



Denial Appeal Language Advisory Committee Memorandum

March 13, 2024

To: Workers' Compensation Board Members

From: Darren Otto, Administrative Law Judge (ALJ) with the Workers' Compensation Board acting as Facilitator¹
Barbra Anderson, Ombuds for Oregon Workers
Derrick Louie, Attorney with Bennett Hartman Morris & Kaplan
Allison Lesh, SAIF Trial Counsel
Sydney Montanaro, Attorney with Thomas Coon Newton & Frost
Amy Osenar, Attorney with Reinisch Wilson PC

Also in Attendance at the January 12, 2024 Public Hearing:

Isabelle Hernandez, Healthy Systems
Heather Williamson, Workers' Compensation Division
Elaine Schooler, SAIF Corporation
Katy Gunville, Executive Assistant to the Workers' Compensation Board's Managing Attorney
Katelyn Crowe, Paralegal and Transcription Coordinator with the Workers' Compensation Board

Also in attendance at the March 1, 2024 Public Hearing:

Katy Gunville, Executive Assistant to the Workers' Compensation Board's Managing Attorney
Katelyn Crowe, Paralegal and Transcription Coordinator with the Workers' Compensation Board

Subject: Mandatory Denial Language in OAR 438-005-0055

Introduction:

¹ On February 28, 2024, Katy Gunville emailed a Memorandum to ALJ Otto, which was written by Katelyn Crowe following the January 12, 2024 Public Hearing. A significant portion of that Memorandum was used to create this report.

On December 11, 2023, Workers' Compensation Board Chair Joy Dougherty sent a letter to the Advisory Committee members describing the procedural background that preceded the two public hearings that were later held to discuss the proposed amendments to OAR 438-005-0055. To summarize, she stated:

1. SAIF Corporation and the Oregon Trial Lawyers Association (OTLA) brought the rule concept to the Workers' Compensation Board with proposed language for amendments in order to simplify and improve the readability of the Board's required denial language in OAR 438-005-0055.
2. The proposed changes were drafted by the OSB Workers' Compensation Section's Access to Justice subcommittee with the approval of the OSB Executive Committee.
3. After considering public comment, the Workers' Compensation Board members decided to defer further action pending a report from an Advisory Committee.
4. The Advisory Committee was asked to complete its review and issue a report by March 15, 2024, which should include the following,
 - a. The committee's consensus (or majority and minority opinions) regarding the proposed rule concept, including any recommended rule modifications,
 - b. Proposed rule language,
 - c. The anticipated financial impact of any proposed rule modifications.
5. After the Advisory Committee issues its final report, the Workers' Compensation Board members intend to return this matter to their meeting agenda for discussion of any necessary rulemaking actions.

On January 12, 2024, and again on March 1, 2024, the Advisory Committee, consisting of Barbara Anderson, Derrick Louie, Allison Lesh, Sydney Montanaro, and Amy Osenar, met with ALJ Darren Otto (acting as Facilitator) at two public hearings to discuss proposed changes to simplify the mandatory denial appeal language in OAR 438-005-0055.

The committee members discussed proposed language updates and formatting changes. The objective was to simplify and improve the readability of the denial appeal language, which tells workers how to appeal a denial. OAR 438-005-0055(1) requires that the denial appeal language "shall" be "in prominent or bold-face type," but the rule does not specify if it has to be both. The committee agreed that the best option was to get away from using all capital letters in two long paragraphs and instead use bold and varied capitalization with seven paragraphs. The use of bold and varied capitalization mirrors the WCD's recent language updates. The Advisory Committee discussed each paragraph separately.

Paragraph 1:

The first paragraph outlines the timeframe in which a worker must appeal a denial and the delivery methods for appealing their denial.

At the January 12, 2024 Public Hearing, the committee agreed to amend “if you think this denial is not right” to “if you disagree with this denial.” There was also discussion of whether “mailing of the denial” should be changed to “mailing date of the denial.” The latter does not track exactly with the wording of ORS 656.319(1), which provides that a hearing must be requested no later than the 60th day “after the mailing of the denial to the claimant.” However, the committee did not believe the minor difference in language would cause a legal issue. The Board’s email address was changed from request.wcb@oregon.gov to request.wcb@wcb.oregon.gov.

