

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION



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

Effective Jan. 1, 2010

TABLE OF CONTENTS

Rule	Page
ORDER OF ADOPTION	iii
436-120-0001 Authority for Rules	1
436-120-0002 Purpose of Rules	1
436-120-0003 Applicability of Rules	1
436-120-0004 Notices and Reporting Requirements	2
436-120-0005 Definitions.....	5
436-120-0006 Administration of Rules.....	8
436-120-0007 Establishing the Adjusted Weekly Wage to Determine Suitable Wage	9
436-120-0008 Administrative Review and Contested Cases	11
436-120-0115 Conditions Requiring Completion of a Vocational Eligibility Evaluation	13
436-120-0125 Conditions for Postponement of the Vocational Eligibility Evaluation	14
436-120-0135 General Requirements and Timeframes for Vocational Eligibility Evaluations.....	15
436-120-0145 Vocational Assistance Eligibility Criteria	15
436-120-0155 Deferral and Completion of an Eligibility Evaluation When the Employer Activates Preferred Worker Program Benefits:	16
436-120-0165 End of Eligibility for Vocational Assistance	17
436-120-0175 Redetermining Eligibility for Vocational Assistance	18
436-120-0185 Choosing a Vocational Assistance Provider	19
436-120-0320 Determining Eligibility for Vocational Assistance and Selection of Vocational Assistance Provider (<i>Renumbered to 436-120-0115, 0125, 0135, 0145, 0155, & 0185</i>)	20
436-120-0340 Determining Substantial Handicap	20
436-120-0350 Ineligibility and End of Eligibility for Vocational Assistance (<i>Renumbered to 436-120-0165</i>)	20

436-120-0360	Redetermining Eligibility for Vocational Assistance (<i>Renumbered to 436-120-0175</i>).....	21
436-120-0400	Selection of Category of Vocational Assistance.....	21
436-120-0410	Vocational Evaluation.....	21
436-120-0430	Direct Employment.....	22
436-120-0440	Training.....	23
436-120-0455	Optional Services.....	26
436-120-0500	Return-to-Work Plans: Development and Implementation	26
436-120-0510	Return-to-Work Plan Support.....	27
436-120-0520	Return-to-Work Plan: Responsibilities of the Eligible Worker and the Vocational Assistance Provider	28
436-120-0530	Return-to-Work Plan Review	28
436-120-0700	Direct Worker Purchases	29
436-120-0710	Direct Worker Purchases: Kinds.....	30
436-120-0720	Fee Schedule and Conditions for Payment of Vocational Assistance Costs	32
436-120-0755	Reimbursement of Vocational Assistance Costs from the Workers’ Benefit Fund	33
436-120-0800	Registration of Vocational Assistance Providers.....	34
436-120-0810	Certification of Individuals	34
436-120-0820	Renewal of Certification	35
436-120-0830	Classification of Vocational Assistance Staff.....	36
436-120-0840	Professional Standards for Registered Vocational Assistance Providers and Certified Individuals	38
436-120-0900	Audits, Penalties and Sanctions	39
436-120-0915	Sanctions of Registered Vocational Assistance Providers and Certified Individuals.....	39

NOTE: Significant revisions are marked with vertical lines in the right margins.

HISTORY LINES: These rules include only the most recent “History” lines. The history line shows when the rule was last revised (or “filed” if the rule has never been revised) and its effective date. To obtain a comprehensive history for OAR chapter 436, please call the Workers’ Compensation Division, (503) 947-7627, or visit the division’s Web site: <http://wcd.oregon.gov/policy/rules/rules.html#fullset>

**BEFORE THE DIRECTOR
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION**

In the Matter of the Amendment of Oregon Administrative)	<i>Amended*</i>
Rules (OAR):)	ORDER OF
436-120, Vocational Assistance to Injured Workers)	ADOPTION
)	No. 09-061

The Director of the Department of Consumer and Business Services, under the general rulemaking authority in ORS 656.726(4), and in accordance with the procedures in ORS 183.335, amends OAR chapter 436, division 120.

On Sept. 15, 2009, the Workers' Compensation Division filed with the Secretary of State a *Notice of Proposed Rulemaking Hearing* and *Statement of Need and Fiscal Impact*. The division mailed copies of the *Notice* and *Statement* to interested persons and legislators in accordance with ORS 183.335 and OAR 436-001-0009, and posted copies to its Web site. The Secretary of State included notice of the public hearing in its October 2009 *Oregon Bulletin*. On October 26, 2009, the division held a public hearing as announced. The record remained open for written testimony through October 29, 2009.

** This order was amended on Dec. 10, 2009 and again on Dec. 22, 2009, to resolve a conflict between OAR 436-120-0115(1)(d) and ORS 656.340(1)(b)(B), as section .340 was revised by House Bill 2705.*

SUMMARY OF RULE AMENDMENTS

These rules:

- Are reorganized to improve clarity.
- Define several terms used in division 120 – “delivered,” “director,” “filed,” “likely eligible,” and “mailed.”
- Defer to OAR 436-001 for awarding attorney fees under ORS 656.385.
- Provide that modified or new employment that results from an employer-at-injury-activated use of the PWP is considered “suitable” 12 months after the department determines a worksite modification is complete
- Implement HB 2705 by eliminating the requirement to complete a vocational eligibility evaluation if the worker is released to regular or returned to other suitable work with the employer at injury or aggravation.
- Specify that the insurer is not required to do an eligibility evaluation if the worker is deceased or has a permanent total disability award.
- Implement HB 2195 by allowing an insurer, without approval by the director, to extend time loss up to 21 months.
- Allow further training to a worker who has completed one training plan if there is a reasonable cause to do so.
- Publish vocational fee schedule maximums as percentages of Oregon’s state average weekly wage rather than fixed dollar amounts.

