

BEFORE THE WORKERS' COMPENSATION BOARD OF  
THE STATE OF OREGON

In the Matter of the Adoption of Permanent )  
Amendments to the Rules of Practice and )  
Procedure for Contested Cases under the )  
Workers' Compensation Law, Relating to: )  
Board Policy (OAR 438-005-0035); Filing )  
and Service of Documents; Correspondence )  
(OAR 438-005-0046); Acknowledgment; )  
Notice of Conference and Hearing in Ordinary )  
Hearing Process (OAR 438-006-0020); )  
Specification of Issues (OAR 438-006-0031); )  
Response (OAR 438-006-0036); Motions, )  
Arguments (OAR 438-006-0045); Prehearing )  
Conference (OAR 438-006-0062); Expedited )  
Remedy for Failure to Pay Temporary Disability )  
(OAR 438-006-0075); Deferred Hearings )  
(OAR 438-006-0105); Medical and Vocational )  
and Other Documentary Evidence )  
(OAR 438-007-0005); Exchange and Admission )  
of Exhibits at Hearing (OAR 438-007-0018); )  
Subpoenas; Witness Fees (OAR 438-007-0020); )  
Claim Disposition Agreements; Form )  
(OAR 438-009-0020). )

WCB ADMIN. ORDER 2-2013  
ORDER OF ADOPTION

1. On July 29, 2013, 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*. The notice was published in the Secretary of State's September 2013 *Administrative Rule Bulletin*.

On July 31, 2013, copies of the notice of this hearing, as well as the proposed rules, were mailed to all interested parties whose names appear on the Board's mailing list. On August 1, 2013, this hearing notice was posted on the Board's website at: <http://authoring-staging.apps.oregon.gov/WCB/legal/Pages/laws-and-rules.aspx>. On August 19, 2013, copies of the notice and the proposed rules were electronically provided to the appropriate legislators. Notice of the hearing was published in the July 2013 and August 2013 issues of the Board's News and Case Notes, which were posted on the Board's website in early August 2013 and September 2013, respectively. In addition, 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 issues in its News and Case Notes on August 14, 2013, and September 12, 2013.

Thereafter, in accordance with the notice, a public hearing was conducted by Debra L. Young, Staff Attorney, on October 4, 2013 at Salem, Oregon. The record of the public hearing was closed at 5:00 p.m. on October 4, 2013.

2. A hearings/appellate attorney with the SAIF Corporation testified at the scheduled hearing. Written comments consisted of: (1) an August 7, 2013 e-mail from an injured worker, who is also the spouse of an injured worker; (2) an August 22, 2013 e-mail from an Administrative Law Judge (ALJ); and (3) the Board's Administrative Rules Coordinator's October 3, 2013 "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 (Exhibits A through M). At its December 3, 2013 public meeting, the Board Members reviewed and considered all comments pertaining to the proposed permanent rules. A written summary of the comments is also included in the record. The Members' meeting was preceded by the following events.

As part of its comprehensive review of OAR Chapter 438 rules, the Board invited public comment regarding its administrative rules. Several of the public comments concerned proposed changes involving "Hearings Division-related" rules. On March 31, April 27, and May 26, 2011, the Board held public meetings regarding those comments. At these public meetings, after reviewing those comments, as well as staff comments, the Members proposed the adoption of several permanent amendments as part of future rulemaking proceedings. Those proposed amendments are included in the current rulemaking proceedings, as addressed below.

In addition, the Members appointed a "Hearings Procedure" Advisory Committee to provide guidance on the impact various other proposed rule changes would have on the workers' compensation system.<sup>1</sup> After holding two public meetings, the committee issued a report. On April 30, and June 25, 2013, at public meetings, the Members reviewed and discussed that report. At the April 30, 2013 meeting, the Members also discussed rule concepts that would: (1) allow "responses" to be electronically filed through the Workers' Compensation Board (WCB) portal; and (2) include "the Administrative Law Judge who mediated the agreement" on the signature line of the Claim Disposition Agreement (CDA) form. After reviewing the committee's report and these additional rule concepts, the Members directed the Board's staff to prepare proposed rulemaking documents for their review. At a public meeting on July 23, 2013, the Members proposed the adoption of permanent rule amendments, as explained below.

For the reasons explained in the Board's July 29, 2013 Statement of Need (incorporated by this reference), as well as those explained below, the Members have reached the following conclusions regarding the proposed rules, which are contained in Exhibits A through M (attached and incorporated by this reference).<sup>2</sup>

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<sup>1</sup> ALJ Jill Riechers served as the facilitator for the committee. The following practitioners also were members of the committee: Martin Alvey, claimant's practitioner; Ronald Atwood, carrier's practitioner; Jeffrey Gerner, carrier's practitioner; and Christopher Moore, claimant's practitioner. The Members extend to the committee their grateful appreciation for their valuable participation in this endeavor.

