetings with the vocational assistance provider, and meetings with employers or at training sites as required by the plan or plan development. The conditions and rates for payment of travel expenses are as follows:

(a) **Transportation.** Costs shall be paid at public transportation rates when public transportation is available; otherwise, mileage shall be paid at the rate of reimbursement for State of Oregon classified employees. Costs incidental to mileage, such as parking fees, also shall be paid. For workers receiving temporary total disability or equivalent income, private car mileage shall be paid only for mileage in excess of the miles the worker traveled to and from work at the time of injury. Mileage payment in conjunction with moving expenses shall be allowed only for one vehicle and for a single one-way trip. To receive reimbursement for private car mileage, the worker must provide the insurer with a copy of the driver's valid driver's license and proof of insurance coverage.

(b) **Meals and lodging, overnight travel.** For overnight travel, meal and lodging expense shall be reimbursed at the rate of reimbursement for State of Oregon classified employees.

(c) **Special travel costs.** Payment shall be made in excess of the amounts specified in this section when special transportation or lodging is necessary because of the physical needs of the worker, or when the insurer finds prevailing costs in the travel area are substantially higher than average.

(4) **Tools and equipment for training or employment.** Payment is limited to items identified as mandatory for the training or initial employment, such as starter sets. Purchases shall not include what the trainer or employer ordinarily would provide to all employees or trainees in the training or employment, or what the worker possesses.

(5) **Moving expenses.** Payment is limited to workers with employment or training outside reasonable commuting distance. In determining the necessity of paying moving expenses, the insurer may consider the availability of employment or training which does not require moving, or which requires less than the proposed moving distance. Payment is limited to moving household goods weighing not more than 10,000 pounds. If necessary, payment includes reasonable costs of meals and lodging for the worker's family and mileage pursuant to subsection (3)(a) of this rule.

(6) **Second residence allowance.** The purpose of the second residence is to enable the worker to participate in training outside reasonable commuting distance. The allowance shall equal the rental expense reasonably necessary, plus not more than \$200 a month toward all other expenses of the second residence, excluding refundable deposits. In order to qualify for second residence allowance, the worker must maintain a permanent residence.

(7) **Primary residence allowance.** This allowance is applicable when the worker must change residence for training or employment. Payment includes the first month's rent and the last month's rent only if required prior to moving in.

(8) **Medical examinations and psychological examinations for conditions not related to the compensable injury when necessary for determining the worker's ability to participate in vocational assistance.**

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(9) Physical or work capacities evaluations.

[**(10) Living expense allowance during vocational evaluation.** Payment is limited to workers involved in a vocational evaluation at least five hours daily for four or more consecutive days, and not receiving temporary disability payments. The worker shall not be barred from receiving a living expense allowance if the worker is unable to participate five hours daily because of limitations caused by the injury. Payment shall be based on the worker's temporary total disability rate if the worker's claim were reopened.]

(10)⁽¹¹⁾ Work adjustment, on-the-job evaluation, or situational assessment cost(s).

(11)⁽¹²⁾ Membership fees and occupational certifications, licenses, and related testing costs. Payment under this category is limited to \$500.

(12)⁽¹³⁾ Clothing required for participation in vocational assistance or for employment. Allowable purchases do not include items the trainer or employer would provide or the worker possesses.

(13)⁽¹⁴⁾ Child or disabled adult care services. These services are payable when required to enable the worker to participate in vocational assistance at rates prescribed by the State of Oregon's Department of Human Services. For workers receiving temporary total disability compensation or equivalent income, these costs shall be paid only when in excess of what the worker paid for such services at the time of injury, adjusted using the cost-of-living matrix.

(14)⁽¹⁵⁾ Dental work, eyeglasses, hearing aids and prosthetic devices. These are not related to the compensable injury and enable the worker to obtain suitable employment or participate in training.

(15)⁽¹⁶⁾ Dues and fees of a labor union. Payment shall be limited to initiation fees, or back dues and one month's current dues.

(16)⁽¹⁷⁾ Vehicle rental or lease. There is no reasonable alternative enabling the worker to participate in vocational assistance or accept an available job. The worker shall provide the insurer with proof of a valid driver's license and insurance coverage. Payment under this category is limited to \$1,000.

(17)⁽¹⁸⁾ Any other direct worker purchase the insurer considers necessary for the worker's participation as described in the introductory paragraph of this rule. Payment under this category is limited to \$1,000.

