

# Vocational WAC 296-19A Guidelines

February 2004

## **Employability**

### **Ability to obtain gainful employment**

See primarily WAC 296-19A-010(1)

### Background

The ability to obtain gainful employment is part of the definition of employable in WAC 296-19A-010(1).

### Goal

Give claim managers and vocational providers a clear understanding of the concept of the “ability to obtain gainful employment” and how it affects employability.

### Decision

The ability to obtain gainful employment is one factor when considering whether someone is employable or not. The inability to obtain gainful employment needs to be related to, or caused by, the injury and pre-existing physical and/or mental limitations. Other factors as they existed at the time of injury together with the effects of the injury, or the progression of these pre-existing limitations, if aggravated or accelerated by the injury, must also be considered.

There is a reasonable expectation that the worker can perform and obtain employment based on the worker’s history (both medical and legal). For example:

- A felony record may make someone unable to obtain the work as a bank teller.
- A convicted sex offender cannot be a teacher.
- A bartender can be a questionable occupation for a recovering alcoholic.

The “ability to obtain gainful employment” decision should not be based solely upon fluctuations in the job market.

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Factors not to be considered when determining employability are characteristics such as personal hygiene of a worker.

Although the “ability to obtain gainful employment” is not a change in business practice, this is the first time “ability to obtain” has been specified in WAC. The Leeper, Taasevigen, and Jones decisions can be used as examples.

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## Physical and mental limitations and restrictions

See primarily WAC 296-19A-010(1)

### Background

Physical and mental limitations and restrictions are listed in WAC 296-19A-010(1) as factors that need to be considered when determining employability. The terms “limitations” and “restrictions” are used interchangeably.

### Goal

Provide claim managers and vocational providers factors to consider when evaluating physical and mental limitations.

### Decision

Before making a vocational referral, the claim manager must determine whether contended conditions, including mental conditions, are, or are not, accepted under the claim. If during a vocational referral a newly contended condition is discovered, the claim manager must act promptly to address this contention.

When determining employability, the claim managers and vocational providers must take into account the whole person when determining physical and/or *mental limitations* related to or caused by the injury and pre-existing physical and/or *mental limitations*. Other factors as they existed at the time of injury, together with the effects of the injury, or the progression of these pre-existing limitations if aggravated or accelerated by the injury, must also be considered.

The vocational provider and claim manager must consider the pre-injury capacities (i.e., documented mental limitations due to mental disabilities, pre-existing educational and aptitude levels or mental disease prior to the injury, etc.) and any mental limitations based on the injury itself (such as a head injury).

Cognitive or other mental limitations from the injury should be documented by tests and evaluations and compared to the pre-injury capacities of the

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worker. Neuro-psychological tests may be used to document objective findings when cognitive limitations are under contention. When there was no neuro-psych testing prior to the injury, then the vocational provider will need to review school transcripts, other available tests, interviews, or other information to evaluate the worker's pre-injury cognitive or other mental limitations.

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## **Reasonable commute as part of a labor market survey See primarily WAC 296-19A-010(4)**

### Background

Reasonable commuting has long been a consideration in establishing a worker's labor market. It is referenced in WAC 296-19A-010(4). The reasonable commute establishes the parameters of the labor market survey.

### Goal

Give claim managers and vocational providers guidelines for defining a reasonable commute for the worker.

### Decision

In some cases, it must be determined whether the worker's commute is reasonable. The commuting distance and mode of transportation must be consistent with the worker's physical and/or mental limitations related to, or caused by, the injury and pre-existing physical and/or mental limitations. Other factors as they existed at the time of injury, together with the effects of the injury, or the progression of these pre-existing limitations, if aggravated or accelerated by the injury, must also be considered. Additional factors that may be appropriate to consider on a case-by-case basis are:

- The worker's pre-injury commuting style, e.g., cost, time, and mode of commuting.
- The commonly accepted commuting style within the worker's labor market for the occupation under review.

There is no set standard for what constitutes a reasonable commute, such as a "50-mile rule of thumb."

When determining a worker's labor market, please refer to the example in WAC 296-19A-010(4).

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## **Transferable skills**

**See primarily WAC 296-19A-010(7) and (8)**

### Background

The terms “non-work related talents or skills” and “demonstrated behavior” have not previously been specified in WAC or department policy. The WAC 296-19A-010(7) adds these terms to the concept of transferable skills.

### Goal

Clarify for claim managers and vocational providers how to apply the concept of “non-work related talents or skills” and “demonstrated behavior” when determining a worker’s transferable skills as they relate to gainful employment.

