

BEFORE THE WORKERS' COMPENSATION BOARD OF  
THE STATE OF OREGON

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| In the Matter of the Adoption of Permanent ) |                         |
| Amendments to the Rules of Practice and )    |                         |
| Procedure for Contested Cases under the )    | WCB ADMIN. ORDER 1-2016 |
| Workers' Compensation Law, Relating )        | ORDER OF ADOPTION       |
| to Filing and Service of Documents )         |                         |
| (OAR 438-005-0046); Representation )         |                         |
| by Counsel (OAR 438-006-0100) )              |                         |

1. On May 24, 2016, the Workers' Compensation Board filed a Notice of Proposed Rulemaking Hearing with the Secretary of State, giving notice of its intent to amend permanent rules of practice and procedure relating to the aforementioned rules. Copies of the notice were electronically provided to the *Oregonian*, the *Associated Press*, and the *Capitol Press* on June 3, 2016. The notice was published in the Secretary of State's July 2016 *Oregon Bulletin*.

On June 3, 2016, copies of the notice and the proposed rules were electronically provided to the appropriate legislators. Also, on June 3, 2016, copies of the notice, as well as the proposed rules, were mailed to all interested parties whose names appear on the Board's mailing list. Notice of the hearing was published in the June 2016 issue of the Board's News and Case Notes, which was posted on the Board's website in early July 2016. In addition, on July 13, 2016, members of the Workers' Compensation Section of the Oregon State Bar were notified by e-mail about the Board's website posting regarding the aforementioned issue of the Board's News and Case Notes. In early July 2016, notice of this hearing was posted on the Board's website at <http://www.oregon.gov/wcb/legal/Pages/laws-and-rules.aspx>.

Thereafter, in accordance with the notice, a public hearing was conducted by Debra L. Young, Staff Attorney, on July 29, 2016 at Salem, Oregon. The record of the public hearing was closed at 5:00 p.m. on July 29, 2016.

2. No testimony was presented at the scheduled hearing. Written comments consisted of the Board's Administrative Rules Coordinator's July 25, 2016 "Statement of Filing/Notice of Procedures" regarding the aforementioned rules. Copies of the transcript of the public hearing and of all written comments received are available for public inspection and copying at the offices of the Board, 2601 25<sup>th</sup> St. SE, Suite 150, Salem, Oregon 97302-1280, during normal working hours from 8:00 a.m. to 5:00 p.m., Monday through Friday.

3. Order of Adoption for Rules. At its September 15, 2016 public meeting, the Members thoroughly reviewed and considered the public record developed regarding the proposed permanent rules. A written summary of the comments is also included in the record.

Pursuant to OAR 438-005-0046(1)(e), parties may file the following things by electronic mail (e-mail): (1) Request for Hearing; (2) Request for Board review of an Administrative Law Judge's order; (3) Request for Board review of a Director's order finding no bona fide medical services dispute; (4) Request for extension of the briefing schedule under OAR 438-011-0020; (5) Request for waiver of the Board's rules under OAR 438-011-0030; and (6) Response to

issues under OAR 438-006-0036. To electronically file such requests, a party must send an e-mail to the Board and “attach” an electronic copy of a completed Workers’ Compensation “Request for Hearing Form,” a completed request for Board review, or other completed requests, with the e-mail filing. The attachments are required to be in specific formats as set forth in OAR 438-005-0046(1)(f)(B), and the date of an electronic filing is determined by the date the Board receives the appropriate completed electronic form.

As explained in their May 24, 2016 Statement of Need, the Members propose to amend the aforementioned rule for the following reasons.

The Members became aware of a potential jurisdictional challenge to e-mail requests if a party did not provide the required completed attachments with the e-mail request. The Members believe that the current wording of OAR 438-005-0046(1)(f), which addresses the electronic filing of certain specified documents, may establish requirements not mandated by ORS 656.283 and 656.295.

Nevertheless, the Members recognize that the “appropriate completed form” assists Board staff in expeditiously processing such requests, and promotes full disclosure among the parties. Thus, the Members wish to encourage the continued use of the Board-prescribed forms with a party’s electronic filings, but to avoid a jurisdictional issue if the form is not attached to the e-mail filing. In doing so, the Members choose to reference the Board’s policy in OAR 438-005-0035(3) that an unrepresented party shall not be held strictly accountable for failure to comply with Board rules.

Furthermore, the Members reason that, as technology continues to change, particular electronic document formats may become obsolete. Therefore, the Members decided to eliminate listing specific formats for the attachments and replace that language with more generic language that “These attachments must be in a format that can be viewed by the Board.” In doing so, the Members believe that identification of specific document formats can be communicated to stakeholders via WCB’s website and articles in the Board’s News and Case Notes.