Order of Adoption
OAR chapter 436, division 120

- To implement HB 2195, provide for “registration” rather than “authorization” of vocational assistance providers.
- Require certified counselors who are subject to continuing education requirements under these rules to take at least eight hours (formerly 7 ½ hours) of training in ethical practices and at least six hours of training on the vocational assistance and reemployment assistance rules during the five years before certification renewal.

FINDINGS

Having reviewed and considered the record and being fully informed, I make the following findings:

- a) The applicable rulemaking procedures have been followed.
- b) These rules are within the director’s authority.
- c) The rules being adopted are a reasonable administrative interpretation of the statutes and are required to carry out statutory responsibilities.

IT IS THEREFORE ORDERED THAT

- 1) Amendments to OAR chapter 436, division 120 are adopted as administrative order No. 09-061 on this **1st day of Dec. 2009, and amended on this 22nd day of Dec. 2009, to be effective Jan. 1, 2010.**
- 2) A certified copy of the adopted rules will be filed with the Secretary of State.
- 3) A copy of the adopted rules with revision marks will be filed with the Legislative Counsel under ORS 183.715 within ten days after filing with the Secretary of State.

DATED this 1st day of December 2009.

/s/ John L. Shilts

John L. Shilts, Administrator
Workers’ Compensation Division

AMENDED this 22nd day of December 2009.

/s/ John L. Shilts

John L. Shilts, Administrator
Workers’ Compensation Division

Under the Americans with Disabilities Act guidelines, alternative format copies of the rules will be made available to qualified individuals upon request.

If you have questions about these rules or need them in an alternate format, contact the Workers’ Compensation Division, 503-947-7810.

Distribution: WCD-ID, S0, S1, S2, S3, S4, S5, S6, S7, S8, ML, ME

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

**EXHIBIT "A"
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: 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: 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 must 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.

(4) Under ORS 656.206, when a worker receiving permanent total disability, incurs a new compensable injury, the worker is not entitled to vocational assistance.

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

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

(7) Timeliness of any document required by these rules to be filed or submitted to the division is determined as follows:

(a) If a document is mailed, it will be considered filed on the date it is postmarked.

(b) If a document is faxed or e-mailed, it must be received by the division by 11:59 p.m. Pacific time to be considered filed on that date.

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

(c) If a document is delivered, it must be delivered during regular business hours to be considered filed on that date.

(8) Time periods allowed for a filing or submission to the division are calculated in calendar days. The first day is not included. The last day is included unless it is a Saturday, Sunday, or legal holiday. In that case, the period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday. Legal holidays are those listed in ORS 187.010 and 187.020.

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

Stat. Impltd.: ORS 656.206, (Oregon Laws, chapter 461), 656.283(2), 656.340

Hist: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07

436-120-0004 Notices and Reporting Requirements

(1) The insurer must 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 must be given:

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

(b) At the time of contact of the worker under OAR 436-120-0115 about the need for vocational assistance, under 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, under ORS 656.340(3), the insurer must 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 under OAR 436-120 must 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 under 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 must be used for the following notices. Should one notice be used for multiple actions, all appropriate headings must be listed:

(A) Eligibility. This notice must:

(i) 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) and;

(ii) Include the following statement in bold type:

“You have the right to request a return-to-work plan conference if the insurer does not approve a return-to-work plan within 90 days of determining you entitled to a training plan, or within 45 days of determining you entitled to a direct employment plan. 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

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

the conference. The insurer or the worker may request a conference with the division if other delays in the vocational rehabilitation process occur. Your request for this conference should be directed to the Employment Services Team of the Workers' Compensation Division. The address and telephone number of the division are: Employment Services Team, Workers' Compensation Division, P.O. Box 14480, Salem, Oregon 97309-0405; 503-378-3351 or 1-800-452-0288."

(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) End of training: NOTICE OF TRAINING END, EFFECTIVE (date)

(E) 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 must 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, entitlement to training or deferral of vocational assistance eligibility must 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: Employment Services Team, Workers' Compensation Division, P.O. Box 14480, Salem, Oregon 97309-0405; 503-378-3351 or 1-800-452-0288."

(3) Notice of Eligibility for vocational assistance and Notice of Entitlement to Training (or) Notice of Entitlement for Direct Employment Services must 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);

(b) The worker's rights and responsibilities;

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

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

(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 must 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 at 1-800-452-0288."

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

(4) Notice of Ineligibility for vocational assistance 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 include information about services that 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 must list some suitable occupations.

(5) Notice of Denial of Vocational Service must be given by the insurer.

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

(7) Notice of End of Training must state whether the worker is entitled to further training. The effective date of the end of training letter is the worker's last date of attendance.

(8) Notice of End of Eligibility for vocational assistance must be sent by both regular and certified mail to the worker.

(9) 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 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 at 1-800-452-0288."

