

STATEMENT OF NEED AND FISCAL IMPACT

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

Workers' Compensation Board

OAR Chapter 438

Agency and Division

Administrative Rules Chapter Number

Adopting rule requiring translation of documents; Amending rules on required notices for acceptance and denials

Rule Caption (Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.)

In the Matter of: Adoption of Permanent Amendments to the Rules of Practice and Procedure for Contested Cases under the Workers' Compensation Law, Relating to: Translation of Documents, and Notices of Claim Acceptances/Denials (OAR 438-007-0045, OAR 438-005-0050, OAR 438-005-0053, OAR 438-005-0055, OAR 438-005-0060)

Statutory Authority: ORS 656.726(5), ORS 656.307, ORS 656.308

Other Authority:

Stats. Implemented: ORS 656.012, ORS 656.262(6), ORS 656.262(15), ORS 656.308(2)

Need for the Rule(s):

To provide better access to justice for diverse populations in Oregon, and to comply with the court's decision in *Camacho v. SAIF*, 263 Or App 647 (2014), the Board Members tasked an advisory committee of stakeholders to review rule concepts submitted by the Oregon State Bar Workers' Compensation Section's Executive Committee and Access to Justice Committee.¹ After holding two public meetings, the committee issued a report. On November 27, 2018, at a public meeting, the Members discussed that report and proposed the adoption of permanent rules, as explained below.

OAR 438-007-0045

As reflected in the Advisory Committee report and the *Camacho* holding, statements in the documentary record of a contested case that are in a language other than English should be translated. Presently, no administrative rule prescribes the manner of fulfilling this obligation. To address this matter, after considering the committee's report and comments expressed at their public meeting, the Members have decided that it is necessary and appropriate to propose an administrative rule.

The rule sets forth the following requirements. (*See* Exhibit A). Documents admitted as evidence in a hearing shall be written in English or translated into English. The parties may stipulate in writing or orally to the English translation of the document, or the party offering the document for admission must include an English translation. Disputes regarding the accuracy of the translation shall be resolved by the Administrative Law Judge. The costs incurred in reaching a stipulated translation shall be borne in a manner agreed upon by the parties. The costs incurred in obtaining a party-offered translation shall be borne by the

¹ The Advisory Committee was comprised of the following individuals: Jennifer Flood, Ombudsman for Injured Workers; Krishna Balasubramani, Attorney at Law; Bin Chen, Attorney at Law; Katherine Krametbauer, Attorney at Law; Matthew U'Ren, Attorney at Law; and Ana Maria Meneses-Henry, interpreter. Administrative Law Judge Bruce Smith served as the facilitator for the committee. The Members extend their grateful appreciation to the committee for their valuable participation in this endeavor.

offering party. The costs incurred by the claimant for translation of documents are subject to reimbursement pursuant to ORS 656.386(2). Finally, the costs incurred in resolving a dispute over the translation before an Administrative Law Judge shall be borne by the Board.

OAR 438-005-0050, OAR 438-005-0053, OAR 438-005-0055, 438-005-0060

After discussing the Advisory Committee's report, the comments presented at the public meeting, and considering the concepts submitted by the Access to Justice Committee of the Workers' Compensation Section of the Oregon State Bar, the Members also believe that it is necessary and appropriate to amend its rules regarding Notices of Claim Denials and Acceptances to include a reference to proposed OAR 436-001-0600 (and particularly Bulletin No. 379).² In this way, carriers will be reminded to include in such notices a "multi-language help-page" document that will notify non-English speaking workers of the importance of such documents, including access to the Ombudsman for Injured Workers. The Members further note that this proposed rule (including the Bulletin) will soon be proposed by the Workers' Compensation Division, which would require inclusion of the "multi-language help-page" document for notices of denial/acceptance and other important claim processing documents. *See proposed* OAR 436-001-0600; Bulletin No. 379.

Accordingly, based on the aforementioned reasoning, the Members propose to amend the Board's rules regarding the Notice of Claim Acceptance and Hearing Rights (OAR 438-005-0050), the Notice of Denial of Responsibility (OAR 438-005-0053), the Notice of Claim Denial and Hearing Rights (OAR 438-005-0055), and the Notice of Partial Denial and Hearing Rights (OAR 438-005-0060) to provide that all such notices shall also comply with the requirements of proposed OAR 436-001-0600 (Bulletin No. 379). (*See* Exhibits B, C, D, and E).