<sup>2</sup> Following issuance of the Board's July 29, 2013 Statement of Need, former Board Chair Abigail Herman's term expired. Thereafter, Chair Holly Somers became a member of the Board and has participated in the deliberations leading to the adoption of these rule amendments.

OAR 438-005-0035

The background for the proposed amendments to this rule is more fully discussed in the Board's July 29, 2013 Statement of Need, which is incorporated in this Order of Adoption by this reference.

To summarize, the "Hearings Procedure" Advisory Committee's report identified the following goals: (1) helping parties obtain clarification of issues and responses; (2) promoting communication between the parties about issues and responses; and (3) reducing situations in which one party is surprised at hearing by an issue or response raised by the other party. With these goals in mind, the committee recommended several amendments to the Board rules, which included: (1) expressing a policy for promoting full and complete disclosure of the parties' specific positions and clarifying the scope of the matters to be litigated (without creating binding admissions on behalf of any party); (2) recognizing the complexity of workers' compensation claims and the time limitations for processing and appealing claims and setting hearings; (3) acknowledging that, as factual, medical, and legal aspects of a case evolve, the amendment of a party's issues, legal theories, positions, and defenses is permissible, subject to OAR 438-006-0081 (Postponement of Hearings) or OAR 438-006-0091 (Continuances); and (4) creating a process for requesting and obtaining clarification of issues and defenses prior to hearing.

After considering the committee's report, a majority of the members proposed to amend OAR 438-005-0035(5) to provide that amendments "may be allowed as prescribed in OAR 438-006-0031(2) and OAR 438-006-0036(2)." In doing so, those members reasoned that a primary objective of the existing administrative rules and proposed amendments was to promote a process that results in the specification and clarification of issues in advance of the scheduled hearing to the greatest extent practicable. Consistent with that objective, the majority of the members were disinclined to propose a rule that contained mandatory language regarding the amendment of issues, relief, theories, and defenses, but rather chose to rest the allowance of such amendments within the discretion of the ALJ.<sup>3</sup>

Consequently, the Members proposed to divide OAR 438-005-0035 into sections (1) through (5), adding reference to "OAR 438-006-0081 and OAR 438-006-0091" in section (2). In addition, in order to incorporate the above policies and goals, the Members proposed to add the following sections (4) and (5):

**"(4) It is the policy of the Board to promote the full and complete disclosure of a party's specific position concerning the issues raised and relief requested in a specification of issues under OAR 438-006-0031 and in a response under**

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<sup>3</sup> In concert with this reasoning, a majority of the members also proposed similar amendments to OAR 438-006-0031(2) and OAR 438-006-0036(2), which would change the existing phrase ("amendments shall be freely allowed") to "amendments may be allowed."

**OAR 438-006-0036. However, it is not the intent of this policy to create binding admissions on behalf of any party, but to clarify the scope of the matters to be litigated.**

**“(5) The Board recognizes the complexity of disputed claims and the time limitations concerning the scheduling and litigation process for such claims. Consistent with this recognition, as factual, medical, and legal aspects of disputed issues evolve, the amendment of issues, relief requested, theories, and defenses may be allowed as prescribed in OAR 438-006-0031(2) and OAR 438-006-0036(2).”**

At the rulemaking hearing, no comments were received regarding these proposed amendments.<sup>4</sup>

At its December 3, 2013 public meeting, the Members approved the above-quoted proposed language.<sup>5</sup>

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 438-005-0046

The Members proposed to expand OAR 438-005-0046 and OAR 438-006-0036 to allow parties to file/serve electronic “responses” to issues raised in a hearing request, including such filing/service through the use of the Board’s website portal. Regarding OAR 438-005-0046, these proposed amendments will be addressed in subsection (1)(e), with the requirements for filing such electronic requests by e-mail and by website portal provided in subsections (1)(f) and (1)(g), respectively. The Members also proposed to amend subsection (2)(a) to include service of “responses” by the same means as those provided for “requests.” These proposed amendments are designed to provide an additional, convenient means to file/serve such responses.<sup>6</sup>

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<sup>4</sup> Although no comments were received regarding the proposed amendments to OAR 438-005-0035, a related comment was received objecting to proposed amendments to OAR 438-006-0031(2) (Specification of Issues) and OAR 438-006-0036(2) (Response) that would change the policy that “amendments shall be freely allowed” to “amendments may be allowed, subject to a motion by an adverse party for a postponement under OAR 438-006-0081 or a continuance under OAR 438-006-0091[.]” The commenter contended that this change would place all of the discretion with the ALJ and, thus, would not promote substantial justice. In addition, the commenter reasoned that the addition of the phrase “subject to a motion for postponement or continuance” merely codified existing practice. This comment is addressed later in this document in the sections relating to OAR 438-006-0031 and OAR 438-006-0036.