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

(11) The insurer must simultaneously send a copy of the following notices to the

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

department:

- (a) Notice of Eligibility;
- (b) Notice of Ineligibility;
- (c) Approved Return-to-Work Plan and any amendments;
- (d) Notice of End of Training;
- (e) Notice of Ending of Eligibility for Vocational Assistance; and
- (f) Notice of Deferral of Vocational Assistance Eligibility Determination

(12) The insurer must file a closing status report with the division for each eligible worker within 30 days after eligibility ends. The insurer must 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 must 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: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07
Amended 12-1-2009 as WCD Admin. Order 09-061, eff. 1-1-2010

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 that 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 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) "Delivered" means physical delivery to the Workers' Compensation Division during regular business hours.

(4) "Director" means the Director of the Department of Consumer and Business Services, or the director's delegate for the matter.

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

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

(7) "Filed" means mailed, faxed, e-mailed, delivered, or otherwise submitted to the division in a method allowable under these rules.

(8) "Insurer" means the State Accident Insurance Fund, an insurer authorized under ORS

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

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.

(9) "Likely eligible" means the worker will be unable to return to regular or other suitable work with the employer-at-injury or aggravation or is unable to perform all of the duties of the regular or suitable work and it is reasonable to believe that the barriers are caused by the accepted conditions.

(10) "Mailed" means postmarked to the last known address.

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

(12) "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 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 required only occasionally and all other sedentary criteria are met.

(b) Light Work (L): Exerting up to 20 pounds of force occasionally, or up to 10 pounds of force frequently, 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 or pulling of arm or leg controls; or (3) when the job requires working at a production rate pace entailing the constant pushing 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, or 10 to 25 pounds of force frequently, 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, or 25 to 50 pounds of force frequently, 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, or in excess of 50 pounds of force frequently, or in excess of 20 pounds of force constantly to move objects. Physical demand requirements are in excess of those for Heavy Work.

(13) "Reasonable cause" may include, but is not limited to, a medically documented

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

limitation in a worker's activities due to illness or medical condition of the worker or the worker's family, financial hardship, incarceration for less than six months, 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.

(14) "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*)

(15) "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.

(16) "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," "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.

(17) "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 that offer

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

employment opportunities;

(c) That pays or would average on a year-round basis a suitable wage as defined in section (18) of this rule;

(d) That 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 (18) 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) Nine months from the effective date of the premium exemption if there are no worksite modifications, or

(B) Twelve months from the date the department determines the worksite modification is complete, or

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

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

(18) "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.

(b) For the purpose of providing 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.

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

(20) "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.

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

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

Sta. Impltd.: ORS 656.340

Hist: Amended 6/9/05 as WCD Admin. Order 05-059, eff. 7/1/05
Amended 12-1-2009 as WCD Admin. Order 09-061, eff. 1-1-2010

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.

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

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

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

Hist: Amended 5/30/02 as WCD Admin. Order 02-057, eff. 7/1/02

436-120-0007 Establishing the Adjusted Weekly Wage to Determine Suitable Wage

To determine a suitable wage as defined in OAR 436-120-0005(18), the insurer must 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 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 is counted as work time. Permanent year-round employment includes trial service. It does not include employment with an annual salary set by contract or self-employment.

(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 must 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 must be supported by verifiable documentation such as the worker's state or federal tax returns, payroll records, or reports of

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

earnings or unemployment insurance payments from the Employment Department. The insurer must 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 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, divide the worker's earned income 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 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.

(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 under 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 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

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

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)

Hist: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07
Amended 12-1-2009 as WCD Admin. Order 09-061, eff. 1-1-2010

436-120-0008 Administrative Review and Contested Cases

(1) Administrative review of vocational assistance matters: Under ORS 656.340(16), 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 436-120-0185(1) when the worker and insurer are unable to agree on a vocational assistance provider, the insurer must 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 will 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 must 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 must provide available information within 14 days of the request. The insurer must 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 must 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 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

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

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 will 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 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 will issue a final order. The parties will have 60 days from the mailing date of the order to request a hearing.

(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 that 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 proposed and final 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 must simultaneously notify all other interested parties of their contentions and provide them with copies of all additional information presented.

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

(2) Attorney fees will be awarded as provided in ORS 656.385(1) and OAR 436-001-0400 to 436-001-0440.

(3) Hearings before an administrative law judge:

(a) Under ORS 656.283(2) and 656.704(2), any party that disagrees with an order issued under subsection (1)(f) of this rule or a dismissal issued under subsection (1)(d) of this rule may

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

request a hearing by filing a request for hearing as provided in OAR 436-001-0019 within 60 days of the mailing date of the order.

(b) Under ORS 656.704(2), any party that disagrees with an order of dismissal based on lack of jurisdiction under subsection (1)(d) of this rule or department denial of reimbursement for vocational assistance costs may request a hearing by filing a request for hearing as provided in OAR 436-001-0019 within 30 days after the party received the dismissal or written denial.

(c) Under ORS 656.704(2), an insurer sanctioned under OAR 436-120-0900, a vocational assistance provider or certified individual sanctioned under ORS 656.340(9) and OAR 436-120-0915, a vocational assistance provider denied registration under ORS 656.340(9)(a) and OAR 436-120-0800, or an individual denied certification under ORS 656.340(9)(a) and OAR 436-120-0810 may request a hearing by filing a request for hearing as provided in OAR 436-001-0019 no later than 60 days after the party received notification of the action.

(d) OAR 436-001 applies to the hearing.

(4) 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 under 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.

(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 will forward the request and other pertinent information to the Hearings Division of the Workers' Compensation Board.