At the March 1, 2024 Public Hearing, ALJ Otto advised the committee that the Board’s Eugene office was now unstaffed and the Medford office was unstaffed two days a week. Given that new information, the committee modified the physical delivery of a letter appealing a denial to include only Portland and Salem, which are the Board’s only full-time staffed offices.²

The committee agreed to the modified proposed language for Paragraph 1:

IF YOU DISAGREE with this DENIAL, you must file an APPEAL WITHIN 60 DAYS after the mailing date of the DENIAL by doing one of the following:

- (1) MAILING a letter to the Workers’ Compensation Board, 2601 25th Street SE, Suite 150, Salem, Oregon 97302-1280;**
- (2) Sending an E-MAIL to: request.wcb@wcb.oregon.gov;**
- (3) Sending a FAX to: 503-373-1600; or**
- (4) PHYSICAL DELIVERY of a letter to a Workers’ Compensation Board Office in Salem or Portland.**

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Paragraph 2:

The second paragraph details what information is to be included when appealing a denial.

² Following the March 1, 2024 Public Hearing, the Advisory Committee agreed in email communications to strike Eugene and Medford from the places allowed for physical delivery of a request for hearing and limit delivery to the Board’s Salem or Portland offices.

To improve the readability, the committee members agreed to omit “physical delivery” from the start of paragraph 2. There was discussion about what information is statutorily required for an appeal of a denial. Case law holds that a request for hearing challenging a denial must refer to the denial to properly raise that issue. *See Guerra v. SAIF*, 111 Or App 579 (1992); *Kurt Grotewold*, 69 Van Natta 36 (2017). Although there is no statutory requirement that an appeal of a denial include the date of injury (DOI), the committee members decided including that information in a request for hearing could prevent a postponement of the hearing and is helpful for insurers. Some committee members proposed exchanging “DOI” for “claim number,” but the committee ultimately decided to include both.

Committee members thoroughly discussed use of the word “must” in the context of information to be included in the request for hearing. In the end, the committee members decided to use the word “should.” That decision was consistent with OAR 438-005-0070 (Request for Hearing) which provides, in relevant part, that “the person requesting a hearing *should* include the person’s full name, the name of the injured worker if different from that of the person requesting the hearing, the date of the injury or exposure, the name of the employer and its insurer, if any, and the claim number.” (emphasis added). Similarly, ORS 656.283(2) provides, “A request for hearing *may* be made by any writing, signed by or on behalf of the party and including the address of the party, requesting the hearing, stating that a hearing is desired, and mailed to the Workers’ Compensation Board.” (emphasis added). There was some concern that the word “should” did not comport with the statutory use of the word “may,” but the difference was deemed insignificant.

Committee members also discussed the use of the word “accident.” Some members were concerned that the word “accident” can be confusing to workers and suggested using “injury/occupational disease.” However, it was brought up that “injury/occupational disease” does not align with case law. It was ultimately decided to use “injury or exposure” instead of “accident,” which corresponds with the terms used in OAR 438-005-0070 which provides that a request for hearing should include, among other things, “the date of the injury or exposure.” The committee members also modified the last sentence by replacing the word “sent” with “filed.”

The committee agreed to the modified proposed language for Paragraph 2:

Your letter, email, or fax, should include: (1) you want a hearing, (2) your address, (3) the date of the denial, (4) the claim number, and (5) the date of your injury or exposure, if you know the date. If the Workers’ Compensation Board receives your appeal more than 60 days after the mailing date of this denial, you may have to prove you filed the appeal within 60 days.

Paragraph 3:

The third paragraph highlights the importance of filing an appeal of a denial in a timely manner.

At the March 1, 2024 Public Hearing, the committee members decided to remove the sentence about requesting an expedited hearing based on their belief that a worker could not receive an expedited hearing from an appeal of a compensability or responsibility denial. Per ORS 656.291(2), an appeal must meet certain criteria for qualifying for an expedited hearing. Due to the specific requirements for an expedited hearing, the committee members felt it would be confusing or create false hope for claimants hoping to get a hearing quicker.

The committee agreed to the modified proposed language for Paragraph 3:

IF YOU DO NOT APPEAL WITHIN 60 DAYS of the mailing date of this denial, YOU WILL LOSE ANY RIGHT you may have to compensation. The only exception is if you can show good cause for delay beyond the 60 days. After 180 days, all of your rights will be lost.

Paragraph 4:

The fourth paragraph was not modified from the original proposed language. It was agreed that the word “affect” is a neutral word that was used appropriately.

The committee agreed to the proposed language for Paragraph 4:

By law, your appeal cannot affect your employment.

Paragraph 5:

The fifth paragraph details the qualifications for a “Worker Requested Medical Examination” (WRME).