<sup>5</sup> One Member would have used the term “shall” rather than “may” in the last sentence of section (5).

<sup>6</sup> Proposed changes to OAR 438-006-0036 are addressed later in this document.

At the rulemaking hearing, no comments were received regarding 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 B and incorporated by this reference.

#### OAR 438-006-0020

This rule concerns acknowledgment of a hearing request and scheduling of a prehearing conference or hearing. Currently, the last sentence provides: “The hearing shall be scheduled for a date that is within 90 days of the request for hearing and not less than 60 days after mailing of a notice of hearing date.”

However, ORS 656.283(4)(b) provides as follows:

“(b) The 60-day prior notice required by paragraph (a) of this subsection:

“(A) May be waived by agreement of the parties and the board if waiver of the notice will result in an earlier date for the hearing.

“(B) Does not apply to hearings in cases assigned to the Expedited Claim Service under ORS 656.291, cases involving stayed compensation under ORS 656.313 (1)(b) and requests for hearing that are consolidated with an existing case with an existing hearing date.”<sup>7</sup>

The Members proposed to add the phrase “subject to the exceptions prescribed in ORS 656.283(4)(b)” to the last sentence of OAR 438-006-0020, which would provide for the above-quoted statutory exceptions to the requirement of “at least 60 days prior notice of the time and place of hearing” under ORS 656.283(4)(a).

At the rulemaking hearing, no comments were received regarding 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 C and incorporated by this reference.

#### OAR 438-006-0031

This rule requires the party who requested a hearing to specify all issues to be raised at the hearing and all relief requested. As addressed in the above section addressing OAR 438-005-0035, the Members proposed amending the “Board Policy” rule to add policy

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<sup>7</sup> This language was added to ORS 656.283 as subsection “(5)(b)” by 2005 Or Laws, ch 624, §1, then renumbered as subsection “(4)(b)” by 2009 Or Laws, ch 35, §2.

statements regarding OAR 438-006-0031 and OAR 438-006-0036. The Members also proposed dividing OAR 438-006-0031 into section (1), which addresses the initial “listing of all issues to be raised at the hearing and all relief requested” on “a form prescribed by the Board,” and section (2), which addresses amendments to such listing. The Members proposed that each section begin with a preamble cross-referencing “the Board’s policy described in OAR 438-005-0035.”

In addition, the Members proposed amending section (1) as follows:

**“(1)Consistent with the Board’s policy described in OAR 438-005-0035, the request for hearing under OAR 438-005-0070 filed with the Board should include** *[Not later than 15 days after the first disclosure of documents under OAR 438-007-0015, the party who requested the hearing shall],* on a form prescribed by the Board, *[file with the Board and simultaneously mail copies to all other parties]* a specific listing of all issues to be raised at the hearing and all relief requested.”

The Advisory Committee recommended elimination of the “15-day” provision, reasoning that it was unnecessary because the Request for Hearing form prescribed by the Board includes specification of issues. Moreover, the committee reasoned that the Request for Hearing form is used by practitioners to specify issues. The Members agreed with this recommendation and reasoning.

In proposing these section (1) amendments, the Members also considered that referencing OAR 438-005-0070 would incorporate the requirements for a request for hearing.<sup>8</sup> These requirements include filing a request for hearing on a Board-prescribed form, which, as addressed above, includes a listing to specify issues. In addition, OAR 438-005-0070 references OAR 438-005-0046, which provides for filing and service (including filing and service by means other than by “mail”). Further, OAR 438-005-0046(2)(a) provides that “[a] true copy of any thing delivered for filing under these rules shall be simultaneously served \* \* \*.” Therefore, by referencing OAR 438-005-0070, the Members’ intent is to retain the requirement of using a form prescribed by the Board to list the issues raised and relief requested, and to incorporate the filing and service requirements in OAR 438-005-0046.

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<sup>8</sup> OAR 438-005-0070 (“Request for Hearing”) provides:

“Proceedings before the Hearings Division are begun by filing a request for hearing meeting the requirements of ORS 656.283 and OAR 438-005-0046. The request for hearing should be on a form prescribed by the Board. A request by an insurer or self-insured employer should also recite whether payment of compensation has been or will be stayed under 656.313. In addition to the information required by 656.283(2), 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. A copy of the request should be served on the insurer, self-insured employer, claimant, or if represented, claimant's counsel.”