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

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

Stat. Impltd.: ORS 656.704, 656.340, 656.447, 656.740, 656.745

Hist: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07

Amended 12-1-2009 as WCD Admin. Order 09-061, eff. 1-1-2010

436-120-0115 Conditions Requiring Completion of a Vocational Eligibility Evaluation

(1) If the worker has an accepted disabling claim, the insurer is required to do an eligibility evaluation when any of the following conditions occurs:

(a) The insurer knows the worker is medically stationary and the worker is likely eligible for vocational assistance;

(b) The worker notifies the insurer that the worker is likely eligible for vocational assistance;

(c) The insurer receives information that indicates the worker is likely eligible for vocational assistance;

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

(d) The time the worker is medically stationary, if the worker has not returned to or been released for the worker's regular employment or has not returned to other suitable employment with the employer at the time of injury or aggravation and the worker is not receiving vocational assistance;

(e) The worker enters into a Claim Disposition Agreement, retains vocational assistance rights, and is likely eligible for vocational assistance; or

(f) Eligibility was previously determined under the current opening of the claim and the worker has newly accepted conditions.

(2) Even if conditions in (1) are met, the insurer is not required to do an eligibility evaluation if the worker is deceased, the worker has a permanent total disability award, or the worker's claim is reopened under a Board's Own Motion.

(3) Nothing in these rules prevents an insurer from finding a worker eligible and providing vocational assistance at any time.

(4) If the insurer receives a request for vocational assistance from the worker and the insurer is not required to determine eligibility, the insurer must notify the worker in writing, within 14 days of the request. The notice must include at least:

(a) The reason(s) an eligibility determination is not required;

(b) The circumstances that, if present, would trigger a requirement to determine eligibility; and

(c) Instructions to contact the division at 503-378-3351 or 1-800-452-0288 with questions about vocational assistance eligibility requirements and procedures.

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

Stat. Impltd.: ORS 656.340

Hist: Amended and renumbered 12-1-2009 from OAR 436-120-0320 as WCD Admin. Order 09-061, eff. 1-1-2010

436-120-0125 Conditions for Postponement of the Vocational Eligibility Evaluation

(1) If the worker requested an eligibility evaluation but the insurer does not know the worker's permanent limitations, the insurer may postpone the evaluation until the worker's permanent restrictions are known or can be projected. In that case, within 14 days of receiving the worker's request the insurer must contact the attending physician to ask if permanent limitations are known or can be projected. The insurer must also notify the worker in writing that the determination will be postponed until permanent restrictions are known or can be projected.

(2) 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.

(3) If the insurer is unable to determine eligibility or make a decision regarding a particular vocational service because of insufficient data, the insurer must explain to the worker in writing what information is necessary and when it expects to determine eligibility or make a decision. This explanation must be mailed to the worker within 14 days of the insurer receiving notification that the worker is likely eligible for vocational assistance,

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

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

Stat. Impltd.: ORS 656.340

Hist: Amended and renumbered 12-1-2009 from OAR 436-120-0320 as WCD Admin. Order 09-061, eff. 1-1-2010

436-120-0135 General Requirements and Timeframes for Vocational Eligibility Evaluations

(1) When an eligibility evaluation is required, the insurer must contact the worker to start the eligibility determination process within 5 days of the date the insurer received knowledge of likely eligibility.

(2) A certified vocational counselor must determine vocational eligibility and the insurer must provide the vocational counselor with all existing relevant medical information.

(3) At the insurer's request, the worker must provide vocationally relevant information needed to determine eligibility within a reasonable time set by the insurer.

(4) The insurer must complete the eligibility determination within 30 days of the date the insurer initiated contact with the worker under subsection (1) of this rule, unless postponed under OAR 436-120-0125.

(5) If the eligibility determination is postponed, the eligibility evaluation must be completed within 30 days of the insurer's receipt of requested relevant information.

(6) Either the insurer or certified vocational counselor may issue the notice with the results of the eligibility evaluation to the worker.

(7) Vocational assistance will only be provided for one claim at a time, unless the parties agree otherwise. If the worker is eligible for vocational assistance under two or more claims, the claim for the injury with the most severe vocational impact is the claim that gave rise to the need for vocational assistance. The parties may agree to provide services for more than one claim at a time, and extend time and fee limits beyond those allowable in these rules.

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

Stat. Impltd.: ORS 656.340

Hist: Amended and renumbered 12-1-2009 from OAR 436-120-0320 as WCD Admin. Order 09-061, eff. 1-1-2010

436-120-0145 Vocational Assistance Eligibility Criteria

(1) A worker whose permanent total disability benefits have been terminated by a final order is eligible for vocational assistance.

(2) A worker is eligible for vocational assistance if all the following conditions are met:

(a) The worker is authorized to work in the United States;

(b) The worker is available for vocational assistance in Oregon or within commuting distance of Oregon.

(A) If the worker is not available in Oregon, or within commuting distance of Oregon, the insurer must consider the worker available in Oregon if the worker states in writing that within 30 days of being determined eligible for vocational assistance the worker will move back to Oregon, or to within commuting distance of Oregon, at the worker's own expense.

(B) The requirement that the worker be available in Oregon for vocational assistance

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

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 suitable and available work with the employer at injury or aggravation; and

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

(d) The worker was not employed in suitable employment for at least 60 days after the injury or aggravation.

