

BEFORE THE WORKERS' COMPENSATION BOARD OF
THE STATE OF OREGON

In the Matter of the Adoption of Permanent Rule)	
Amendments to the Rules of Practice and)	WCB ADMIN. ORDER 1-2024
Procedure for Contested Cases under the Workers')	
Compensation Law, Relating to: Required Denial)	
Language (OAR 438-005-0055(1), (2)) and)	
Attorney Fees For Claim Disposition Agreements)	
and Disputed Claim Settlements)	
(OAR 438-015-0050(1), OAR 438-015-0052(1)).)	ORDER OF ADOPTION

1. On May 24, 2024, the Workers' Compensation Board filed a Notice of Proposed Rulemaking with the Secretary of State, giving notice of its intent to permanently amend OAR 438-005-0055(1) and (2), concerning mandatory denial appeal language, and OAR 438-015-0050(1) and OAR 438-015-0052(1), concerning attorney fees for claim disposition agreements and disputed claim settlements. The notice was published in the Secretary of State's June 2024 *Oregon Bulletin*.

On June 3, 2024, a notice of a rulemaking hearing, a Statement of Need and Fiscal Impact, and the proposed rule amendments were published on the Board's website at <https://www.oregon.gov/wcb/legal/Pages/laws-and-rules.aspx>. Also on June 3, 2024, copies of the notice, Statement of Need and Fiscal Impact, and the proposed rule amendments were mailed to all interested parties whose names appear on the Board's mailing list. The materials were also electronically provided to the Oregonian, the Associated Press, the Capitol Press, Senator Robert Wagner, Senate President, and Representative Julie Fahey, Speaker of the House. The notice of the rulemaking hearing was published in the June 2024 issue of the Board's News and Case Notes, which was posted on the Board's website in early June 2024. Members of the Workers' Compensation Section of the Oregon State Bar were notified by email about the Board's website posting of the June 2024 News and Case Notes on June 14, 2024.

Thereafter, in accordance with the notice, a telephonic public hearing was conducted by Lauren Eldridge, the rulemaking hearing officer, on June 28, 2024, in Salem, Oregon. The record of the public hearing was closed at 10:16 a.m. on June 28, 2024.

2. One comment was offered at the hearing. Jill Gragg of the SAIF Corporation stated that SAIF did not have any additional comment beyond that submitted in writing before the hearing. Two written comments were received. The first was a letter from Elaine Schooler of SAIF regarding the implementation date of the proposed amendments to OAR 438-005-0055(1) and (2), concerning the mandatory denial appeal language. The second was a memorandum from Katy Gunville, the Board's former rules coordinator, concerning the reading level of the proposed amendments to OAR 438-005-0055(1) and (2).

Copies of the public hearing transcript and written comments are available on the Board's website at <https://www.oregon.gov/wcb/legal/Pages/laws-and-rules.aspx>.

3. Order of Adoption for Rules. The Board has proposed amendments to its permanent rules to simplify and improve the readability of the required denial language in OAR 438-005-0055(1) and (2), and to amend the attorney fee caps for claim disposition agreements and disputed claim settlements in OAR 438-015-0050(1) and OAR 438-015-0052(1).

As described above, a public hearing regarding the proposed amendments was held on June 28, 2024. At the hearing, one oral comment and two written comments were received into the record.

At its July 30, 2024, public meeting, the Members thoroughly reviewed and considered the public record developed regarding the proposed permanent rule amendments. After completing its review and considering the public comments, the Board approved the proposed rule amendments described below.