Regarding OAR 438-006-0100(1), the Members decided to conform the rule with the amendment to ORS 9.320, which deleted the word “corporation” and added in its place the phrase “party that is not a natural person.” As amended, ORS 9.320 provides:

“Any action, suit, or proceeding may be prosecuted or defended by a party in person, or by attorney, except that the state or a party that is not a natural person appears by attorney in all cases, unless otherwise specifically provided by law. Where a party appears by attorney, the written proceedings must be in the name of the attorney, who is the sole representative of the client of the attorney as between the client and the adverse party, except as provided in ORS 9.310.”

To conform to the amended statute, the Members wish to amend OAR 438-006-0100(1) by deleting the word “corporations” and replacing it with the phrase “parties that are not natural persons.”

At their March 17, 2016 public meeting, the Members decided to seek public comment regarding the aforementioned concepts. Announcements were delivered via the workers' compensation list serve and the Board's News and Case Notes publication in April 2016. Thereafter, the Members held a public meeting on May 17, 2016 to discuss "conceptual language," as well as any written comments and public comments at the meeting.

For the reasons explained in the Board's May 24, 2016 Statement of Need (incorporated by this reference), as well as those expressed below, the Members have reached the following conclusions regarding the proposed amendments, which are contained in Exhibits A and B (attached and incorporated by this reference).

OAR 438-005-0046(1)(f)

OAR 438-005-0046(1)(f) permits the filing of certain specified requests by e-mail and provides requirements for electronic form attachments to such e-mail filings. The rule also establishes the date of filing for requests filed by mail. For the reasons expressed above, the Members propose amendments to delete various listed formats and to provide that the attachments described in paragraph (1)(f)(B) must be in a format "that can be viewed by the Board." Furthermore, the Members propose language stating that strict compliance with paragraph (1)(f)(B) is not jurisdictional and that, consistent with the Board's policy in OAR 438-005-0035(3), an unrepresented party shall not be held strictly accountable for failure to comply with Board rules. Finally, the Members propose to amend paragraph (1)(f)(C) to provide that the date of an electronic filing is determined by the date the Board receives the e-mail described in paragraph (1)(f)(A), and propose to delete language that the date is determined by the date the Board receives the appropriate completed electronic form in a specified format.

At the rulemaking hearing, no comments were received regarding these proposed amendments. At its September 15, 2016 public meeting, the Members approved these proposed amendments.

The Members find for the reasons expressed in the Statement of Need, and those discussed herein, that the proposed rule is reasonable, necessary, and proper. Accordingly, the Board adopts this proposed rule as a permanent rule, contained in Exhibit A and incorporated by this reference.

OAR 438-006-100(1)

OAR 438-006-0100 currently requires:

- (1) Except as permitted by ORS 656.291 and this rule, corporations and state agencies must be represented by members of the Oregon State Bar. The Board encourages injured workers also to be represented in formal hearings.

As addressed above, the legislature amended ORS 9.320. For the reasons previously expressed, to conform to the amended statute, the Members propose to amend OAR 438-006-0100(1) to delete the word "corporations" and replace it with the phrase "parties that are not natural persons."

At the rulemaking hearing, no comments were received regarding this proposed amendment. At its September 15, 2016 public meeting, the Members approved this proposed amendment.

The Members find for the reasons expressed in the Statement of Need, and those discussed herein, that the proposed rule is reasonable, necessary, and proper. Accordingly, the Board adopts this proposed rule as a permanent rule, contained in Exhibit B and incorporated by this reference.

4. Under the authority granted by ORS 656.726(5), the Board finds that:
  - a. All applicable rulemaking procedures have been followed; and
  - b. The rules being adopted are reasonable, necessary and proper.

**PURSUANT TO THE AMERICANS WITH DISABILITIES ACT GUIDELINES, ALTERNATIVE FORMAT COPIES OF THE RULES WILL BE MADE AVAILABLE TO QUALIFIED INDIVIDUALS UPON REQUEST TO THE BOARD.**

Consequently, in accordance with its Notice of Proposed Rulemaking, the Board adopts the attached amendments, as set forth in Exhibits “A” and “B” incorporated herein by this reference, as permanent amendments of the Workers’ Compensation Board, to become effective November 1, 2016. The amendments to OAR 438-005-0045(1)(f) shall apply to all requests provided for in that rule filed on and after November 1, 2016. The amendments to OAR 438-006-0100(1) shall apply to all cases that are pending before the Hearings Division on and after November 1, 2016.

The Board further orders that a certified copy of the adopted rules be filed with the Secretary of State and that a copy of the Order of Adoption and the adopted rule with revision marks be filed with the Legislative Counsel within 10 days after filing with the Secretary of State as required by ORS 183.715.

Dated this 15<sup>th</sup> day of September, 2016

**WORKERS’ COMPENSATION BOARD**

by:   
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Holly J. Somers, Board Chair

  
\_\_\_\_\_  
Sally Anne Curey, Board Member

  
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Judy L. Johnson, Board Member

  
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Steve Lanning, Board Member

  
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Margaret F. Weddell, Board Member