(e) The worker did not refuse or fail to make a reasonable effort in available light-duty work intended to result in suitable employment. Prior to finding the worker ineligible, the insurer must document the existence of one or more suitable jobs that would be available for the worker after 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.

(f) The worker is available for vocational assistance. If the worker is not available, the insurer must determine if the reasons are for reasonable or unreasonable cause prior to ending the worker's eligibility. If the reason was for incarceration, this reason must be cited in the notice to the worker. 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, is reasonable cause.

(3) The worker must participate in the vocational assistance process and must provide relevant information. If the worker does not participate, or fails to provide relevant information, the insurer must issue a written warning before finding the worker ineligible under this rule.

(4) The worker must not misrepresent a matter material to evaluating eligibility.

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

Stat. Impltd.: ORS 656.206, 656.340

Hist: Amended and renumbered 12-1-2009 from OAR 436-120-0320 & 0350 as WCD Admin. Order 09-061, eff. 1-1-2010

436-120-0155 Deferral and Completion of an Eligibility Evaluation When the Employer Activates Preferred Worker Program Benefits:

(1) 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 in writing to accept the new or modified regular job. All of the following conditions must exist:

(a) The employer must make a written job offer to the worker that includes the following information:

(A) The start date;

(B) Wage and hours;

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

(C) Job site location;

(D) Description of job duties; and

(E) A statement that the job does not begin until the modifications are in place.

(b) The insurer must send the worker a Notice of Deferral of Vocational Assistance Eligibility Determination within 14 days of the date the worker signed the job offer letter indicating acceptance of the job.

(2) The insurer must complete the eligibility evaluation within 30 days of a determination that preferred worker benefits will not be provided or if the agreement is terminated.

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

Stat. Impltd.: ORS 656.340

Hist: Amended and renumbered 12-1-2009 from OAR 436-120-0320 as WCD Admin. Order 09-061, eff. 1-1-2010

436-120-0165 End of Eligibility for Vocational Assistance

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

(1) Based on new information that did not exist or that could not have been obtained with reasonable effort at the time the insurer determined eligibility, the worker no longer meets the eligibility requirements.

(2) The worker, prior to beginning an authorized return-to-work plan, refused an offer of suitable employment. If the employer-at-injury offers employment to a non-medically stationary worker, the offer must be made in accordance with OAR 436-060.

(3) The worker, prior to beginning an authorized return-to-work plan, left suitable employment after the injury or aggravation for a reason unrelated to the limitations caused by the injury.

(4) 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. Prior to ending eligibility, the insurer must document the existence of one or more suitable jobs that would be available for the worker after 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.

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

(6) The worker declined or became unavailable for vocational assistance. The insurer must determine if the reasons are for reasonable or unreasonable cause prior to ending the worker's eligibility. If the reason was for incarceration, this reason must be cited in the notice to the worker. 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, is reasonable cause.

(7) The worker refused a suitable training site after the vocational counselor and worker have agreed in writing upon a return-to-work goal.

(8) The worker failed after written warning to participate in the development or

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

implementation of a return-to-work plan. No written warning is required if the worker fails to attend two consecutive training days and fails, without reasonable cause, to notify the vocational counselor or the insurer by the close of next business day.

(9) 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.

(10) The worker misrepresented information relevant to providing vocational assistance.

(11) The worker refused after written warning to return property provided by the insurer or reimburse the insurer as required. No vocational assistance will be provided under subsequent openings of the claim until the worker returns the property or reimburses the funds.

(12) The worker misused funds provided for the purchase of property or services. No vocational assistance will be provided under subsequent openings of the claim until the worker reimburses the insurer for the misused funds.

(13) After written warning the worker continues to harass any participant to the vocational process. This section does not apply if such behavior is the result of a documented medical or mental condition.

(14) The worker entered into a claim disposition agreement and disposed of vocational rights. The parties may agree in writing to suspend vocational services pending approval by the Workers' Compensation Board. The insurer must end eligibility when the Worker's Compensation Board approves the claims disposition agreement that disposes of vocational assistance rights. No notice regarding the end of eligibility is required.

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

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

Stat. Impltd.: ORS 656.340

Hist: Amended and renumbered 12-1-2009 from OAR 436-120-0350 as WCD Admin. Order 09-061, eff. 1-1-2010

436-120-0175 Redetermining Eligibility for Vocational Assistance

If a worker was previously found ineligible or the worker's eligibility ended for any of the following reasons, the insurer must redetermine eligibility within 35 days of notification of a change of circumstances, including:

(1) The worker, for reasonable cause, was unavailable for vocational assistance and is now available.

(2) The worker's lack of suitable employment could not be resolved by providing vocational assistance. The insurer may require the worker to provide documentation that the circumstances have changed.

(3) The worker declined vocational assistance to accept modified or new employment that resulted from an employer-at-injury-activated use of preferred worker benefits under OAR 436-110, and the job was not suitable. In this case, the worker must request redetermination within 30 days of termination of the employment for which preferred worker benefits were provided.

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

(4) The worker becomes available in Oregon and requests redetermination within six months of receiving the insurer's notice that the worker is not eligible because the worker is not available in Oregon.

(5) The worker's claim, that had been denied, has been accepted and all appeals have been exhausted.

(6) The worker, who was not authorized to work in the United States, is now authorized to work in the United States. 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 has applied for authorization to work in the United States and is awaiting a decision by the U.S. Citizenship and Immigration Services (USCIS). The worker must provide the insurer with a copy of any decision by the USCIS within 30 days of receipt. The insurer must redetermine eligibility upon receipt of documentation of the worker's authorization to work in the United States.