In its July 23, 2013 public meeting, a majority of the members proposed to include the word “should” (rather than “shall”) regarding the “specification of issues” requirement and the use of the Board prescribed form. Although all of the Members strongly encouraged parties to specify the issues in an expeditious manner, a majority wished to mirror the terminology employed in the “hearing request” rule (OAR 438-005-0070); *i.e.*, using the term “should.” Likewise, although the Members unanimously supported the use of the Board prescribed form, a majority wanted to avoid a potential procedural issue in those cases where an unrepresented party (unfamiliar with the Board’s rules) neglected to follow a mandatory rule. Thus, at the July 2013 meeting, the majority of the Members proposed to use the word “should,” instead of “shall.”

At that July 2013 meeting, former Chair Herman opposed this particular amendment; *i.e.*, using the word “should,” instead of “shall.” Reasoning that the specification of issues is essential information for the agency to schedule its hearings, assign its ALJs to particular hearing sites, arrange for interpreters and to collect/compile data necessary to comply with legislative and budgetary requirements, former Chair Herman considered the use of the mandatory word “shall” (rather than “should”) regarding the “specification of issues” and “Board prescribed form” provisions to be critical to the agency’s essential functions. Finally, citing OAR 438-005-0035, former Chair Herman further noted that an unrepresented party shall not be held strictly accountable for a failure to comply with the Board’s rules, thereby reducing the severity of any potential repercussions to an unrepresented party from a violation of a mandatory rule.

At the rulemaking hearing, a comment from an ALJ was received objecting to the proposal to amend “shall” to “should” regarding the “specification of issues” in a hearing request under OAR 438-006-0031(1). This commenter agreed with former Chair Herman’s comments (as summarized above and addressed in the Board’s July 29, 2013 Statement of Need (footnote 6)) and anticipated that, rather than voluntary compliance with the Board’s newly stated policy, a significant motion practice would develop under the proposed amendments to OAR 438-006-0045 (Motions, Arguments).<sup>9</sup>

In addition, during the “public comment” phase of the December 3, 2013 public meeting, a claimant’s attorney opposed all proposed changes to OAR 438-006-0031, contending that such changes would ultimately result in a “motion practice” that would be detrimental to the interests of claimants.

At its public meeting, the Members reconsidered the proposed change to use the word “should,” instead of “shall,” regarding the “specification of issues” in a hearing request under OAR 438-006-0031(1). Considering the comments received, the committee’s

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<sup>9</sup> Proposed changes to OAR 438-006-0045 are addressed later in this document.

recommendation, the Board's explicit policy statement in OAR 438-005-0035(4), and the importance of the "specification of issues" in a hearing request, the Members ultimately decided to retain the word "shall" in OAR 438-006-0031(1).<sup>10</sup>

Consequently, the Members ultimately proposed amending section (1) as follows:

**"(1) Consistent with the Board's policy described in OAR 438-005-0035, the request for hearing under OAR 438-005-0070 filed with the Board shall include** *[Not later than 15 days after the first disclosure of documents under OAR 438-007-0015, the party who requested the hearing shall], on a form prescribed by the Board, [file with the Board and simultaneously mail copies to all other parties] a specific listing of all issues to be raised at the hearing and all relief requested."*

In addition, consistent with the discussion in the "Board Policy" rule (OAR 438-005-0035) section, the Members proposed amending section (2) as follows:

**"(2) Consistent with the Board's policy described in OAR 438-005-0035, [A] amendments may [shall] be [freely] allowed, subject to a motion by an adverse party for a postponement under OAR 438-006-0081 or a continuance under OAR 438-006-0091** *[up to the date of the hearing]. If, during the hearing, the evidence supports an issue or issues not previously raised, the Administrative Law Judge may allow the issue(s) to be raised during the hearing. In such a situation, the Administrative Law Judge may continue the hearing [upon motion of an adverse party] pursuant to OAR 438-006-0091."*

At the rulemaking hearing, a comment from a SAIF attorney was received objecting to the proposal to change the longstanding practice and policy that "amendments shall be freely allowed" to "amendments may be allowed subject to a motion \* \* \* for postponement \* \* \* or continuance \* \* \*." Reasoning that this language ("may be allowed") placed all of the discretion with the ALJ, this commenter contended that the proposed change would not promote substantial justice, noting that the "abuse of discretion" standard of review on an ALJ's ruling is a very high standard. Finally, regarding the addition of the phrase "subject to a motion for postponement or

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<sup>10</sup> In doing so, the Members stressed that retaining the term "shall" does not create a jurisdictional issue, even if "a specific listing of all issues to be raised at the hearing and all relief requested" is not included in the request for hearing. In this regard, prior use of the term "shall" in OAR 438-006-0031 did not create jurisdictional issues. *See Peggy J. Barnett*, 60 Van Natta 843, 849 (2008) ("[Former] OAR 438-006-0031 presumes that a party has filed a timely and effective request for hearing, and it does not apply until *after* a valid request for hearing is filed. That rule does not 'create' jurisdiction." (Emphasis in original)); *see also Connie L. Cranston*, 63 Van Natta 2378, 2381 (2011) (citing *former* OAR 438-006-0031, Board held that relevant section of "Request for Hearing and Specification of Issues" form addressed the scope of issues to be raised at hearing rather than the jurisdictional requirements for requesting a hearing).

continuance,” the commenter considered that this language codified existing practice; *i.e.*, parties are less likely to raise a “hearing” issue knowing that it will result in a postponement or continuance.