Stat. Auth.: ORS 656.340(9), 656.726(4)

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436-120-0720 Fee Schedule and Conditions for Payment of Vocational Assistance Costs

(1) The director has established the following fee schedule for professional costs and direct worker purchases. The schedule sets maximum spending limits per claim opening for each category; however, the insurer may spend more than the maximum limit if the insurer determines

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the individual case so warrants. Spending limits are to be adjusted annually, effective July 1. The annual adjustment is based on the conversion factor described in OAR 436-120-0005(2) and published with the cost-of-living matrix. The amounts in section (3) do not include the adjustment effective July 1, 2004.

(2) For workers found to have an exceptional disability or exceptional loss of earning capacity as defined in OAR 436-120-0440 the fee schedule spending limits for the Training category and DE/Training Combined category listed below shall be increased by 30%.

(3) Amounts include professional costs, travel/wait, and other travel expenses:

Categories of Vocational Assistance	Professional Spending Limits	Direct Worker Purchases Spending Limits
Eligibility determination without substantial handicap analysis	[\$364] \$377	Not applicable (NA)
Substantial handicap analysis	[\$728] \$754	NA
[Vocational evaluation]	[\$1,360]	[\$1,088]
Direct Employment	[\$4,896] \$5,069	[\$2,448] \$2,534
Training	[\$12,240] \$12,672	[\$16,157] \$16,727
DE/Training Combined	[\$13,600] \$14,080	NA
Dispute Resolution	[\$408] \$422	NA

(4) Wage reimbursement for on-the-job training contracts[, and the living expense allowance during vocational evaluation,] are not covered by the fee schedule.

(5) Services and direct worker purchases provided after eligibility ends to complete a plan or employment is subject to the maximum amounts in effect at the time of closure.

(6) The insurer shall pay, within 60 days of receipt, the vocational assistance provider's billing for services provided under the insurer-vocational assistance provider agreement. The insurer shall not deny payment on the grounds the worker was not eligible for the assistance if the vocational assistance provider performed the services in good faith without knowledge of the ineligibility.

(7) An insurer entitled to claims cost reimbursement pursuant to OAR 436-110 for services provided pursuant to OAR 436-120 is subject to the following limitations:

(a) Optional services are not reimbursable.

(b) The director must approve eligibility before any services are provided. The request must be submitted on Form 1084.

(c) The insurer must obtain the director's approval in advance of the following actions:

(A) Notifying the worker of eligibility for vocational services;

(B) Any waiver of the provisions of OAR 436-120; or

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(C) Exceeding the fee schedule.**Stat. Auth.:** ORS 656.340(9), 656.726(4)**Stat. Impltd.:** ORS 656.340, 656.258

Hist: Filed 5/22/80 as WCD Admin. Order 6-1980, eff. 6/1/80
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Amended 12/14/83 as WCD Admin. Order 5-1983, eff. 1/1/84
Renumbered from OAR 436-61-120, 5/1/85
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Amended 12/17/87 as WCD Admin. Order 11-1987, eff. 1/1/88
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Amended 4/27/00 as WCD Admin. Order 00-055, eff. 6/1/00
Amended 4/13/01 as WCD Admin. Order 01-053, eff. 5/15/01
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Amended 3/4/04 as WCD Admin. Order 04-056, eff. 4/1/04
Amended xx/xx/xx as WCD Admin. Order xx-xxx, eff. xx/xx/xx

436-120-0730 Reimbursement of Vocational Assistance Costs for Pre-1986 Injuries

(1) This rule applies only to pre-1986 injuries, and carries out the provisions of section 15, chapter 600, Oregon Laws 1985. A reference to "pre-1986 injuries" relates to injuries sustained before January 1, 1986, and encompasses original claims, claims for aggravation, new medical condition claims, and claims for omitted conditions.

(2) For costs to be reimbursable, services must be approved in advance by the Workers' Compensation Division. Both direct worker purchases and professional services shall be billed on the Vocational Reimbursement Request (Form 1592). The insurer shall not request reimbursement of costs the insurer has not paid. Requests to exceed the fee schedule must be submitted on Form 1084. Original insurer signatures (not photocopied signatures) must be provided on all reimbursement requests. Staff certification number(s) must be provided for all reimbursement request charges with the exception of direct worker purchases. The insurer shall submit all reimbursement requests no later than one year after the date of service.

Stat. Auth.: ORS 656.726(4)**Stat. Impltd.:** Section 15, chapt. 600, Oregon Laws 1985, ORS 656.340

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Amended 12/17/87 as WCD Admin. Order 11-1987, eff. 1/1/88
Amended and Renumbered from OAR 436-120-220 and 255, 10/31/94 as WCD Admin. Order 94-058, eff. 1/1/95
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Amended 5/30/02 as WCD Admin. Order 02-057, eff. 7/1/02.