(7) The worker, who returned to work prior to becoming medically stationary, informs the insurer that he or she is likely eligible for vocational assistance and requests a redetermination within 60 days of the mailing date of the Notice of Closure.

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

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

(10) The worker's average weekly wage is redetermined and increased.

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

Stat. Impltd.: ORS 656.340

Hist: Amended and renumbered 12-1-2009 from OAR 436-120-0360 as WCD Admin. Order 09-061, eff. 1-1-2010

436-120-0185 Choosing a Vocational Assistance Provider

(1) Once the worker is found eligible, the insurer and worker must agree on a vocational assistance provider. Within 20 days of an eligibility finding, the insurer must notify the worker of the selection of vocational assistance provider. If they are unable to agree on a vocational assistance provider, the insurer or self-insured employer must notify the director and the director will select a provider.

(2) If the worker or insurer requests a change in vocational assistance provider, the insurer and worker must agree on a vocational assistance provider. If they are unable to agree, the insurer must refer the dispute to the director.

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

Stat. Impltd.: ORS 656.340

Hist: Amended and renumbered 12-1-2009 from OAR 436-120-0320 as WCD Admin. Order 09-061, eff. 1-1-2010

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

436-120-0320 Determining Eligibility for Vocational Assistance and Selection of Vocational Assistance Provider (*Renumbered to 436-120-0115, 0125, 0135, 0145, 0155, & 0185*)

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

Stat. Impltd.: ORS 656.206, (Oregon Laws, chapter 461), 656.340

Hist: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07

Amended and renumbered 12-1-2009 to 436-120-0115, 0125, 0135, 0145, 0155, & 0185 as WCD Admin. Order 09-061, eff. 1-1-2010

436-120-0340 Determining Substantial Handicap

(1) A certified vocational counselor must perform a substantial handicap evaluation as part of the eligibility determination when applicable.

(2) To complete the substantial handicap evaluation the vocational counselor must 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(18);
- (d) Permanent limitations due to the injury;
- (e) An analysis of the worker's transferable skills, if any;
- (f) A list of physically suitable jobs for which the worker has the knowledge, skills and abilities, that 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 using 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 will 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 must perform individual labor market search as described in OAR 436-120-0410(7); and
- (h) Consideration of the vocational impact of any limitations that existed prior to the injury.

Stat. Auth.: ORS 656.726(4)

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

Hist: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07

Amended 12-1-2009 as WCD Admin. Order 09-061, eff. 1-1-2010

436-120-0350 Ineligibility and End of Eligibility for Vocational Assistance (*Renumbered to 436-120-0165*)

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

Stat. Impltd.: ORS 656.340

Hist: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07

Amended and renumbered 12-1-2009 to 436-120-0165 as WCD Admin. Order 09-061, eff. 1-1-2010

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

436-120-0360 Redetermining Eligibility for Vocational Assistance (*Renumbered to 436-120-0175*)

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

Stat. Impltd.: ORS 656.340

Hist: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07

Amended and renumbered 12-1-2009 to 436-120-0175 as WCD Admin. Order 09-061, eff. 1-1-2010

436-120-0400 Selection of Category of Vocational Assistance

(1) The insurer must select the category of vocational assistance prior to referral to a vocational assistance provider. The insurer must notify the worker and document the reason for its decision.

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

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

(b) **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 must 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)

Stat. Impltd.: ORS 656.340(7)

Hist: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07

436-120-0410 Vocational Evaluation

A certified vocational counselor must complete the vocational evaluation. Vocational evaluation may include one or more of the following:

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

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

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

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

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

(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 must evaluate the worker's performance in the areas originally identified for assessment.

(4) **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.

(5) **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.

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

(7) Labor market search is 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 search 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, that 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 search 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 search are not, in themselves, proof a reasonable labor market exists.

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

Stat. Impltd.: ORS 656.340(7)

Hist: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07
Amended 12-1-2009 as WCD Admin. Order 09-061, eff. 1-1-2010

436-120-0430 Direct Employment

(1) The insurer must 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

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

date of an authorized training plan. Direct employment services include, but are not limited to, the following:

(a) Employment counseling.

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

(d) Job analysis.

(2) The insurer must 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)

Stat. Impltd.: ORS 656.340(7)

Hist: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07

436-120-0440 Training

(1) Training services include plan development, training, monthly monitoring of training progress, and job placement services as necessary.

(2) A worker enrolled and actively engaged in training must receive temporary disability compensation subject to OAR 436-060, and payment of awards of permanent disability are suspended. Temporary disability compensation is limited to 16 months subject to an extension to a maximum of 21 months by the insurer. In no event will temporary disability compensation be paid for a period longer than 21 months.

(3) Training costs may be paid for periods longer than 21 months. Reasons for extending training may include but are not limited to reasons beyond the worker's control, an exceptional disability, 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 that 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), to the worker's adjusted weekly wage and at least 10 percent greater than could be expected with a shorter training program.

(4) The selection of plan objectives and kind of training must attempt to minimize the length and cost of training necessary to prepare the worker for suitable employment. Notwithstanding OAR 436-120-0145(2), 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

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

cost effective than other alternatives. The plan must be developed and monitored by a vocational assistance provider certified under 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 that 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 training employer and for employment in the labor market at large. On-the-job training must 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 must 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 must not reimburse the training employer 100 percent of the wages for the entire contract period.