During the “public comment” phase of the December 2013 public meeting, this commenter repeated these concerns that the above proposed change (from “amendments shall be freely allowed” to amendments “may be allowed”) would place all of the discretion with the ALJ. Thus, this commenter recommended that the existing language (“amendments shall be freely allowed”) be retained.

After considering these comments, the Members determined that the proposed changes to OAR 438-006-0031(2) were beneficial, especially in light of other proposed changes that encourage clarity of issues. The Members reasoned that an ALJ should have discretion to conduct the hearing and that an “abuse of discretion” standard of review for such ALJ rulings was appropriate. Finally, even if the phrase “subject to a motion for postponement \* \* \* or continuance \* \* \*” constituted codification of existing practice, the Members considered such codification beneficial to the parties and ALJs. Consequently, the Members proposed to amend OAR 438-006-0031(2) as quoted above.

At its December 2013 public meeting, a majority of the Members approved the amendments to OAR 438-006-0031(1) and (2).<sup>11</sup>

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 D and incorporated by this reference.

#### OAR 438-006-0036

This rule concerns responses to issues raised in a hearing request; *i.e.*, responses to specification of issues required by OAR 438-006-0031. As discussed above, the Members proposed to expand OAR 438-005-0046 and OAR 438-006-0036 to allow parties to file/serve electronic “responses” to issues raised in a hearing request, including such filing/service through the use of the Board’s website portal. To provide for such electronic “responses,” the Members proposed to change the language in OAR 438-006-0036 from “simultaneously mail copies to all other parties” to “simultaneously serve copies on all other parties.”

In addition, as addressed above regarding OAR 438-005-0035, the Members proposed amending the “Board Policy” rule to add policy statements regarding OAR 438-006-0031 and OAR 438-006-0036. The Members also proposed dividing OAR 438-006-0036 into section (1), which addresses the initial response to the listing of issues required by OAR

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<sup>11</sup> One Member opposed changing the language in section (2) from “amendments shall be freely allowed” to “amendments may be allowed.”

438-006-0031,<sup>12</sup> and section (2), which addresses amendments to such responses. The Members proposed that each section begin with a preamble cross-referencing “the Board’s policy described in OAR 438-005-0035.”

Based on the aforementioned reasoning, the Members proposed amending section (1) as follows:

**“(1) Consistent with the Board’s policy described in OAR 438-005-0035 and subject to OAR 438-006-0045(2),** [N]ot later than [15] **21** days after receiving the listing of issues and other information required by OAR 438-006-0031, a party defending against a request for hearing [*shall*] **should**, on a form prescribed by the Board, file **with the Board** and simultaneously [*mail*] **serve** copies [*to*] **on** all other parties a response specifying the respondent’s position on the issues raised and relief requested and any additional issues raised and relief requested by the respondent.”

Based on the Advisory Committee’s recommendation, the Members proposed to increase the time to file a response to issues raised and relief requested from 15 to 21 days. This extension is designed to provide the responding party with additional time to evaluate the specification of issues and to prepare an informative response. Furthermore, as addressed below, in order to meet the goals addressed above in OAR 438-005-0035, the Members proposed to amend OAR 438-006-0045 to provide for motions for clarification. In this regard, proposed OAR 438-006-0045(2) consists of the following proposed language: “A party may file a motion for clarification of the issues raised and relief requested by any party in a specification of issues under OAR 438-006-0031 or a response under OAR 438-006-0036.” In order to provide for a motion for clarification in response to the specification of issues under OAR 438-006-0031, the Members proposed to cross-reference OAR 438-006-0045(2) in OAR 438-006-0036(1).

At the rulemaking hearing, two comments were received regarding the proposed changes to section (1). The first comment (from an ALJ) objected to the proposed change to use the word “should,” instead of “shall,” regarding the response to issues raised and relief requested. At its December 2013 public meeting, for the reasons expressed above concerning a similar decision regarding OAR 438-006-0031(1), the Members reconsidered this proposed change and decided to retain the word “shall” in OAR 438-006-0036(1).

