

BEFORE THE WORKERS' COMPENSATION BOARD OF
THE STATE OF OREGON

In the Matter of the Adoption of a Permanent Rule)	
and Amendments to the Rules of Practice and)	
Procedure for Contested Cases under the Workers')	
Compensation Law, Relating to: Translation)	WCB ADMIN. ORDER 1-2019
of Documents, and Notices of Claim)	
Acceptances/Denial (OAR 438-007-0045,)	ORDER OF ADOPTION
OAR 438-005-0050, OAR 438-005-0053,)	
OAR 438-005-0055, OAR 438-005-0060))	

1. On November 30, 2018, the Workers' Compensation Board filed a Notice of Proposed Rulemaking Hearing with the Secretary of State, giving notice of its intent to adopt and amend the aforementioned permanent rules. Copies of the notice were electronically provided to the *Oregonian*, the *Associated Press*, and the *Capitol Press* on December 12, 2018. The notice was published in the Secretary of State's December 2018 *Oregon Bulletin*.

On December 5, 2018, copies of the notice and the proposed rules were mailed to all interested parties whose names appear on the Board's mailing list. On December 14, 2018, copies of the notice and the proposed rules were electronically provided to the appropriate legislators. Notice of the hearing was published in the November 2018 and December 2018 issues of the Board's News and Case Notes, which were posted on the Board's website in early December 2018 and January 2019, respectively.

Members of the Workers' Compensation Section of the Oregon State Bar were notified by e-mail about the Board's website postings of the aforementioned issues of the Board's News and Case Notes on December 10, 2018, and January 4, 2019. In December 2018, 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 Trisha Fleischman, Senior Staff Attorney, on February 1, 2019, at Salem, Oregon. The record of the public hearing was closed at 5:00 p.m. on February 1, 2019.

2. One individual offered comments at the hearing. That individual was the Workers' Compensation Division (WCD) Rules Coordinator. In addition, three written comments were received. Those written comments consisted of the Board's Administrative Rules Coordinator's January 28, 2019, "Statement of Filing/Notice of Procedures" regarding the aforementioned rules, a draft copy of Bulletin No. 379, and a copy of WCD's January 24, 2019, Notice of Proposed Rulemaking/Statement of Need & Fiscal Impact regarding Chapter 436 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 25th 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 March 28, 2019, 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. After completing its review and consideration of the comments and summary, the Members have reached the following conclusions regarding each of the following proposed rules.

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 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. 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 the following permanent rules and amendments. Thereafter, a public hearing regarding those rules was scheduled for February 1, 2019, at which time written comments and testimony could be presented.

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 adopt 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 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.

There were no written comments or testimony submitted concerning this proposed rule. Thus, after further considering this matter, the Members find, for the reasons expressed in their November 30, 2018, Statement of Need, and those discussed herein, that the proposed rule is reasonable, necessary, and proper. Accordingly, the Members adopt this proposed rule as a permanent rule, contained in Exhibit A and incorporated by this reference. OAR 438-005-0050, OAR 438-005-0053, OAR 438-005-0055, OAR 438-005-0060

After discussing the Advisory Committee's report, the comments presented at the Board's 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 the Board rules regarding Notices of Claim Denials and Acceptances to include a reference to OAR 436-001-0600 (and particularly Bulletin No. 379). In this way, it is anticipated that 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 note that this rule (including the Bulletin), which has been adopted by the Workers' Compensation Division (WCD),¹ requires inclusion of the "multi-language help-page" document for notices of denial/acceptance and other important claim processing documents. *See* OAR 436-001-0600; Bulletin No. 379. Consistent with that rule, the Members encourage carriers to promptly begin compliance with the "help-page" requirement, which has an "effective date" of April 1, 2019, and a "required use" date of June 1, 2019.

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 OAR 436-001-0600 (Bulletin No. 379). (*See* Exhibits B, C, D, and E).

After considering this matter (including the Advisory Committee's report and the testimony/written submissions from WCD's Rules Coordinator) the Members find, for the reasons expressed in their November 30, 2018, Statement of Need, and those discussed herein, that the proposed amendments are reasonable, necessary, and proper. Accordingly, the proposed amended rules as permanent rules, contained in Exhibits B, C, D, and E, and incorporated by this reference, are adopted.

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.

¹ The proposed rule amendments originally referred to "proposed" OAR 436-001-0600. The WCD formally adopted its proposed rule as a permanent rule on March 11, 2019. Therefore, the rule amendments now refer to the permanently adopted version of the WCD rule.

**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 new rule and amended rules, as set forth in Exhibits A through E incorporated herein by this reference, as permanent rules of the Workers' Compensation Board. OAR 438-007-0045 ("Translation of Documents") becomes effective June 1, 2019, and applies to all cases pending before the Hearings Division where the initial hearing is convened on and after June 1, 2019. The amended rules (OAR 438-005-0050, OAR 438-005-0053, OAR 438-005-0055, OAR 438-005-0060) become effective June 1, 2019, and apply to all such Notices as described in those rules that are issued on and after June 1, 2019.²

The Board further orders that a certified copy of the adopted rules be filed with the Secretary of State as required by ORS 183.355.

Dated this 1st day of April, 2019

WORKERS' COMPENSATION BOARD

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

Steve Lanning
Steve Lanning, Board Member

Sally Anne Curey
Sally Anne Curey, Board Member

Roger Ousey
Roger Ousey, Board Member

Barbara Woodford
Barbara Woodford, Board Member

² This "effective date" coincides with WCD's "required use" date. However, consistent with WCD's Order of Adoption, carriers are encouraged to begin complying with these rules as soon as possible.