OAR 438-005-0055

OAR 438-005-0055 outlines appeal rights language that must be included in a carrier's denial of a worker's compensation claim. In July 2023, SAIF and the Oregon Trial Lawyers Association jointly submitted a rulemaking concept to the Board, proposing that the Board simplify and improve the readability of the mandatory denial language in OAR 438-005-0055. The concept included proposed amendments drafted by the Access to Justice Subcommittee and Executive Committee of the Worker's Compensation Section of the Oregon State Bar. At its September 18, 2023, public meeting, the Board discussed the proposal, received public comment, and agreed to form an advisory committee to consider amending the required denial language in the rule.¹

After conducting public meetings on January 12, 2024, and March 1, 2024, the Advisory Committee issued a memorandum dated March 13, 2024. The Advisory Committee recommended amendments to the mandatory denial language in OAR 438-005-0055(1) and OAR 438-005-0055(2) (concerning noncooperation denials). The Advisory Committee drafted amendments to OAR 438-005-0055(1) and (2) that included wording and formatting changes regarding how to appeal a denial, what must be included in the appeal, and that a worker can request a worker requested medical examination (WRME).

On May 16, 2024, at a public meeting, the Members discussed the Advisory Committee's report and received further public comment. After considering the public comment and the Advisory Committee Report, the Members agreed to propose rule amendments to OAR 438-005-0055 (1) and (2) that substantially mirrored the Advisory Committee's recommendations.²

¹ The Advisory Committee was comprised of the following individuals: Darren Otto, Administrative Law Judge and Advisory Committee facilitator, Barb Anderson, Ombuds for Injured Workers, Derrick Louie, Attorney at Law, Allison Lesh, SAIF Trial Counsel, Sydney Montanaro, Attorney at Law, and Amy Osenar, Attorney at Law. The Board Members thank the Advisory Committee members for their participation.

² Members Curey and Ogawa objected to the Advisory Committee's proposed language in paragraph five of subsection (1) regarding WRMEs. They would have proposed that paragraph five mirror the statutory language in ORS 656.325(1)(e).

At the rulemaking hearing, two written comments were received regarding this proposed amendment. The first was a letter from Elaine Schooler of SAIF regarding the implementation date of the proposed amendments. Specially, SAIF requested that the effective date of the amendments be at least three months after the adoption of the proposed amendments to give SAIF sufficient time to update its internal forms. The second comment was a memorandum from Katy Gunville, the Board's former rules coordinator concerning the reading level of the proposed amendments. The memorandum explained that with the proposed amendments improved the readability of the rule by 5 grade levels, *i.e.*, from an 11th grade level to a 6th grade level.

After considering the public comments at the July 30, 2024, public meeting, the Members concluded that, for the reasons expressed in the Statement of Need and Fiscal Impact and those discussed herein, the proposed amendments are reasonable, necessary, and proper.³ Thus, the Board adopts this proposed rule, contained in Exhibit A and incorporated by reference.

OAR 438-015-0050(1)

The current rule provides that, in the absence of extraordinary circumstances, claimant's attorney shall receive up to 25 percent of the first \$50,000 of disputed claim settlement proceeds and up to 10 percent of the proceeds exceeding \$50,000. As part of the Board's biennial review of attorney fee schedules pursuant to ORS 656.388(4), in May 2022, the Oregon Trial Lawyers Association requested that the Board review the attorney fee caps in the rule. At its December 12, 2023, public meeting, the Board discussed the proposal, received public comment, and agreed to form an advisory committee to review the attorney fee caps.⁴

On March 18, 2024, the Advisory Committee conducted a meeting. Thereafter, the committee drafted a report that recommended removal of the 10 percent cap on attorney fees for disputed claim settlement proceeds over \$50,000, so an attorney could receive up to 25 percent of all settlement proceeds. The committee proposed rule amendment language to effectuate that change. The committee report noted that although the removal of the 10 percent cap may decrease the portion of settlement proceeds over \$50,000 paid to the injured worker, it would serve to compensate attorneys for their work on more complex settlements, encourage attorneys to engage in settlement practice, and help attract and retain high quality representation for injured workers.

At its May 16, 2024, public meeting, the Board discussed the Advisory Committee's report and received public comment. After considering the report and public comments, the Members agreed to propose amendments to OAR 438-015-0050(1) that mirrored the Advisory Committee's recommendations and removed the 10 percent cap for attorney fees on disputed claim settlement proceeds over \$50,000.