436-120-0800 Authorization of Vocational Assistance Providers

(1) A vocational assistance provider must be authorized by the director under this rule.

(2) A vocational assistance provider must submit an application which includes the following:

(a) A description of the specific vocational services to be provided and verification of staff certifications pursuant to these rules;

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(b) The plan for supervising and training staff; and

(c) Evidence of compliance with applicable state and federal requirements.

(3) The director may approve or deny authorization based on the completed application and the department's certification records.

(a) The authorization shall specify the scope of authorized vocational services as determined by the vocational assistance provider's staff certifications.

(b) Vocational assistance providers whose authorization is denied under this rule may appeal as described in OAR 436-120-0008.

(4) An authorized vocational assistance provider shall:

(a) Notify the division within 30 days of any changes in office address, telephone number, contact person or staff, and update the roster of certified staff which includes staff certification numbers.

(b) Adequately train and supervise certified staff; and

(c) Provide each certified staff person with department rules, bulletins, and other information, as provided by the director.

(d) The vocational assistance provider shall maintain the worker's vocational assistance files for four years after the end of vocational assistance with that vocational assistance provider, or in a pre-1986 case, for five years after the end of vocational assistance with that provider.

Stat. Auth.: ORS 656.340(9), 656.726(4)

Stat. Impltd.: ORS 656.340

Hist: Filed 12/4/81 as WCD Admin. Order 4-1981, eff. 1/1/82.

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436-120-0810 Certification of Individuals

Individuals determining workers' eligibility and providing vocational assistance shall be certified by the director and on the staff of an authorized vocational assistance provider, insurer, or self-insured employer.

(1) An applicant for certification shall submit an application, as prescribed by the director, demonstrating the qualifications for the specific classification of certification as described in OAR 436-120-0830.

(2) Department certification is not required to perform work evaluations, but the work evaluator must be certified by the professional organizations described in OAR 436-120-0410(1)(b).

(3) The director may approve or disapprove an application for certification based on the

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individual's application.

(a) Certification shall be granted for five years. A vocational counselor who is nationally certified as described in OAR 436-120-0830(1)(a) shall be granted an initial certification period to coincide with their national certification.

(b) Individuals whose certification is denied under this rule may appeal as described in OAR 436-120-0008.

Stat. Auth.: ORS 656.340(9), 656.726(4)

Stat. Impltd.: ORS 656.340

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436-120-0820 Renewal of Certification

(1) A certified individual shall renew their certification every five years by submitting the following documentation to the director no later than 30 days prior to the end of their certification period:

(a) Current certification by the Commission on Rehabilitation Counselor Certification (CRCC) or the Commission for Case Managers Certification (CCMC) or the Certification of Disability Management Specialists Commission (CDMSC); or

(b) Verification of a minimum of 60 hours of continuing education units pursuant to this rule within the five years prior to renewal. At least seven and one-half hours must be for training in ethical practices in rehabilitation counseling.

(2) The department will accept continuing education units for training approved by the CRCC, CCMC or the CDMSC; courses in or related to psychology, sociology, counseling, and vocational rehabilitation, if given by an accredited institution of higher learning; training presented by the department pertaining to OAR 436-120, 436-105, and 436-110; and any continuing education program certified by the department for vocational rehabilitation providers. Sixty minutes of continuing education will count as one unit, except as noted in section (3) of this rule.

(3) In the case of college course work, the department will grant credit only for grades of C or above and will multiply the number of credit hours by six to establish the number of continuing education units.

(4) Failure to meet the requirements of this section shall cause an individual's certification to expire. Such an individual may reapply for certification upon completion of the required 60 hours of continuing education.

Stat. Auth.: ORS 656.340(9), 656.726(4)

Stat. Impltd.: ORS 656.340

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436-120-0830 Classification of Vocational Assistance Staff

Individuals providing vocational assistance shall be classified as follows:

(1) Vocational Rehabilitation Counselor certification allows the individual to determine eligibility and provide vocational assistance services. Vocational Rehabilitation Counselor certification requires:

(a) Certification by the following national certifying organizations: Commission on Rehabilitation Counselor Certification (CRCC), the Commission for Case Managers Certification (CCMC), or the Certification of Disability Management Specialists Commission (CDMSC);

(b) A master's degree in vocational rehabilitation counseling and at least six months of direct experience;

(c) A master's degree in psychology, counseling, or a field related to vocational rehabilitation, and 12 months of direct experience; or

(d) A bachelor's or higher degree and 24 months of direct experience. Thirty-six months of direct experience may substitute for a bachelor's degree.