### Decision

Demonstrated and applicable skills obtained through hobbies or volunteer work may be considered in addition to education and work related skills when transferable skills are determined. Activities of daily living cannot be the sole consideration when transferable skills are determined. Many examples of activities of daily living such as balancing a check book, cooking, or home landscaping by themselves may not be considered transferable skills on their own to demonstrate a worker’s employability.

In determining transferable skills an injured worker may possess, it must be shown that the injured worker actually possesses, or has developed the skill at issue, in order for that skill to be considered a “transferable skill.”

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## **Discretionary criteria**

**See primarily WAC 296-19A-020 and -025**

### Background

Since 1985, vocational rehabilitation services have been offered at the discretion of the department. Claim managers apply discretion when determining whether vocational rehabilitation services are necessary and likely to make a worker employable.

### Goal

Describe how to apply the discretionary criteria in WAC 296-19A-020 and – 025 when authorizing vocational rehabilitation services.

### Decision

Discretion can be used any time before an IW has been determined eligible for Plan Development. CMs may use discretion without an open vocational referral, or during an EI, AWA, or forensic referral.

The claim manager should consider all of the factors that affect the likelihood of the worker benefiting from vocational rehabilitation services, such as the following, in making his or her determination of whether to offer vocational services:

- May have been eligible, but declines services.
- Voluntarily retires from the workforce.
- Actions that can be documented, such as lack of participation in the ability-to-work assessment, show that the worker is unlikely to benefit from vocational services.
- Participated in a previous vocational plan(s), but did not take advantage of and/or utilize the vocational services offered.
- Prior appropriate suspension of benefits for non-cooperation of vocational rehabilitation services.
- Impact of an unrelated, post-injury condition that impairs the worker's function.
- Other relevant factors that are apparent and can be documented.

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Services Not Appropriate is the outcome used when a claim manager determines that the worker is not likely to benefit from vocational services. The claim manager will make this decision with an opportunity for the vocational services consultant to review the information.

The claim manager's determination must be based on documentation of how the worker would benefit if it were not for the documented barriers. If there is an open vocational referral, the claim manager must clearly communicate to the VRC which conditions are accepted under the claim, which ones are pre-existing, and which ones are unrelated, post-injury.

A recommendation that the worker is not likely to benefit due to an unrelated, post-injury condition requires the VRC to complete an analysis of the worker based upon the worker's pre-existing conditions and those conditions accepted under the claim. Such analysis would include the development of a medically approved hypothetical job goal, the recommended methodology to be used for acquiring the necessary skills and labor market survey demonstrating the hypothetical job goal exists. Rationalization for the selection of the hypothetical job goal, i.e. work history or demonstrated aptitudes, should be included.

The department may not apply discretionary criteria on a claim where the worker has already been determined eligible for plan development services. If an IW does not participate during plan development or plan implementation services, and does not have good cause for not participating, the CM will follow the non-cooperation/suspension process and close the vocational referral with an ADMB outcome. (Note: The VRC has probably recommended a SNA3 outcome.)



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## **Work pattern as a part of a labor market survey See primarily WAC 296-19A-070**

### Background

A work pattern is evaluated when assessing employability. A worker's pattern of work at the job-of-injury must be compared to job goals considered by the worker during vocational rehabilitation services or other jobs when employability is assessed.

### Goal

Clarify issues pertaining to work pattern for purposes of assessing employability.

### Decision

When assessing employability the work pattern of the proposed occupation(s) must at a minimum meet the work pattern (e.g., full-time, part-time) established at the time of injury. The work pattern established in the labor market survey may exceed the worker's work pattern at the time of injury provided the worker is released to, for example, perform more hours of work.

Work shift cannot be considered in determining the work pattern.

For a claim that has been reopened, the work pattern at the time of injury must be compared to jobs or job goals.

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## **Ability to benefit as part of a vocational rehabilitation plan development referral**

**See WAC 296-19A-100**

### Background

If the provider has to stop plan development before a rehabilitation plan is submitted and/or approved, the WAC specifies that the vocational provider must assess the worker's ability to benefit. The provider must do this as part of the open plan development referral.

### Goal

Provide direction and examples for claims staff when a Plan Development referral must end prior to submission of plan.

### Decision

If an IW has been determined to be eligible for Plan Development, and is no longer likely to benefit from vocational services, then CMs would use the vocational outcome "services not appropriate" (SNA3) due to relevant factors that can be documented.

The claim manager's determination must be based on documentation of how the worker would benefit if it were not for the documented barriers. The claim manager must clearly communicate to the VRC which conditions are accepted under the claim, which ones are pre-existing, and which ones are unrelated, post-injury.