³ Member Ogawa abstained from voting on the adoption of this proposed rule.

⁴ The Advisory Committee was comprised of the following individuals: Geoffrey Wren, Administrative Law Judge and Advisory Committee facilitator, Barb Anderson, Ombuds for Injured Workers, Elaine Schooler, SAIF Trial Counsel, Brian Noble, Regional Manager of Sheet Metal Workers SMART Local 16, Jovanna Patrick, Attorney at Law, and Caitlin Breitbach, Small Business Ombuds. The Board Members thank the advisory committee members for their participation.

No comment was received at the rulemaking hearing regarding this proposed amendment.

After considering this matter at the July 30, 2024, public meeting, the Members concluded that, for the reasons expressed in the Statement of Need and Fiscal Impact and those discussed herein, the proposed amendment is reasonable, necessary, and proper. Thus, the Board adopts this proposed rule amendment, contained in Exhibit B and incorporated by reference.

OAR 438-015-0052(1)

The current rule provides that, in the absence of extraordinary circumstances, claimant's attorney shall receive up to 25 percent of the first \$50,000 of claim disposition agreement proceeds and up to 10 percent of the proceeds exceeding \$50,000. As part of the Board's biennial review of attorney fee schedules pursuant to ORS 656.388(4), the Oregon Trial Lawyers Association also requested that the Board review the attorney fee caps for claim disposition agreements in OAR 438-015-0052(1). At its December 12, 2023, public meeting, the Board discussed the proposal, received public comment, and agreed to form an advisory committee to review the attorney fee caps for claim disposition agreements along with the fee caps for disputed claim settlements.

For the reasons expressed regarding disputed claim settlements, the Advisory Committee recommended an amendment to OAR 438-015-0052 that removes of the 10 percent cap on attorney fees for claim disposition agreement proceeds over \$50,000.

At its May 16, 2024, public meeting, the Board discussed the Advisory Committee's report and received public comment. After considering the report and public comments, consistent with the proposed amendments to OAR 438-015-0050, the Members agreed to propose amendments to OAR 438-015-0052 that mirrored the Advisory Committee's recommendations and removed the 10 percent cap for attorney fees on claim disposition agreement proceeds over \$50,000.

No comment was received at the rulemaking hearing regarding this proposed amendment.

Thus, after considering this matter at the July 30, 2024, public meeting, the Members concluded that, for the reasons expressed in the Statement of Need and Fiscal Impact and those discussed herein, the proposed rule is reasonable, necessary, and proper. Accordingly, the Board adopts this proposed rule amendment, contained in Exhibit C and incorporated by 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 rules, as set forth in Exhibits A through C incorporated herein by reference, as permanent rules of the Workers' Compensation Board.

The amendments to OAR 438-005-0055 become effective on November 1, 2024, and apply to denials issued on or after November 1, 2024.⁵

The amendments to OAR 438-015-0050(1) and OAR 438-015-0052(1) become effective on September 3, 2024, and apply to claim disposition agreements and disputed claim settlements filed with the Workers' Compensation Board on or after September 3, 2024.

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.

Dated this 29 day of August 2024.

WORKERS' COMPENSATION BOARD

by:


Joy Dougherty, Board Chair


Sally Anne Curey, Board Member


Jenny Ogawa, Board Member


Roger Ousey, Board Member


Moisés R. Ceja, Board Member

⁵ In proposing the permanent rule amendments, the Board sought public comment on the effective date of the amendments. As noted above, a SAIF representative submitted a written public comment requesting that the effective date of the amendment regarding the mandatory denial appeal language be three months from the date of the amendments' adoption to give SAIF time to update its internal forms. After conducting its review and deliberation at the July 30, 2024, public meeting, the Board agreed that the amendments to OAR 438-005-0055 will have an effective date of November 1, 2024.