Committee members discussed whether this paragraph should say who pays for the WRME or how a worker requests one. It was also noted that subsection 3 of paragraph 5, which stated, “your attending physician does not agree with or did not comment on the [IME] report(s),” was not in ORS 656.325(1)(e), which instead used the phrase “does not concur with the report or reports.”

Specifically, ORS 656.325(1)(e) provides,

If the worker has made a timely request for a hearing on a denial of compensability as required by ORS 656.319 (1)(a) that is based on one or more reports of examinations conducted pursuant to paragraph (a) of this subsection and the worker’s attending

physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 does not concur with the report or reports, the worker may request an examination to be conducted by a physician selected by the director from the list described in ORS 656.328. The cost of the examination and the examination report shall be paid by the insurer or self-insured employer.

The committee agreed to the following proposed language for Paragraph 5 with no modifications:

You may request an examination by a physician selected by the Workers' Compensation Division at no cost to you if: (1) you timely request a hearing on a denial of compensability, (2) the denial is based on one or more medical reports of insurer or self-insured employer requested medical examinations, and (3) your attending physician does not agree with or did not comment on the report(s).

Paragraph 6:

The sixth paragraph states that a worker may be represented by an attorney at no cost to them. This was the same as the current language in the rule. There were no suggestions to change the language.

The committee agreed to the following proposed language for Paragraph 6:

You may be REPRESENTED BY AN ATTORNEY of your choice at NO COST TO YOU for attorney fees.

Paragraph 7:

The seventh paragraph provides the contact information for the Ombuds Office for Oregon Workers, the Workers' Compensation Board, and the Workers' Compensation Division.

The proposed language had the old name and old hyperlink for the Ombuds Office. That contact information was corrected. The committee members agreed the Ombuds Office should be the first contact that workers see. Finally, the Workers' Compensation Board was included as a secondary contact with the Workers' Compensation Division dropping into the third position.

The committee agreed to the following proposed language for Paragraph 7:

**If you have questions you may contact:
(1) The Ombuds Office for Oregon Workers toll free at 1-800-927-1271,
<https://www.oregon.gov/dcbs/OOW>.**

(2) The Workers' Compensation Board toll free at 877-311-8061,
<https://www.oregon.gov/wcb>.

(3) The Workers' Compensation Division toll free at 1-800-452-0288,
<https://wcd.oregon.gov>.

Following the January 12, 2024 Public Hearing:

ALJ Otto agreed to type up all of the proposed modifications to the denial appeal rights language in OAR 438-005-0055(1) and email those changes to the committee members, which occurred on January 12, 2024. In that same email, ALJ Otto asked Board Chair Dougherty (1) to confirm whether the Advisory Committee members should propose modifications to OAR 438-005-0055(2), which contains noncooperation denial appeal rights language, and (2) to seek clarification of the rulemaking process after ALJ Otto submits the memorandum to the Board.

On February 5, 2024, Lauren Eldridge, Interim Managing Attorney for the Workers' Compensation Board, wrote a letter to the Advisory Committee members and ALJ Otto on behalf of Board Chair Daugherty. Ms. Eldridge stated, in relevant part,

1. The advisory committee may but is not obligated to, propose changes (including proposed language) to OAR 438-005-0055(2) that mirror its proposed changes to OAR 438-005-0055(1).
2. Once the Board received the advisory committee's report, the Members intend to return this matter to their public meeting agenda for discussion of any necessary rulemaking actions. At that public meeting, the Members will discuss whether to propose amendments to the Board's administrative rules. If the Board decides to proceed with rulemaking, it will send out a notice of rulemaking action, which will include the language of any proposed rule amendments. The notice will allow for public comment on the proposed rule amendments in compliance with the Oregon Administrative Procedures Act. After the public comment period, the Board will set another public meeting to discuss any public comments received and determine whether to adopt the proposed rule amendments.

At the March 1, 2024 Public Hearing, the Advisory Committee members agreed to propose amendments to OAR 438-005-0055(2), which mirrored the proposed amendments to OAR 438-005-0055(1). There was some discussion about removing proposed paragraph 4 in OAR 438-005-0055(2) which states, "**You will receive an EXPEDITED hearing within 30 days**" because proposed paragraph 2 advises the worker that their appeal of the denial should include, among other things, "**that you want an EXPEDITED hearing.**" However, the committee

members decided to retain proposed paragraph 4 because it includes additional important information.