The second comment (from a SAIF attorney) regarding section (1) suggested changing the response period to run from a party’s receipt of the Notice of Hearing, rather than from the receipt of the listing of issues and other information required by

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<sup>12</sup> At its July 23, 2013 public meeting, consistent with the amendment to OAR 438-006-0031(1) (which changed the word “shall” to “should”), a majority of the Members proposed a similar amendment to OAR 438-006-0036(1). For the reasons expressed in her opposition to the proposed amendment to OAR 438-006-0031(1), former Chair Herman did not agree with the proposed change from “shall” to “should” in OAR 438-006-0036(1). Member Langer also voted against this proposed change.

OAR 438-006-0031. The commenter explained that attorneys are likely not assigned to cases until a hearing is “set,” when the particular attorney’s calendar is known. Thus, to ensure a meaningful response, the commenter recommended connecting the timeline to the receipt of the Notice of Hearing.

During the “public comment” phase of the December 2013 public meeting, a claimant’s attorney objected to extending the timeline for a response to 21 days, contending that this would reduce the time a claimant had to prepare his/her case for a hearing.

At its December 2013 public meeting, the Members considered these comments and decided that the “21-day” response period should begin to run from the issuance of the Board’s Notice of Hearing under OAR 438-006-0020. The Members reasoned that such a change will further promote the Board’s policy of full and complete disclosure of a party’s response under OAR 438-006-0036.

Consequently, the Members ultimately proposed amending section (1) as follows:

**“(1) Consistent with the Board’s policy described in OAR 438-005-0035 and subject to OAR 438-006-0045(2), [N]not later than [15] 21 days after [receiving the listing of issues and other information required by OAR 438-006-0031] the issuance of the Board’s Notice of Hearing under OAR 438-006-0020, a party defending against a request for hearing shall, on a form prescribed by the Board, file with the Board and simultaneously [mail] serve copies [to] on all other parties a response specifying the respondent’s position on the issues raised and relief requested and any additional issues raised and relief requested by the respondent.”**

In addition, consistent with the discussion in the “Board Policy” rule (OAR 438-005-0035) section, the Members proposed to amend section (2) as follows:

**“(2) Consistent with the Board’s policy described in OAR 438-005-0035, [A]amendments may [shall] be [freely] allowed, subject to a motion by an adverse party for a postponement under OAR 438-006-0081 or a continuance under OAR 438-006-0091 [up to the date of the hearing]. If, during the hearing, the evidence supports an issue or issues not previously raised, the Administrative Law Judge may allow the issue(s) to be raised during the hearing. In such a situation, the Administrative Law Judge may continue the hearing [upon motion of an adverse party] pursuant to OAR 438-006-0091.”**

At the rulemaking hearing, a comment from a SAIF attorney was received objecting to the proposal to change the longstanding practice and policy that “amendments shall be freely allowed” to “amendments may be allowed subject to a motion \* \* \* for postponement \* \* \* or continuance \* \* \*.” The commenter presented the same arguments regarding this proposed change to OAR 438-006-0036(2) as presented above

regarding OAR 438-006-0031(2).<sup>13</sup> Based on their reasoning to such arguments regarding OAR 438-006-0031(2), the Members proposed to amend OAR 438-006-0036(2) as quoted above.

At its December 2013 public meeting, a majority of the Members approved the amendments to OAR 438-006-0036(1) and (2).<sup>14</sup>

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 E and incorporated by this reference.

#### OAR 438-006-0045

This rule concerns motions and arguments. After considering the Advisory Committee's report, the Members agreed that parties should be encouraged to clarify issues and responses as expressed in the "Board Policy" rule section (OAR 438-005-0035). In order to implement those goals, the Members proposed to amend OAR 438-006-0045 to prescribe a system to address disputes concerning the specification of issues and responses. Specifically, the Members proposed to divide the rule into sections (1) through (6). As proposed, section (1) adds the exception of section (2) to the general requirements of a pre or post hearing motion. In addition, sections (2) through (5) provide as follows. A party may file a motion for clarification of the issues raised and relief requested by any party in a specification of issues under OAR 438-006-0031 or a response under OAR 438-006-0036. *See* Section (2). That motion will be denied, however, unless the moving party files a certificate verifying a good faith effort to confer in an attempt to clarify the issues raised and relief requested. *See* Section (3). This section is designed to insure that parties have attempted to resolve their dispute on an informal basis before seeking ALJ participation.

Section (4) requires that the ALJ consider the Board's policy in OAR 438-005-0035 in resolving a motion for clarification under section (2). Section (5) provides that a party's failure to reasonably respond to a clarification request may be grounds for a postponement under OAR 438-006-0081 or a continuance under OAR 438-006-0091. Finally, other than numbering it as section (6), the last sentence of the rule remains unchanged, which provides that, unless otherwise ordered by the ALJ, a responding party has 10 days to file a written response.

At the rulemaking hearing, no comments were received regarding these proposed amendments.

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<sup>13</sup> This commenter also presented these same arguments at the December 2013 public meeting.

