

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)	WCB ADMIN. ORDER 2-2014
to Acknowledgment; Notice of Conference)	ORDER OF ADOPTION
and Hearing in Ordinary Hearing Process)	
(OAR 438-006-0020); Notice of Hearing)	
Date (OAR 438-013-0025).)	

1. On September 17, 2014, 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 have been electronically provided to the *Oregonian*, the *Associated Press*, and the *Capitol Press*. The notice was published in the Secretary of State's November 2014 *Administrative Rule Bulletin*.

On September 22, 2014, copies of the notice, as well as the proposed rule, were mailed to all interested parties whose names appear on the Board's mailing list. On September 19, 2014, copies of the notice and the proposed rule were electronically provided to the appropriate legislators. Notice of the hearing was published in the September and October 2014 issues of the Board's News and Case Notes, which was posted on the Board's website in early October and November 2014, 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 of the Board's News and Case Notes on October 1, 2014 and November 5, 2014. In early November 2014, notice of this hearing was posted on the Board's website at: <https://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 November 21, 2014 at Salem, Oregon. The record of the public hearing was closed at 5:00 p.m. on November 21, 2014.

2. No testimony was presented at the scheduled hearing. Written comments consisted of the Board's Administrative Rules Coordinator's November 19, 2014 "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 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 December 4, 2014 public meeting, the Board Members thoroughly reviewed and considered all comments pertaining to the proposed permanent rules. A written summary of the comments is also included in the record.

Following a comprehensive review of OAR Chapter 438 rules, the Board appointed an Advisory Committee on Technology to provide guidance on the impact any proposed “technology-related” rule changes would have on the workers’ compensation system.¹ After considering the committee’s March 2, 2012 report and public comment, the Board made several amendments to its rules. *See* WCB Admin. Order 1-2012, eff. 11/1/2012; WCB Admin. Order 2-2013, eff. 4/1/2014.

At a public meeting on September 16, 2014, the Board Members returned to a previous recommendation made by the Technology Committee. In general, the committee recommended that parties receive Board confirmation of receipt of parties’ requests made by electronic means, and specifically requested that OAR 438-006-0020 be amended to permit the Hearings Division to provide electronic acknowledgment of receipt of a request for hearing. Following the committee’s March 2012 report, the Members deferred action on the committee’s recommendation in order to further develop the Board’s website portal system. Following these further developments of its portal system, the Members proposed to amend OAR 438-006-0020 to replace the word “mailing” with “distribution,” which would allow the Hearings Division to distribute its acknowledgment of a request for hearing by means of mail, website portal, or other means.

In addition, a similar issue is presented by OAR 438-013-0025, which requires that a “notice of hearing date” for an expedited claim service case must be made by “mail.” As currently drafted, this notice could not be distributed by electronic means.

The Members believe that modification of these “mail” references would expand the means by which such acknowledgments/notices could be distributed to those parties/practitioners who are registered on the website portal. Meanwhile, acknowledgments/notices could still be provided by mail for those individuals/entities that are not so registered. Also, such a proposed change would not increase expenses to either the parties (unless they chose to print “hard” copies of website portal transmissions) or the agency and would decrease expenses (postage and supplies) to the agency.

For the reasons explained in the Board’s September 17, 2014 Statement of Need (incorporated by this reference), as well as those explained 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 438-006-0020

OAR 438-006-0020 currently provides:

“The Hearings Division shall, by mail, acknowledge receipt of a request for hearing. Such acknowledgment may include notice of date for an informal prehearing conference pursuant to OAR 438-006-0062 or notice of hearing date. The hearing shall be

¹ Administrative Law Judge (ALJ) Joy Dougherty served as the facilitator for the committee. The following practitioners also were members of the committee: Robert Guarrasi, Robert Kinney, Nancy Marque, and Rebecca Watkins. The Members continue to extend their grateful appreciation to the committee for their valuable participation in this endeavor.

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 subject to the exceptions prescribed in ORS 656.283(4)(b).”

For the reasons addressed above, the Members propose amending this rule by eliminating the requirement that the acknowledgment of a request for hearing must be mailed. In this way, such acknowledgments may also be distributed by the website portal (if the party is registered on the website portal). The amended rule is as follows:

“The Hearings Division shall[, *by mail*,] acknowledge receipt of a request for hearing. Such acknowledgment may include notice of date for an informal prehearing conference pursuant to OAR 438-006-0062 or notice of hearing date. 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*] **distribution** of a notice of hearing date subject to the exceptions prescribed in ORS 656.283(4)(b).”

In proposing this change, the Members acknowledge that ORS 656.283(4)(a) provides, in part: “At least 60 days’ prior notice of the time and place of hearing shall be given to all parties in interest *by mail*.” (Emphasis added). However, in accordance with ORS 656.726(5)(b), the Members note that “[n]otwithstanding any other provision of this chapter, the board may adopt rules to allow for the electronic transmission of filings, reports, notices and other documents required to be filed under the board’s authority.”

At the rulemaking hearing, no comments were received regarding these proposed amendments. At its December 4, 2014 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 438-013-0025

OAR 438-013-0025 currently requires that a “notice of hearing date” for an expedited claim service case must be mailed by the Hearings Division. For the reasons addressed above, the Members proposed amending the rule to permit the Hearings Division to expand the manner in which such notice may be distributed; *e.g.*, permitting delivery of such notice by the website portal (if the party is registered on the website portal) or by mailing (if the party is not so registered). To make this change, the Members proposed to amend the rule as follows:

“The Hearings Division shall [*mail*] **distribute** a notice of hearing date to all parties and to all other individuals who represent the parties. The hearing shall be scheduled for a date that is not less

than 15 days from the [mailing] **distribution** of the notice of hearing nor more than 30 days from the date of receipt of the request for hearing by the Hearings Division.”

At the rulemaking hearing, no comments were received regarding these proposed amendments. At its December 4, 2014 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 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 January 1, 2015. The amended rules shall apply to all hearing requests and cases that are pending before the Hearings Division on and after January 1, 2015.

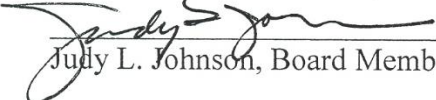
The Board further orders that a certified copy of the adopted rules be filed with the Secretary of State and that a copy of the Order of Adoption and the adopted rule with revision marks be filed with the Legislative Counsel within 10 days after filing with the Secretary of State as required by ORS 183.715.

Dated this 10th day of December, 2014.

WORKERS’ COMPENSATION BOARD

by: 
Holly J. Somers, Board Chair


Sally Anne Curey, Board Member


Judy L. Johnson, Board Member


Steve Lanning, Board Member


Margaret F. Weddell, Board Member