(2) Vocational Rehabilitation Intern certification allows an individual who does not meet the requirements for certification as a Vocational Rehabilitation Counselor the opportunity to gain direct experience. Vocational Rehabilitation Intern certification requires a master's degree in psychology, counseling, or a field related to vocational rehabilitation; or a bachelor's degree and 12 months of direct experience. Thirty-six months of direct experience may substitute for a bachelor's degree. The Vocational Rehabilitation Intern certification is subject to the following conditions:

(a) The intern must be supervised by a certified Vocational Rehabilitation Counselor who shall co-sign and assume responsibility for all the intern's eligibility determinations,[vocational evaluations,] return-to-work plans, vocational and billing reports.

(b) When the intern has met the experience requirements, the intern may apply for certification as a Vocational Rehabilitation Counselor.

(3) Return-to-Work Specialist certification allows the person to provide job search skills instruction; job development; return-to-work follow-up and labor market survey; and to determine eligibility for vocational assistance, except where such determination requires a judgment as to whether the worker has a substantial handicap to employment. This certification requires 24 months of direct experience. Full-time (or the equivalent) additional college coursework in psychology, counseling, education, a human services related field, or a field related to vocational rehabilitation may substitute for up to 18 months of direct experience, on a month-for-month basis. To conduct only labor market research and/or job development does not require certification when conducted under the supervision of a certified vocational rehabilitation counselor.

(4) To meet the direct experience requirements for Vocational Rehabilitation Counselor, the individual must:

(a) Perform return-to-work plan development and implementation for the required

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number of months; or

(b) Perform three or more of the qualifying job functions listed in paragraphs (A) through (J) of this subsection for the required number of months, with at least six months of the experience in one or more of functions listed in paragraphs (A) through (D) of this subsection. The qualifying job functions are:

(A) Return-to-work plan development and implementation;

(B) Employment counseling;

(C) Job development;

(D) Early return-to-work assistance which must include working directly with workers and their employers;

(E) Vocational testing;

(F) Job search skills instruction;

(G) Job analysis;

(H) Transferable skills assessment or employability evaluations;

(I) Return-to-work plan review and approval; or

(J) Employee recruitment and selection for a wide variety of occupations.

(5) To meet the direct experience requirements for Vocational Rehabilitation Intern or Return-to-Work Specialist, the individual must:

(a) Perform return-to-work plan development and implementation for the required number of months; or

(b) Perform three or more of the qualifying job functions listed in paragraphs (4)(b)(A) through (J) of this rule for the required number of months.

(6) To receive credit for direct experience, the individual must:

(a) Perform one or more of the qualifying job functions listed in paragraphs (4)(b)(A) through (J) of this rule at least 50 percent of the work time for each month of direct experience credit. Qualifying job functions performed in a job which is less than full time shall be prorated. For purposes of this rule, full time shall be 40 hours a week. An individual will not receive credit for any function performed less than 160 hours.

(b) Provide any documentation required by the director, including work samples. The director may also require verification by the individual's past or present employers.

(7) All degrees must be from accredited institutions and documented by a copy of the transcript(s) with the application for certification.

Stat. Auth.: ORS 656.340(9), 656.726(4)

Stat. Impltd.: ORS 656.340

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Amended 3/4/04 as WCD Admin. Order 04-056, eff. 4/1/04

436-120-0840 Professional Standards for Authorized Vocational Assistance Providers and Certified Individuals

(1) Authorized vocational assistance providers and certified individuals shall:

(a) Determine eligibility and provide assistance in an objective manner not subject to any conditions other than those prescribed in these rules;

(b) Fully inform the worker of the categories and kinds of vocational assistance pursuant to OAR 436-120 and reemployment assistance pursuant to OAR 436-110;

(c) Document all case activities in legible file notes or reports;

(d) Provide only vocationally relevant information about workers in written and oral reports;

(e) Recommend workers only for suitable employment;

(f) Fully inform the worker of the purpose and results of all testing and evaluations and

(g) Comply with generally accepted standards of conduct in the vocational rehabilitation profession.

(2) Authorized vocational assistance providers and certified individuals shall not:

(a) Provide evaluations or assistance if there is a conflict of interest or prejudice concerning the worker;

(b) Enter into any relationship with the worker to promote personal gain, or the gain of a person or organization in which the vocational assistance provider or certified individual has an interest;

(c) Engage in, or tolerate, sexual harassment of a worker. "Sexual harassment" means deliberate or repeated comments, gestures or physical contact of a sexual nature;

(d) Violate any applicable state or federal civil rights law;

(e) Commit fraud, misrepresent, or make a serious error or omission, in connection with an application for authorization or certification;

(f) Commit fraud, misrepresent, or make a serious error or omission in connection with a report or return-to-work plan, or the vocational assistance activities or responsibilities of a vocational assistance provider under OAR chapter 436;

(g) Engage in collusion to withhold information, or submit false or misleading information relevant to the determination of eligibility or provision of vocational assistance;

(h) Engage in collusion to violate these rules or other rules of the department, or any policies, guidelines or procedures issued by the director;

(i) Fail to comply with an order by the director to provide specific vocational assistance, except as provided in ORS 656.313; or

(j) Instruct any individual to make decisions or engage in behavior which is contrary to the requirements of these rules.