<sup>14</sup> One Member opposed changing the language in section (2) from "amendments shall be freely allowed" to "amendments may be allowed."

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 F and incorporated by this reference.

OAR 438-006-0062(1), (2), (3), (4), (5)

This rule concerns prehearing conferences. The Members proposed to amend section (1) by explicitly listing the purposes for prehearing conferences as provided in ORS 656.726(5), rather than simply referring to that statute. Section (2) currently provides: “The parties shall be given not less than ten days notice of the date of the conference.” To provide the ALJ and the parties more flexibility in scheduling prehearing conferences, the Members proposed to prefix that language with the phrase: “Unless otherwise agreed among the parties and the Administrative Law Judge, \* \* \*.”

Section (3) currently provides: “At the conference, any party may participate in the conference with or without an attorney.” However, most carriers are incorporated and, as such, are represented by an attorney. *See* ORS 9.320; OAR 438-006-0100(1). Furthermore, an unrepresented claimant himself/herself must participate in any prehearing conference; therefore, the inclusion of a rule authorizing such participation is superfluous. Consequently, the Members proposed deleting section (3).<sup>15</sup>

Section (4) currently provides: “If a party is represented by counsel at the conference, a client representative with settlement authority (claimant, employer or claims examiner, as applicable) must attend the conference with counsel, or be available by telephone during that time.” Yet, the Members concurred with the Advisory Committee’s reasoning that most prehearing conferences concern procedural or technical issues (*e.g.*, discovery matters), rather than settlement of substantive issues. Considering that reality, the Members proposed deleting section (4).

The Members also proposed to delete section (5), which currently provides: “The Administrative Law Judge who conducts a prehearing conference on the merits shall not conduct the hearing on the matter over objection by any party.” The Members shared the committee’s conclusion that, if a problem arises concerning an ALJ’s notice of something potentially prejudicial in a prehearing conference, the ALJ may recuse himself/herself, or a party may request recusal pursuant to OAR 438-006-0095.

At the rulemaking hearing, no comments were received regarding 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.

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<sup>15</sup> Although the Members proposed deleting section (3), the corresponding exhibit attached to the Statement of Need inadvertently retained an amended version of section (3). Consistent with the Members’ stated intentions, current Exhibit G, attached hereto and incorporated by this reference, deletes (3).

Accordingly, the Board adopts this proposed rule as a permanent rule, contained in Exhibit G and incorporated by this reference.

OAR 438-006-0075(1)

This rule concerns an expedited remedy for failure to pay temporary disability. The Members proposed to amend section (1) to improve clarity and readability, without changing the meaning of this section or the rule. Specifically, the Members proposed moving the following clause from the end of this section to the beginning: “the claimant may file with the Hearings Division with copies to the insurer, a motion supported by affidavit asserting the failure to receive such compensation.” In addition, the Members proposed numbering as separate subsections the existing potential allegations that the claimant may make in asserting that the carrier has terminated temporary disability compensation without the proper authority.

At the rulemaking hearing, no comments were received regarding 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 H and incorporated by this reference.

OAR 438-006-0105

This rule provides three situations under which a “hearing may be deferred until a time specified in the order of deferral[.]” However, ORS 656.283(3)(a)(B) provides that a hearing shall not be postponed “[f]or more than 120 days after the date of the postponed hearing.” *Compare* ORS 656.283(3)(d)(B) (providing an exception to the 120-day maximum postponement under ORS 656.283(3)(a) for postponements relating to responsibility matters under ORS 656.283(3)(b)). Because deferral of a hearing in any of the three situations listed in OAR 438-006-0105 appears to conflict with ORS 656.283(3)(a)(B), the Members proposed to repeal the rule.

At the rulemaking hearing, no comments were received regarding 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 I and incorporated by this reference.

OAR 438-007-0005(1), (2), (3), (4), (5)

This rule concerns medical, vocational, and other documentary evidence. Section (1) provides: “Statutory references: Medical reports as evidence, ORS 656.310(2); vocational reports, 656.287.” That same information is listed in the “history information” for this rule. The Members proposed to delete section (1), which would result in renumbering sections (2), (3), (4), and (5) accordingly.

At the rulemaking hearing, no comments were received regarding 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 J and incorporated by this reference.

OAR 438-007-0018(4), (5)

This rule concerns the exchange and admission of exhibits at hearing. The Members proposed adding a new section (4) to provide the following (which would result in renumbering the existing section (4) as section (5)):

**“(4) Filing of the documents described in section (1) shall not establish that:**

**“(a) The insurer or self-insured employer is the sponsor for each of these documents for purposes of admission into the evidentiary record; and**

**“(b) The claimant is automatically entitled to cross-examine the author of any document filed by the insurer or self-insured employer under section (1).”**

These amendments are designed to address the occasional procedural issues that arise concerning the right to cross-examine based on a party’s filing of a document. This language provides clarification regarding the effect of filing documents and sponsorship of that document for purposes of cross-examination requests.