The VRC will complete the analysis of the worker based upon the worker's pre-existing conditions and those conditions accepted under the claim. Such analysis would include the development of a medically approved hypothetical job goal, the recommended methodology to be used for acquiring the necessary skills and labor market survey demonstrating the hypothetical job goal exists. The rationale for the selection of the hypothetical job goal, i.e. work history or demonstrated aptitudes, should be included. This is not the submission of a formal retraining plan with time and cost encumbrance forms and does not require the worker to sign off in agreement.

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**Example:** The worker is in the first month of plan development, and a retraining plan has not yet been developed. The worker had a brain aneurysm, unrelated to the industrial injury. The worker's doctor says the worker will not be able to participate in plan development services ever again. In the closing report, the VRC clarifies that given the effects of the unrelated post-injury factors, the worker is not likely to benefit from vocational services. However, based on the worker's pre-existing conditions and accepted conditions under the claim, the worker would have been likely to benefit from vocational services. The closing report includes a hypothetical job goal, training methodology and labor market information.

If an IW fails to participate in Plan Development or Plan Implementation, the CM will follow the suspension process and close the vocational referral with an ADMB outcome. (Note: The VRC has probably recommended a SNA3 outcome.)

**Example:** The worker fails to participate during plan development, and for this reason, a plan could not be developed. In the closing report, the VRC clarifies that, given the worker's accepted industrial condition and pre-existing factors, the worker could benefit from vocational services; however, in the VRC's opinion, the worker is unlikely to benefit due to failure to participate.

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## Forensic evaluation

See WACs 296-19A-125, 130 and 135

### Background

A forensic evaluation is used when an adjudicator requires a comprehensive evaluation of a complex claim to clarify vocational issues, and previous referrals have not resolved an injured worker's vocational issues.

### Goals

- ◆ Define who may refer for forensic evaluations,
- ◆ Clarify the circumstance under which a forensic referral may be made,
- ◆ Describe which providers may perform these evaluations, and
- ◆ Provide guidelines for managing forensic referrals.

### Decision

#### **Who may refer for a forensic evaluation?**

Only workers' compensation unit supervisors and adjudicators (WCAs) 3, 4, and 5 may refer for a forensic evaluation under the State Fund.

#### **Under what circumstances may a forensic referral be made?**

A worker's claim must meet one of three requirements:

1. Two or more vocational referrals, which have not resolved the worker's vocational issues, must have been provided. (Prior to June 1, 2001, an intervention referral that included both early intervention and ability-to-work assessment services will be considered two referrals.)

Examples to consider are:

- Catastrophic injury claims.
- Claims with complex or multiple medical conditions that were not addressed in prior services.
- Claims where previous vocational attempts have resulted in conflicting opinions regarding the worker's employability.
- Claims where unrelated factors may be preventing the worker from participating or succeeding in vocational services.

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- Closed claims with a protest contending total permanent disability. The Claim Unit Supervisor, WCA3, 4 or 5 may request a forensic evaluation to resolve the protest.
- Closed claims with an appeal contending total permanent disability. The WCA4 or 5 may request a forensic evaluation to resolve the appeal, or prepare the case for litigation.

2. The worker has suffered an unrelated, post-injury condition, which results in his inability to interact or participate in vocational assessment, and there is no prior viable vocational work-up.

3. The worker has died due to an unrelated cause and a determination is needed to address if the worker's permanent disability resulting from the injury was partial or total in nature. The pension adjudicator may make a forensic referral or direct a WCA3 to make the referral.

### **When should a forensic evaluation be performed?**

A forensic evaluation should be requested:

- When a review of the medical and vocational reports indicates the worker's claim meets one of the three requirements, and
- At the direction of a WCA 4 or 5, or after a staffing with the unit supervisor, the WCA3, and the unit vocational services consultant, it is concluded that a forensic evaluation is needed.

### **Who can provide a forensic evaluation?**

Only vocational providers who meet requirements in WAC 296-19A-210(3) may perform forensic evaluations. LINIIS screens will indicate which providers meet the requirements of WAC 296-19A-210(3). LINIIS will list providers in CACO order; however, the CACO will only measure the provider's non-forensic work. Some providers will not have a CACO if they only provide forensic evaluations. The qualified providers without a CACO score will appear below the providers with a CACO score on the LINIIS referral screen.

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A vocational provider must not perform a forensic evaluation of a worker for whom they have previously provided vocational services. LINIIS will not contain an edit on whether the vocational provider has performed other services for that worker. The claim manager must rely on the claim file reviews to identify all previous vocational providers. It is the vocational provider's responsibility to decline the referral if he/she has previously provided services to the injured worker.

