

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 )	WCB ADMIN. ORDER 3-2013
Workers' Compensation Law, Relating to )	ORDER OF ADOPTION
Third Party Election Letter )	
(OAR 438-011-0055). )	

1. On June 28, 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 rule. 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 August 2013 *Administrative Rule Bulletin*.

On July 17, 2013, notice of this hearing was posted on the Board's website at: <http://authoring-staging.apps.oregon.gov/WCB/legal/Pages/laws-and-rules.aspx>. On July 8, 2013, copies of the notice, as well as the proposed rule, were also mailed to all interested parties whose names appear on the Board's mailing list. On July 17, and August 19, 2013, copies of the notice and the proposed rule were electronically provided to the appropriate legislators. Notice of the hearing was published in the June 2013 and July 2013 issues of the Board's News and Case Notes, which were posted on the Board's website in early July 2013 and August 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.

Thereafter, in accordance with the notice, a public hearing was conducted by Debra L. Young, Staff Attorney, on September 6, 2013 at Salem, Oregon. The record of the public hearing was closed at 5:00 p.m. on September 6, 2013.

2. No testimony was presented at the scheduled hearing. Written comments consisted of the Board's Administrative Rules Coordinator's August 29, 2013 "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 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 (Exhibit A). At its December 3, 2013 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.

As part of its comprehensive review of OAR Chapter 438 rules, the Members discussed "third party" rule concepts and ultimately appointed an Advisory Committee to provide guidance

regarding such concepts.<sup>1</sup> After holding a public meeting, the committee issued a report. On April 15, 2013, at a public meeting, the Members discussed that report and directed the Board's staff to prepare proposed rule language for their review. At a public meeting on June 21, 2013, the Members proposed the adoption of a permanent rule.

For the reasons explained in the Board's June 28, 2013 Statement of Need (incorporated by this reference), as well as those explained below, the Members have reached the following conclusions regarding the proposed rule, which is contained in Exhibit A (attached and incorporated by this reference).<sup>2</sup>

#### OAR 438-011-0055

As reflected in cases such as *Liberty Mut. Ins. Co. v. Schwanenberg*, 251 Or App 536 (2012), and *William Coultas*, 63 Van Natta 781, *recons* 63 Van Natta 963 (2011), disputes occasionally arise regarding whether a worker (or beneficiary) elected to proceed with a cause of action against a third party for damages resulting from a compensable injury or chose to assign his/her cause of action to the carrier. While conducting its review of these disputes, the Board noticed the absence of administrative rules prescribing the manner of fulfilling the actions and explaining the consequences of the events described in the enabling statutes. To address this matter (and in the interest of clarifying the parties' respective responsibilities in this "election/assignment" process), the Members proposed to adopt an administrative rule (OAR 438-011-0055).

Section (1) of the rule requires a carrier ("paying agency") to serve a written demand ("third party election" letter) on the claimant/beneficiaries/legal representative ("the claimant") if the paying agency intends to require the claimant to exercise the right of election in ORS 656.578 to recover damages from a noncomplying employer or third person ("third party"). Section (2) requires the "paying agency" to include with this "third party election" letter a separate enclosure prescribed by Board bulletin that explains the "third party election/assignment" process. If the claimant does not read or understand English, or is otherwise unable to understand written language, the paying agency shall provide this information in a language or other manner that ensures the claimant's understanding. *Id.* Section (3) provides that the "third party election" letter must: (a) contain the information prescribed in ORS 656.583; and (b) include a statement that the claimant has been provided with the informational enclosure prescribed by Board bulletin in section (2).

At the rulemaking hearing, no comments were received regarding this proposed rule.

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<sup>1</sup> The "Third Party Rule Concepts" Advisory Committee was comprised of the following individuals: Jennifer Flood, Ombudsman for Injured Workers; Nelson Hall, claimant's practitioner; Bill Replogle, carrier's practitioner; Steve Schoenfeld, claimant's practitioner; and Barbara Woodford, carrier's practitioner. Roger Pearson, the Board's Managing Attorney, served as the facilitator for the committee. The Members extend their grateful appreciation to the committee for their valuable participation in this endeavor.

<sup>2</sup> Following issuance of the Board's June 28, 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 this rule.

At its December 3, 2013 public meeting, the Members approved this proposed rule.<sup>3</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.

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 Exhibit "A" incorporated herein by this reference, as permanent rules of the Workers' Compensation Board, to become effective April 1, 2014. The rule is applicable as follows:


OAR 438-011-0055 applies to all cases in which a "third party election" letter is issued under ORS 656.578 and ORS 656.583 on or after April 1, 2014.

The Board further orders that a certified copy of the adopted rule 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 12<sup>th</sup> day of December, 2013.

**WORKERS' COMPENSATION BOARD**

by:

  
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Holly J. Somers, Board Chair

  
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Vera Langer, Board Member

  
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Steve Lanning, Board Member

  
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Greig Lowell, Board Member

  
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Margaret F. Weddell, Board Member

<sup>3</sup> Two Members would have omitted the last sentence in section (2) of the proposed rule.