At the rulemaking hearing, no comments were received regarding these proposed amendments.

During the “public comment” phase of the December 2013 public meeting, a comment from a SAIF attorney suggested changing the conjunction “and” at the end of subsection (4)(a) to “or.” The Members agreed with that suggestion and approved the proposed amendments.<sup>16</sup>

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<sup>16</sup> Member Weddell approved the proposed amendments to OAR 438-007-0018(4) and (5). However, referring to Member Lowell’s dissent in *Donald E. Bell*, 64 Van Natta 776 (2012), she commented that sections (1) through (3) of the rule were confusing and did not reflect current practice. Consequently, Member Weddell suggested that the Board revisit OAR 438-007-0018(1), (2), and (3) in the future to ensure that those sections reflect current practice.

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 K and incorporated by this reference.

OAR 438-007-0020(6)(b)

This subsection provides the notice language to be included in subpoenas involving individually identifiable health information. The Members proposed to change the language at the end of this notice from: “**OR THE OMBUDSMAN’S OFFICE AT (503) 378-3351, OR TOLL-FREE, (800) 927-1271**” to: “**OR THE OMBUDSMAN FOR INJURED WORKERS TOLL-FREE AT 1-800-927-1271.**” This proposed language inputs the Ombudsman’s name change and comports with her request to only include the toll-free number.

The Members also proposed to change the listing of the Board’s telephone numbers in this notice to eliminate the “IN OREGON” limitation on its toll-free number because that toll-free number is available throughout the United States. To eliminate the toll-free “limitation,” the following amended language is proposed:

**“IF YOU HAVE QUESTIONS YOU MAY CALL THE  
WORKERS' COMPENSATION BOARD AT (503) 378-3308  
OR TOLL-FREE [IN OREGON] AT 1-877-311-8061  
[OR, IN SALEM OR FROM OUTSIDE OREGON, AT  
(503) 378-3308] \* \* \*.”**

At the rulemaking hearing, no comments were received regarding 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 L and incorporated by this reference.

OAR 438-009-0020(3)

This section provides the language to be included in the “Approval Paragraph” for a Claim Disposition Agreement (CDA). A CDA may be approved by the Board or “the ALJ who mediated the agreement.” See ORS 656.236(1)(a). WCB Admin. Order 2-2007 (eff. January 1, 2008) added this ALJ-approval option to the first signature line in OAR 438-009-0020(3). However, due to a clerical error, that amendment was not incorporated into the Secretary of State’s website’s online listing for OAR 438-009-0020(3). Therefore, in order to restore the amended language provided in WCB Admin. Order 2-2007, the Members proposed to add “or Administrative Law Judge who mediated the agreement” to the first signature line.

At the rulemaking hearing, no comments were received regarding 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 M 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 rule, as set forth in Exhibits “A” through “M” incorporated herein by this reference, as permanent rules of the Workers’ Compensation Board, to become effective April 1, 2014. These amendments are is applicable as follows:

Amendments to OAR 438-005-0035, OAR 438-006-0020, and OAR 438-006-0031 apply to all requests for hearing filed on or after April 1, 2014.

Amendments to OAR 438-005-0046 and OAR 438-006-0036 apply to all responses that arise from requests for hearing filed or served on or after April 1, 2014.

Amendments to OAR 438-006-0045 apply to all motions that arise from requests for hearing (including responses thereto) filed on or after April 1, 2014.

Amendments to OAR 438-006-0062 apply to all prehearing conferences held on or after April 1, 2014.

Amendments to OAR 438-006-0075, OAR 438-006-0105, OAR 438-007-0005, and OAR 438-007-0018 apply to all cases where the hearing request was filed on or after April 1, 2014.

Amendments to OAR 438-007-0020 apply to all subpoenas served on or after April 1, 2014.

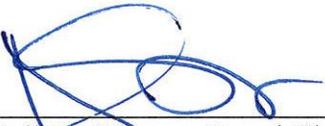
Amendments to OAR 438-009-0020 apply to all claim disposition agreements filed on or after April 1, 2014.

The Board further orders that a certified copy of the amended rules be filed with the Secretary of State and that a copy of the Order of Adoption and the amended rules 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 5<sup>th</sup> day of December, 2013.

**WORKERS' COMPENSATION BOARD**

by:

  
\_\_\_\_\_  
Holly J. Somers, Board Chair

  
\_\_\_\_\_  
Vera Langer, Board Member

  
\_\_\_\_\_  
Steve Lanning, Board Member

  
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Greig Lowell, Board Member

  
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Margaret F. Weddell, Board Member