

STATEMENT OF NEED AND FISCAL IMPACT

A Notice of Proposed Rulemaking Hearing or a Notice of Proposed Rulemaking accompanies this form.

Workers' Compensation Board
Agency and Division

OAR Chapter 438
Administrative Rules Chapter Number

Adopting OAR 438-011-0055, which requires "paying agency" to issue a "third party election" letter.

Rule Caption (Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.)

In the Matter of: Adoption of Permanent Amendments to the Rules of Practice and Procedure for Contested Cases under the Workers' Compensation Law, Relating to:
Third Party Election Letter (OAR 438-011-0055).

Statutory Authority: ORS 656.726(5).

Other Authority:

Stats. Implemented: ORS 656.576; ORS 656.578; ORS 656.580; ORS 656.583; ORS 656.587; ORS 656.591; ORS 656.593.

Need for the Rule(s):

As part of its comprehensive review of OAR Chapter 438 rules, the Members discussed suggested "third party" rule concepts and ultimately appointed an Advisory Committee to provide guidance regarding such concepts.¹ 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, as explained below.

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 have decided to propose an administrative rule.

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"). See Section (1). The "paying agency" shall also include with this "third party election" letter a separate enclosure prescribed by Board bulletin that explains the "third party election/

¹ 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 Repogle, 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.

assignment” process. *See* Section (2). 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.² *Id.*

Section (3) provides that the “third party election” letter must: (a) contain the information prescribed by 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).

The Members propose to adopt the rule in the manner described above. This proposed rule is presented in Exhibit A, attached and incorporated by reference.

Rulemaking Hearing:

The accompanying “Notice of Proposed Rulemaking Hearing” provides information regarding the September 6, 2013 hearing scheduled regarding this proposed rule. Pending the hearing, written comments regarding this rule may be submitted for admission into the record by directing such comments by mail, FAX (503-373-1600), e-mail (rulecomments.wcb@state.or.us), or by means of hand-delivery to any permanently staffed Board office. The comments may be addressed to the attention of Debra L. Young, Rulemaking Hearing Officer, Workers’ Compensation Board, 2601 25th St. SE, Ste. 150, Salem, OR 97302-1280.

Documents Relied Upon, and Where They Are Available:

ORS Chapter 656; rule draft language prepared by Board staff; June 17, 2013 staff memo; June 17, 2013 e-mail and attachments from the Ombudsman for Injured Workers; June 7, 2013 comments from the SAIF Corporation; March 27, 2013 “Third Party Rule Concepts” Advisory Committee Report; October 25, 2012 “2010-2012 Rule Review Journal” (summarizing October 25, 2012 Board Meeting); February 24, 2012 “2010-2012 Rule Review Journal” (summarizing February 23, 2012 Board Meeting). These documents are available Monday through Friday, 8:00 am to 5:00 pm, at the Workers’ Compensation Board, 2601 25th St. SE, Ste. 150, Salem, OR 97302-1280.

Fiscal and Economic Impact:

In general, neither the Members nor the advisory committee identifies significant fiscal or adverse small-business impact as a result of these proposed amendments. The Members invite public comment (written and oral) on these subjects.

Statement of Cost of Compliance:

1. Impact on state agencies, units of local government and the public (ORS 183.335(2)(b)(E)):

It is not anticipated that there would be any impact on state agencies, local government, or the public.

2. Cost of compliance effect on small business (ORS 183.336):

a. Estimate the number of small businesses and types of business and industries with small businesses subject to the rule:

Although an estimated number is presently indeterminate, all small businesses subject to the Workers’ Compensation Law, as well as workers’ compensation insurers, and self-insured employers would be subject to the proposed rules.

² This provision is modeled on a provision concerning claim disposition agreements. *See* OAR 438-009-0022(2).

b. Projected reporting, recordkeeping and other administrative activities required for compliance, including costs of professional services:

Paying agencies are already statutorily required to provide an "election letter" to claimants. The proposed rule prescribes the method for fulfilling this existing statutory obligation. The rule mandates service of the "election letter" by registered or certified mail or personal service. Thus, for those paying agencies who have not previously served their elections letters in such a manner, there will be a slight increase in their mailing/service expenses. Nevertheless, at this time, there is no basis to conclude that the impact would be "significantly adverse" (under ORS 183.540) regarding these matters.

c. Equipment, supplies, labor and increased administration required for compliance:

At this time, there is no basis to say the impact would be significant regarding these matters.

How were small businesses involved in the development of this rule?

This proposed rule is the culmination of the Members' comprehensive review of its administrative rules. This process began with the Members requesting comments/suggestions regarding amendments to its rules. After considering these comments, the Members appointed a "Third Party Rule Concepts" advisory committee to review comments/suggestions regarding possible "third party" rules. Members of that committee (which held a public meeting) included small businesses impacted by the proposed rule amendments recommended by the committee. For example, those members represented workers' compensation practitioners and law firms (representing both workers and carriers), as well as workers' compensation carriers. In addition, the Ombudsman for Injured Workers served on the committee.

Administrative Rule Advisory Committee consulted?: Yes.

If not, why?:

The Members appointed an advisory committee to consider Third Party Rule Concepts. That committee submitted written recommendations, which the Members considered, along with public comment at their April 15, 2013 and June 21, 2013 meetings, in proposing these rule amendments.

Dated this 28th day of June, 2013.

WORKERS' COMPENSATION BOARD

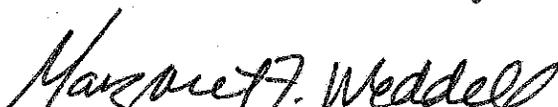
by:


Abigail L. Herman, Board Chair


Vera Langer, Board Member


Steve Lanning, Board Member


Greig Lowell, Board Member


Margaret D. Weddell, Board Member

Administrative Rules Unit, Archives Division, Secretary of State, 800 Summer Street NE, Salem, Oregon 97310. ARC 925-2007