

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)	WCB ADMIN. ORDER 2-2019
Procedure for Contested Cases under the Workers')	
Compensation Law, Relating to: Subpoenas;)	ORDER OF ADOPTION
Witness Fees (OAR 438-007-0020(6)(b)).)	

1. On June 25, 2019, 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 rule. On June 28, 2019, notice of this hearing was posted on the Board's website at <http://www.oregon.gov/wcb/legal/Pages/laws-and-rules.aspx>.

The notice was also published in the Secretary of State's July 2019 *Oregon Bulletin*. On July 1, 2019, copies of the notice and the proposed amended rule were mailed to all interested parties whose names appear on the Board's mailing list.

In addition, notice of the hearing was published in the June 2019 and July 2019 issues of the Board's News and Case Notes, which were posted on the Board's website in early July 2019 and August 2019, respectively. Members of the Workers' Compensation Section of the Oregon State Bar were also notified by email concerning the proposed rulemaking through the Board's June and July 2019 News and Case Notes, which were distributed to them on July 16, 2019 and August 13, 2019.

On August 19, 2019, copies of the notice and the proposed rules were provided electronically to the appropriate legislators, the *Oregonian*, the *Associated Press*, and the *Capitol Press*.

Thereafter, in accordance with the notice, a public hearing was conducted by Trisha Fleischman, Administrative Law Judge, on August 23, 2019, at Salem, Oregon. The record of the public hearing was closed at 5:00 p.m. on August 23, 2019.

2. No comments were offered at the hearing. One written comment was received, consisting of the Board's Administrative Rules Coordinator's August 23, 2019, "Statement of Filing/Notice of Procedures" regarding the aforementioned rule. 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. As previously explained in their June 25, 2019 Statement of Need, the Members held a public meeting on August 23, 2018, to consider a rule concept submitted by attorney Marcia Alvey. Ms. Alvey reported problems with medical providers responding to a *subpoena duces tecum* when a claimant raises an objection to the release of his/her individually identifiable health information. After considering the comments provided by Ms. Alvey, as well as those from other attendees at the meeting (paralegal Lisa Stalder, and attorney Keith Semple on behalf of the Oregon Trial Lawyers Association, Workers' Compensation Section), the Members decided to appoint an Advisory Committee to study the rule concept. The Advisory Committee met on December 17, 2018, and submitted a report to the Members on February 25, 2019.¹ On June 25, 2019, at a public meeting, the Members discussed that report and proposed the adoption of amendments to OAR 438-007-0020(6)(b). Thereafter, a public hearing regarding the rule was scheduled for August 23, 2019, at which time written comments and testimony could be presented.

At their September 19, 2019, public meeting, the Members reviewed and considered the public record developed regarding the proposed amended permanent rule. After completing their review and discussion, the Members have reached the following conclusions regarding the proposed rule amendments.

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As discussed in the Board's June 25, 2019 Statement of Need and as reflected in the Advisory Committee report, medical providers who receive subpoenas for medical records are unclear on their responsibilities when receiving an objection from a claimant. In many cases, the medical provider has already provided the records before the objection is received. To remedy these issues, the Members accepted the Advisory Committee's recommendation to: (1) extend the time period in which to object to a subpoena (from seven calendar days to 10 calendar days), and (2) add required language in the subpoena clarifying how objections should be processed, along with general information concerning how/when compliance with the subpoena would be achieved.

In doing so, the Board's Statement of Need recognized the committee's acknowledgment that Chapter 656 requires that cases be heard in a timely manner, but reasoned that the extended period for objections would actually help avoid the increasing number of postponed cases. Furthermore, the Board's Statement of Need shared the committee's reasoning that the additional required language in a subpoena would clarify for medical providers where to send the records if an objection is received.

¹ The Advisory Committee consisted of Administrative Law Judge Jenny Ogawa, claimant practitioners Marcia Alvey and Steve Schoenfeld, defense practitioners Larry Schucht and Vincci Lam, Stan Fields of the Oregon Workers' Compensation Division, Ombudsman for Injured Workers Jennifer Flood, and Kaiser Permanente manager Georgia Gree. Presiding Administrative Law Judge Joy Dougherty served as committee facilitator. The Board extends its deep appreciation to the committee and its members.

Consistent with the Statement of Need, the proposed rule amendments provide as follows: (1) the subpoena shall notify the person whose individually identified health information is being subpoenaed that an objection must be filed within 10 calendar days (formerly 7 calendar days); (2) requires the subpoena to include language clarifying the response time for the custodian of records, and (3) provides instructions for the records custodian to supply the records to the Workers' Compensation Board if a timely objection is received. (Exhibit A).

There were no written comments or testimony submitted concerning the substance of this proposed amended rule.² Thus, after further considering this matter, the Members find, for the reasons expressed in their June 25, 2019 Statement of Need, as well as those discussed herein, that the proposed amended rule is reasonable, necessary, and proper. Accordingly, the Members adopt this proposed amended rule as a permanent rule, contained in Exhibit A 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 amended rule, as set forth in Exhibit A incorporated herein by this reference, as a permanent amended rule of the Workers' Compensation Board. OAR 438-007-0020(6)(b) becomes effective January 1, 2020 and applies to all subpoenas issued on and after January 1, 2020.

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.

² A statement from the Board's Rules Coordinator was submitted, which described the filing of the Notice of Hearing and the manner in which notice of this proposed rulemaking was provided to interested parties, practitioners, legislators, and the general public.

Dated this 24th day of September, 2019

WORKERS' COMPENSATION BOARD

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

Steve Lanning
Steve Lanning, Board Member

Sally Anne Cusey
Sally Anne Cusey, Board Member

Roger Ousey
Roger Ousey, Board Member

Barbara Woodford
Barbara Woodford, Board Member