### **What are the guidelines for managing forensic evaluations?**

A forensic evaluation is paid at 120% of the professional rate and does not have a fee cap. Therefore, it is important that the adjudicator establish clear timeframes and monitor progress closely. The adjudicator will:

- Discuss timeframes when the need for the referral is staffed internally, and communicate the dates to the provider,
- Communicate a due date for the closing report to insure timely resolution. This is particularly important when under legal constraints, such as a reassumed appeal from the BIIA.

If appropriate progress has not been made on the referral, the adjudicator may decide to close the referral and reassess need for another forensic referral.

**Progress reports are due every thirty calendar days from the date of the electronic referral.**

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## **Preponderance of medical evidence**

See primarily WAC 296-19A-140

### Goal

Describe how claim managers and vocational providers apply preponderance of medical information referenced in WAC 296-19A-140.

### Decision

#### *What is preponderance of medical evidence?*

Preponderance of medical information shows, as a whole, that the medical evidence that supports the vocational decision has greater weight or is more convincing than the opposing evidence. It is not based solely on the number of medical witnesses.

#### *Why do we need preponderance of medical evidence in recommending vocational decisions?*

Preponderance of medical evidence is needed when there are conflicting medical opinions in the file regarding an injured worker's limitations. Preponderance of medical evidence also may be needed if the opinion or action of the attending doctor impedes the vocational process. Preponderance may also be needed if the attending doctor's opinion is not supported by objective medical findings.

#### *What factors are considered in evaluating preponderance of medical opinion?*

When making vocational decisions, physical and/or mental limitations must be based on objective medical findings or other available medical evidence. A doctor's opinion of the limitations is required.

Preponderance of medical evidence includes factors such as the following when determining the validity of the limitations:

- ❑ Valid effort by the worker in a physical capacities evaluation (PCE)
- ❑ Whether the PCE addresses specific jobs

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- Whether limitations are consistent with the injury and treatment
- Whether we took into consideration the effects of the injury and any pre-injury limitations which affect performance when the limitations were determined. (We must also ensure that the consideration of “preponderance” does not reflect limitations due to unrelated post-injury conditions.)
- Whether the injured worker has reached maximum medical improvement (MMI) Note: A worker may be eligible for vocational services before reaching MMI when the medical treatment to date (e.g., surgery) and medical opinions in the file support permanent limitations that prevent the worker from becoming employed at the job of injury or employable based on transferable skills.
- Whether the attending physician and/or panel concur with the PCE recommendations

The medical evidence needs to accurately reflect the worker’s current medical status

### ***How do we use physical capacity evaluations (PCE) in determining preponderance of medical opinion in resolving vocational issues?***

A PCE is a diagnostic test used as a basis for medical opinion. The file needs to reflect that a doctor has evaluated the results and provided an opinion that the PCE is consistent with or is not consistent with objective medical findings.

A PCE is not a stand-alone medical opinion.

### ***How is Work Hardening used in determining preponderance of medical opinion in resolving vocational issues?***

When the attending doctor approves the worker’s participation in work hardening and approves the job goal, and the work hardening therapist provides an objective opinion that an IW successfully completes a work hardening program or demonstrates an ability to perform an identified job, the CM may consider this as part of the preponderance of medical evidence decision.



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## **Job analysis and essential functions**

See primarily WAC 296-19A-170

### **Background**

The department had requested that vocational providers describe the essential functions of a job in a job analysis before the Americans with Disabilities Act (ADA) was mandated. The term “essential function” is now commonly associated with the ADA and its definition.

### **Goal**

Explain how “essential function” will be interpreted for workers’ compensation by the department and how it relates to the ADA definition of the term. Refer to WAC 296-19A-170(3).

### **Decision**

Essential functions are the fundamental duties of a job, or a specific job, performed by the worker. Job functions are observable activities performed in the job. (For example, busing tables is an observable activity; providing good customer service is not.) The essential functions are a basic, necessary, and integral part of a job. Providers must describe the job requirements as they actually exist, not in the context of potential accommodations.

Evidence of essential functions may include, but are not limited to:

- an employer’s judgment,
- written job descriptions,
- amount of time spent performing the function,
- on-site observation of job functions,
- experience of past workers and of the current workers.

In determining whether a function is essential, the vocational provider must decide whether removing the function causes an occasional inconvenience or fundamentally alters the job. These are some ways to evaluate whether removing a function can alter a job:

- The reason the position exists is to perform the function

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- Even if rarely performed, removing the function from the position could have large consequences
- When there are few employees in a shift, then the addition of the function might fundamentally alter the position. (For example, lifting heavy objects on your own could be required during a night shift when fewer employees are available to assist in the lifting.)
- The function is highly specialized

The essential functions in a job analysis for worker's compensation does not satisfy ADA requirements. It is the employer's responsibility to define the essential functions under the ADA. It is the department's responsibility to adjudicate the essential functions described in a job analysis.