The committee agreed to the following proposed language for OAR 438-005-0055(2), paragraphs 1 through 7, which mirrors the proposed language for OAR 438-005-0055(1) with minor differences:

IF YOU DISAGREE with this DENIAL, you must file an APPEAL WITHIN 60 DAYS after the mailing date of the DENIAL by doing one of the following:

- (1) MAILING a letter to the Workers' Compensation Board, 2601 25th Street SE, Suite 150, Salem, Oregon 97302-1280;**
- (2) Sending an E-MAIL to: request.wcb@wcb.oregon.gov;**
- (3) Sending a FAX to: 503-373-1600; or**
- (4) PHYSICAL DELIVERY of a letter to a Workers' Compensation Board Office in Salem or Portland.**

Your letter, email, or fax should include: (1) that you want an EXPEDITED hearing, (2) your address, (3) the date of the denial, (4) the claim number, and (5) the date of your injury or exposure, if you know the date. If the Workers' Compensation Board receives your appeal more than 60 days after the mailing date of this denial, you may have to prove you filed the appeal within 60 days.

IF YOU DO NOT APPEAL WITHIN 60 DAYS of the mailing date of this denial, YOU WILL LOSE ANY RIGHT you may have to compensation. The only exception is if you can show good cause for delay beyond the 60 days. After 180 days, all of your rights will be lost.

You will receive an EXPEDITED hearing within 30 days.

By law, your appeal cannot affect your employment.

You may be REPRESENTED BY AN ATTORNEY of your choice at NO COST TO YOU for attorney fees.

If you have questions you may contact:

- (1) The Ombuds Office for Oregon Workers toll free at 1-800-927-1271, <https://www.oregon.gov/dcbs/OOW>.**
- (2) The Workers' Compensation Board toll free at 877-311-8061, <https://www.oregon.gov/wcb>.**
- (3) The Workers' Compensation Division toll free at 1-800-452-0288, <https://wcd.oregon.gov>.**

Conclusions:

The Advisory Committee members' proposed amendments to the mandatory denial appeal language in OAR 438-005-0055 were all made by consensus without any stated minority positions. The committee members also agreed that the proposed rule modifications were not expected to have any financial impact.

Complete text of the Advisory Committee's proposed mandatory denial appeal language in OAR 438-005-0055(1) and (2):

(1) Except for a denial issued under ORS 656.262(15), in addition to the requirements of 656.262 and OAR 436-001-0600 (Bulletin No. 379), the notice of denial shall specify the factual and legal reasons for denial; and shall contain a notice, in prominent or bold-face type, as follows:

IF YOU DISAGREE with this DENIAL, you must file an APPEAL WITHIN 60 DAYS after the mailing date of the DENIAL by doing one of the following:

- (5) MAILING a letter to the Workers' Compensation Board, 2601 25th Street SE, Suite 150, Salem, Oregon 97302-1280;**
- (2) Sending an E-MAIL to: request.wcb@wcb.oregon.gov;**
- (3) Sending a FAX to: 503-373-1600; or**
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You may request an examination by a physician selected by the Workers' Compensation Division at no cost to you if: (1) you timely request a hearing on a denial of compensability, (2) the denial is based on one or more medical reports of insurer or self-insured employer requested medical examinations, and (3) your attending physician does not agree with or did not comment on the report(s).

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(3) The Workers' Compensation Division toll free at 1-800-452-0288,

<https://wcd.oregon.gov>.

(2) If an insurer or self-insured employer intends to deny a claim under ORS 656.262(15) because of a worker's failure to cooperate in the investigation of the claim, in addition to the requirements of 656.262, the notice of denial shall specify the factual and legal reasons for denial, and shall contain a notice, in prominent or bold-face type, as follows:

IF YOU DISAGREE with this DENIAL, you must file an APPEAL WITHIN 60 DAYS after the mailing date of the DENIAL by doing one of the following:

(2) MAILING a letter to the Workers' Compensation Board, 2601 25th Street SE, Suite 150, Salem, Oregon 97302-1280;

(2) Sending an E-MAIL to: request.wcb@wcb.oregon.gov;

(5) Sending a FAX to: 503-373-1600; or

(6) PHYSICAL DELIVERY of a letter to a Workers' Compensation Board Office in Salem or Portland.

Your letter, email, or fax should include: (1) that you want an EXPEDITED hearing, (2) your address, (3) the date of the denial, (4) the claim number, and (5) the date of your injury or exposure, if you know the date. If the Workers' Compensation Board receives your appeal more than 60 days after the mailing date of this denial, you may have to prove you filed the appeal within 60 days.

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