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

(e) The worker's schedule must 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) Occupational skills training is offered through a community college, based on predetermined curriculum, at the training employer's location. Occupational 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 must be the same as for a regular full-time employee. The

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

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 that is part of a state system of higher education. Course load must be consistent with the worker's abilities, limitations and length of time since the worker last attended school. Courses must 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 must 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 must be re-evaluated when any of the following occurs:

(a) A change in the worker's limitations that 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 must report any unsatisfactory performance and the insurer must give the worker a written warning of the possible end of training at the first indication of unsatisfactory performance.

(14) The insurer will not provide any further training to a worker who has completed one training plan unless there is reasonable cause to do so.

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

(a) The worker has successfully completed training;

(b) The worker's eligibility has ended under OAR 436-120-0165; or

(c) 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 that 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

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

Hist: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07
Amended 12-1-2009 as WCD Admin. Order 09-061, eff. 1-1-2010

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 must 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 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07

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 must 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 must confirm the worker's understanding of and agreement with the plan by obtaining the worker's signature. The counselor must submit copies signed by the vocational counselor and the worker to all parties. If the insurer lacks sufficient information to make a decision, the insurer must advise the parties what information is needed and when it expects to make a decision.

(2) 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 a period of time agreeable to the parties. The insurer or the worker may request a conference with the division if other delays in the vocational rehabilitation process occur.

(3) If, during development of a return-to-work plan, an employer offers the worker a job, the insurer must 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(17). If the job is suitable, the insurer must help the worker return to work with the employer. The insurer must 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 must immediately resume development of the return-to-work plan.

(4) If the vocational goal or category of assistance is later changed, the insurer must amend the plan. All amendments to the plan must be initialed by the insurer, vocational assistance provider, and the worker.

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

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

Stat. Impltd.: ORS 656.340(9)

Hist: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07

Amended 12-1-2009 as WCD Admin. Order 09-061, eff. 1-1-2010

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

(1) The injured worker and vocational counselor must 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 must 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, Standard Occupational Classification (SOC) codes, Dictionary of Occupational Titles (DOT) 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 that 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 must explain why the goals are appropriate.
- (g) A summary of current labor market information that shows the labor market supports the vocational goals and documents that the worker has been informed of the condition of the labor market.
- (h) A labor market search as prescribed in 436-120-0410(7), if needed.

(i) If the labor market information does not support the goals, the vocational assistance provider must explain why the goals are appropriate. The worker and worker's representative, if any, must 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 must 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

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

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 must 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 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

Hist: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07
Amended 12-1-2009 as WCD Admin. Order 09-061, eff. 1-1-2010

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

(1) The worker must participate and maintain contact with the vocational counselor throughout plan development and as required in the plan, and must 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 must 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 must help the worker plan the curriculum and help the worker enroll. The vocational assistance provider must 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)

Stat. Impltd.: ORS 656.340

Hist: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07

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 must 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 must, within 30 days of notification, make appropriate changes, supply

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

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

Hist: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07

436-120-0700 Direct Worker Purchases

(1) The insurer must 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 will 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 must approve the purchase or notify the worker of its denial.

(5) The insurer must pay for approved direct worker purchases in time to prevent delay in 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 must reimburse costs within 28 days of receiving the written request from the worker and any required supporting documentation.

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

(a) The insurer must 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

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

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)

Stat. Impltd.: ORS 656.340

Hist: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07

436-120-0710 Direct Worker Purchases: Kinds

The insurer must 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 must 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 will 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 must pay the cost in full, and will 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 must be stipulated in a contract between the training employer and the insurer.

(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 will be paid at public transportation rates when public transportation is available; otherwise, mileage will be paid at the rate of reimbursement for State of Oregon classified employees. Costs incidental to mileage, such as parking fees, also will be paid. For workers receiving temporary total disability or equivalent income, private car mileage will 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 will 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 will be reimbursed at the rate of reimbursement for State of Oregon classified employees.

(c) **Special travel costs.** Payment will 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

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

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 will 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 must 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.**

(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 will 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 must be based on the worker's temporary total disability rate if the worker's claim were reopened.

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

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

(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.

(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 will be paid only when in excess of what the

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

worker paid for such services at the time of injury, adjusted using the cost-of-living matrix.

(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.

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

(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 must provide the insurer with proof of a valid driver's license and insurance coverage. Payment under this category is limited to \$1,000.

(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)

Stat. Impltd.: ORS 656.340

Hist: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07

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 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.

(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 must 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	54.7%	Not applicable (NA)
Substantial handicap analysis	109.4%	NA
Direct Employment	736.1%	368.1%
Training	1840.4%	2429.3%
DE/Training Combined	2044.8	NA
Dispute Resolution	61.3%	NA

NOTE: *Each limit is shown as a percentage of Oregon's state average weekly wage (SAWW), determined under ORS 656.211. Dollar amounts are published in Bulletin 124 and are adjusted annually, effective July 1, based on changes in the SAWW.

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

(4) Wage reimbursement for on-the-job training contracts 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 must pay, within 60 days of receipt, the vocational assistance provider's billing for services provided under the insurer-vocational assistance provider agreement. The insurer must 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 under OAR 436-110 for services provided under OAR 436-120 is subject to the following limitations:

(a) Optional services are not reimbursable.

(b) The insurer must obtain the director's approval in advance for any waiver of the provisions of OAR 436-120.