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Stat. Auth.: ORS 656.340(9), 656.726(4)

Stat. Impltd.: ORS 656.313, 656.340

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Amended 3/4/04 as WCD Admin. Order 04-056, eff. 4/1/04

436-120-0900 Audits, Penalties and Sanctions

(1) Insurers and employers at injury shall fully participate in any department audit, periodic program review, investigation or review, and provide records and other information as requested.

(2) If the director finds the insurer or employer at injury failed to comply with OAR 436-120, the director may impose one or more of the following sanctions:

- (a) Reprimand by the director.
- (b) Recovery of reimbursements.
- (c) Denial of reimbursement requests.

(d) An insurer may be assessed a civil penalty pursuant to ORS 656.745 for any violation of OAR 436-120.

(3) Insurers or employers at injury who fail to comply with a director's order, to give notices required by OAR 436-120-0004, or to provide materials requested by the director may be assessed civil penalties pursuant to this matrix.

Violations in a Calendar Year:	1	2	3	4	5+
Days Late:					
1 to 7	\$100	\$200	\$300	\$500	\$1,000
8 to 14	\$200	\$300	\$500	\$1,000	\$2,000
15 to 21	\$300	\$500	\$1,000	\$2,000	\$2,000
22+	\$500	\$1,000	\$2,000	\$2,000	\$2,000

(4) In determining the amount of a civil penalty to be assessed in matters not listed in section (3) of this rule, the director may consider:

- (a) The degree of harm inflicted on the worker;
- (b) Whether there have been previous violations or warnings; and
- (c) Other matters as justice may require.

(5) Pursuant to ORS 656.447, the director may suspend or revoke an insurer's authority to issue guaranty contracts upon determination that the insurer has failed to comply with these rules.

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Stat. Auth.: ORS 656.340, 656.726(4)

Stat. Impltd.: ORS 656.340, 656.447, 656.745(1) and (2)

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436-120-0915 Sanctions of Authorized Vocational Assistance Providers and Certified Individuals

(1) Vocational assistance providers and certified individuals shall fully participate in any department audit, periodic program review, investigation or review, and provide records and other information as requested.

(2) If the director finds any authorized vocational assistance provider or certified individual failed to comply with OAR 436-120, the director may impose one or more of the following sanctions:

(a) Reprimand by the director.

(b) Probation, in which the department systematically monitors the vocational assistance provider's or individual's compliance with OAR 436-120 for a specified length of time. Probation may include the requirement an individual receive supervision, or successfully complete specified training, personal counseling or drug or alcohol treatment.

(c) Suspension, which is the termination of authorization or certification to determine eligibility and provide vocational assistance to Oregon injured workers for a specified period of time. The vocational assistance provider or individual may reapply for authorization or certification at the end of the suspension period. If granted, the vocational assistance provider or individual will be placed on probation as described in subsection (2)(b) of this rule.

(d) Revocation, which is a permanent termination of authorization or certification to determine eligibility and provide vocational assistance to Oregon injured workers.

(3) The director shall investigate violations of OAR 436-120 and may impose a sanction under these rules. Before issuing a suspension or revocation, the director shall send a notice of the proposed action and provide the opportunity for a show-cause hearing. The process is as follows:

(a) The director shall send by certified mail a written notice of intended suspension or revocation and the grounds for such action. The notice shall advise of the right to participate in a show-cause hearing.

(b) The vocational assistance provider or individual has 10 days from the date of receipt of the notification of proposed action in which to request a show-cause hearing.

(c) If the vocational assistance provider or individual does not request a show-cause hearing, the proposed suspension or revocation shall become final.

(d) If the vocational assistance provider or individual requests a show-cause hearing, the

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director shall send a notification of the date, time and place of the hearing.

(e) After the show-cause hearing, the director shall issue a final order which may be appealed as described in OAR 436-120-0008(5).

(4) The director may bar a vocational assistance provider or individual who has received a suspension or revocation under this rule from sponsoring or teaching continuing education programs.

Stat. Auth.: ORS 656.340(9), 656.726(4)

Stat. Impltd.: ORS 656.340

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