Rulemaking Hearing:

The accompanying "Notice of Proposed Rulemaking Hearing" provides information regarding the February 1, 2019 hearing scheduled regarding this proposed rule. Pending the hearing, written comments regarding this rule may be submitted for admission into the record by directing such comments by mail, FAX (503-373-1684), e-mail (rulecomments.wcb@oregon.gov) or by means of hand-delivery to any permanently staffed Board office. The comments may be addressed to the attention of Trisha Fleischman, Rulemaking Hearing Officer, Workers' Compensation Board, 2601 25th St. SE, Ste. 150, Salem, OR 97302-1280.

Documents Relied Upon, and Where They Are Available:

ORS Chapter 656; October 25, 2018 Advisory Committee Memorandum; October 30, 2017 letter titled "Rule Concept for Translation of Written Evidence at Hearings" from Keith Kekauhoa, OSB Workers' Compensation Section Access to Justice Committee Member; January 12, 2018 letter from Bin Chen, OSB Workers' Compensation Section Access to Justice Committee Chair. These documents are available Monday through Friday, 8:00 a.m. to 5:00 p.m., at the Workers' Compensation Board, 2601 25th St. SE, Ste. 150, Salem, OR 97302-1280).

² The proposed rule amendments refer to "proposed OAR 436-001-0600 and Bulletin No. 379." The reason for the use of the word "proposed" is that the Workers' Compensation Division (WCD) is preparing to propose such a rule and bulletin regarding a "multi-language help-page" document for important notices. Assuming that WCD will formally adopt its proposed rule as a permanent rule by the time the Members consider the permanent adoption of these rule amendments, it is the Members' intention to eventually have the rule amendments refer to the permanently adopted version of the WCD rule.

Fiscal and Economic Impact:

The Members recognize that the adoption of OAR 438-007-0045 may impact costs to the parties. However, because most admitted documents are already being translated without a rule, such costs are presumably already being incurred. To the extent that there are translation costs incurred resolving future disputes under the rule, those costs will be borne by the agency. At the present time, the amount of such costs is undetermined, but projected to be relatively minimal. The amendments to OAR 438-005-0050, OAR 438-005-0053, 438-005-0055 and 438-005-0060 (regarding WCD’s “multi-language help-page” rule/bulletin) will likely increase costs to carriers in that an additional document will be included with any notice of denial/acceptance. At the present time, the amount of such a cost is undetermined. The Members invite public comment (written and oral) on these subjects.

Statement of Cost of Compliance:

1. Impact on state agencies, units of local government and the public (ORS 183.335(2)(b)(E)):

It is not anticipated that there would be any impact on state agencies, local government, or the public.

2. Cost of compliance effect on small business (ORS 183.336):

a. Estimate the number of small businesses and types of business and industries with small businesses subject to the rule:

Although an estimated number is presently indeterminate, all small businesses subject to the Workers’ Compensation Law, as well as workers’ compensation insurers, and self-insured employers would be subject to the proposed rules.

b. Projected reporting, recordkeeping and other administrative activities required for compliance, including costs of professional services:

At this time, there is no basis to say that the impact would be “significantly adverse” (under ORS 183.540) regarding these matters.

c. Equipment, supplies, labor and increased administration required for compliance:

At this time, there is no basis to say the impact would be significant regarding these matters.

How were small businesses involved in the development of this rule?

This process began with rule concepts submitted by the Access to Justice Committee of the Oregon State Bar. After considering these comments, the Members appointed an advisory committee to review comments/suggestions regarding a possible rule adoption and rule amendments. Members of that committee (which held two public meetings) included small businesses impacted by the proposed rule amendments recommended by the committee. For example, those members represented workers’ compensation practitioners and law firms (representing both workers and carriers), as well as workers’ compensation carriers. In addition, the Ombudsman for Injured Workers’ served on the committee.

Administrative Rule Advisory Committee consulted?: Yes.

If not, why?:

The Members appointed an advisory committee to consider rule concepts for translation of non-English documents and a “multi-language help-page” document. That committee submitted written recommendations, which the Members considered, along with public comment at their November 27, 2018 meeting in proposing these relevant rule amendments.

Dated this 30th day of November, 2018.

WORKERS' COMPENSATION BOARD

by: *Constance L. Wold*
Constance L. Wold, Board Chair

Sally Anne Curey
Sally Anne Curey, Board Member

Steve Lanning
Steve Lanning, Board Member

Roger Ousey
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Administrative Rules Unit, Archives Division, Secretary of State, 800 Summer Street NE, Salem, Oregon 97310. ARC 925-2007