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

Stat. Impltd.: ORS 656.340, 656.258

Hist: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07

Amended 12-1-2009 as WCD Admin. Order 09-061, eff. 1-1-2010

436-120-0755 Reimbursement of Vocational Assistance Costs from the Workers' Benefit Fund

(1) The director will reimburse the insurer or self-insured employer for costs associated with providing vocational benefits when:

(a) The director issues an order overturning the insurer's or self-insured employer's denial of vocational benefits; and

(b) The insurer's or self-insured employer's denial is later upheld by a final order.

(2) To receive reimbursement from the Workers' Benefit Fund, the insurer or self-insured employer must provide the division with the following documentation, within one year from the date of the final order:

(a) Injured worker's name and Workers' Compensation Division's claim file number;

(b) Date and order number of the director's order appealed;

(c) Itemized listing with dates of service for all costs incurred after the date of the director's order that was reversed. All costs, in order to be reimbursed, must meet all conditions set forth in OAR 436-120, and reimbursement requests must:

(A) Use terms, "direct employment" or "training" to show the category of vocational assistance provided;

(B) List vocational provider costs by category of "professional services";

(C) List direct worker purchases by the categories in OAR 436-120-0710, to include purchase dates and costs;

(D) Show temporary total disability paid between the start and end dates of the return to

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

work plan; and

(E) List any other costs incurred in providing vocational benefits as a result of the order that was appealed.

(d) Signed certified statement that the requested reimbursement amount was actually paid; and

(e) The insurer's or self-insured employer's name and address where reimbursement is to be sent.

(3) The director may require additional information to clarify and process a reimbursement request.

(4) No reimbursement is allowed for the insurer's administrative costs.

Stat. Auth.: 656.726(4)

Stat. Impltd.: Oregon Laws, chapter 588, sections 4 & 5; ORS 656.313, 656.605

Hist: Filed 12/5/05 as WCD Admin. Order 05-080 eff. 01/01/06

436-120-0800 Registration of Vocational Assistance Providers

(1) A vocational assistance provider may not provide vocational assistance services unless they are first registered by the director under this rule.

(2) A vocational assistance provider must submit an application that includes: a description of the specific vocational services to be provided and verification of staff certifications under these rules;

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

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

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

(4) A registered vocational assistance provider must:

(a) Notify the division within 30 days of any changes in office address, telephone number, contact person or staff.

(b) 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: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07
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436-120-0810 Certification of Individuals

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

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

(1) An applicant for certification must 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(2).

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

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

(b) Certified individuals must notify the division within 30 days of any changes in address and telephone number.

(c) 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

Hist: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07

Amended 12-1-2009 as WCD Admin. Order 09-061, eff. 1-1-2010

436-120-0820 Renewal of Certification

(1) A certified individual must 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 under this rule within the five years prior to renewal.

(A) At least eight hours must be for training in ethical practices in rehabilitation counseling.

(B) At least six hours of training must be on the Oregon vocational assistance and reemployment assistance rules. Individuals already certified on the effective date of these rules will have no less than one year to complete this requirement.

(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

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

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 will 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

Hist: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07
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436-120-0830 Classification of Vocational Assistance Staff

Individuals providing vocational assistance will 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 must co-sign and assume responsibility for all the intern's eligibility determinations, 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, labor market search, 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

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

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 /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 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 that is less than full time will be prorated. For purposes of this rule, full time will 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

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

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

Hist: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07

Amended 12-1-2009 as WCD Admin. Order 09-061, eff. 1-1-2010

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

(1) Registered vocational assistance providers and certified individuals must:

(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 under OAR 436-120 and reemployment assistance under 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) Registered vocational assistance providers and certified individuals must 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 registration 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;

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

(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 that is contrary to the requirements of these rules.

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

Stat. Impltd.: ORS 656.313, 656.340

Hist: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07
Amended 12-1-2009 as WCD Admin. Order 09-061, eff. 1-1-2010

436-120-0900 Audits, Penalties and Sanctions

(1) Insurers and employers at injury must 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 or employer may be assessed a civil penalty under ORS 656.745 for any violation of statutes, rules, or orders of the director.

(3) In determining the amount of a civil penalty to be assessed 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.

(4) under ORS 656.447, the director may suspend or revoke an insurer's authority to issue worker's compensation insurance policies upon determination that the insurer has failed to comply with these rules.

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

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

Hist: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07
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436-120-0915 Sanctions of Registered Vocational Assistance Providers and Certified Individuals

(1) Vocational assistance providers and certified individuals must 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 registered vocational assistance provider or certified individual failed to comply with OAR 436-120, the director may impose one or more of the

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

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 registration 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 registration 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 registration or certification to determine eligibility and provide vocational assistance to Oregon injured workers.

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

(a) The director will send by certified mail a written notice of intended suspension or revocation and the grounds for such action. The notice must 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 will become final.

(d) If the vocational assistance provider or individual requests a show-cause hearing, the director will send a notification of the date, time and place of the hearing.

(e) After the show-cause hearing, the director will issue a final order which may be appealed as described in OAR 436-120-0008(3).

(4) For the purposes of section (3) "show-cause hearing" means an informal meeting with the director in which the vocational assistance provider or certified individual will be provided an opportunity to be heard and present evidence regarding any proposed actions by the director to suspend or revoke a vocational assistance provider or certified individual's authority to provide vocational assistance services to injured workers.

(5) 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

Hist: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07
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