

**STATEMENT OF NEED AND FISCAL IMPACT**

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

Workers' Compensation Board

OAR Chapter 438

Agency and Division

Administrative Rules Chapter Number

Amends OAR 438-005-0055, OAR 438-015-0050(1), and OAR 438-015-0052(1), regarding mandatory denial language and attorney fees for settlements.

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: Simplifying denial language required under OAR 438-005-0055(1) and (2); and adjusting the caps for attorney fees related to claim disposition agreements and disputed claims settlements contained in OAR 438-015-0050(1) and OAR 438-015-0052(1).

**Statutory Authority:** ORS 656.388; ORS 656.726(5).

**Other Authority:**

**Stats. Implemented:** ORS 656.388; ORS 656.726(5); ORS 656.236(4); ORS 656.289(4)

**Need for the Rule(s):**

The Board has proposed the amendment of permanent rules simplifying and improving the readability of the language required to be included in a denial under OAR 438-005-0055. Additionally, the Board has proposed the amendment of permanent rules removing adjusting the limitation on attorney fees for claims disposition agreements and disputed claim settlements. These actions are proposed for the following reasons.

**OAR 438-005-0055**

In July 2023, the SAIF Corporation 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.<sup>1</sup>

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 "non-cooperation denials). The advisory committee drafted rule amendments to OAR 438-005-0055(1) and (2) that include 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

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<sup>1</sup> The Advisory Committee was comprised of the following individuals: Darren Otto, Administrative Law Judge (ALJ) and facilitator of the Advisory Committee, 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 members of the advisory committee for their service.

Members agreed to propose rule amendments to OAR 438-005-0055 (1) and (2) that mirror the advisory committee's recommendations.<sup>2</sup> In addition, the Members requested that paragraph 1, subsection 4 of the denial language in subsections (1) and (2) of the rule include the physical addresses for the Board's Portland and Salem offices.

This proposed amendment is presented in Exhibit A, attached and incorporated by reference.

#### OAR 438-015-0050(1)

The current rule provides that, in the absence 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.

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 ten 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 rule amendments to OAR 438-015-0050(1) that mirror the advisory committee recommendations and remove the ten percent cap for attorney fees on disputed claim settlement proceeds over \$50,000.

This proposed amendment is presented in Exhibit B, attached and incorporated by reference.

#### OAR 438-015-0052(1)

The current rule regarding attorney fees for claim disposition agreements mirrors the rule for disputed claim settlements. That is, an attorney may receive up to 25 percent of the first \$50,000 in 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.

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<sup>2</sup> Members Curey and Ogawa object to the Advisory Committee's proposed language in paragraph 5 of subsection (1) regarding WRMEs. They would propose that paragraph five mirror the statutory language in ORS 656.325(1)(e).

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 rule amendments to OAR 438-015-0052 that mirror the advisory committee recommendations and remove the ten percent cap for attorney fees on claim disposition agreement proceeds over \$50,000.

This proposed amendment is presented in Exhibit C, attached and incorporated by reference.

**Rulemaking Hearing:**

The accompanying “Notice of Proposed Rulemaking Hearing” provides further information regarding the June 28, 2024, hearing concerning these proposed rule amendments. Pending the hearing, written comments may be submitted for admission into the record by directing such comments by mail, FAX (503-373-1600), or email ([rulecomments.wcb@wcb.oregon.gov](mailto:rulecomments.wcb@wcb.oregon.gov)). The comments may be addressed to the attention of Lauren Eldridge, Rulemaking Hearing Officer, Workers’ Compensation Board, 2601 25<sup>th</sup> St. SE, Ste. 150, Salem, OR 97302-1280. Written comments must be submitted by 10:00 a.m. on June 28, 2024.

**Documents Relied Upon, and Where They Are Available:**

ORS Chapter 656; OAR Chapter 438 are available on the Board’s website at <http://www.oregon.gov/wcb/legal/Pages/laws-and-rules.aspx>.

Denial Appeal Language Advisory Committee Memorandum:

<https://www.oregon.gov/wcb/Documents/brdmtgs/2024/031324-denial-appeal-lang-rpt.pdf>

Report of the Attorney Fee Advisory Committee Regarding Settlement Attorney Fee Caps:

<https://www.oregon.gov/wcb/Documents/brdmtgs/2024/031824-sett-attfeecaps-rpt.pdf>

**Statement Identifying How Adoption of Rule(s) Will Impact Racial Equity in This State:**

The proposed rule amendments to OAR 438-005-0055 will increase access to justice for injured workers by simplifying the mandatory denial language. The proposed amendments to OAR 438-015-0050 and OAR 438-015-0052 are also likely to increase access to justice for injured workers by increasing access to representation in the settlement process.

**Fiscal and Economic Impact:**

As noted by the advisory committee, the removal of the ten percent attorney fee caps in OAR 438-015-0050(1) and 438-015-0052(1) will reduce claimant’s share of claim disposition agreement and disputed claim settlement proceeds over \$50,000, because the claimant’s attorney will be able to receive a greater percentage of those proceeds. It is also conceivable that the total settlement proceeds may increase as a result of the amendments to OAR 438-015-0050(1) and OAR 438-015-0052(1), which could increase claim costs. However, the amount of any potential impact is presently undetermined. The Members invite public comment on this subject.

**Statement of Cost of Compliance:**

1. **Impact on state agencies, units of local government and the public (ORS 183.335(2)(b)(E)):**  
None anticipated.
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:**

All small business subject to the Workers' Compensation Law, as well as workers' compensation insurers, and self-insured employers will be subject to the proposed rule amendments.

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

None anticipated.

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

None anticipated.

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

The Small Business Ombuds participated in the Advisory Committee regarding attorney fee caps on settlements. Although small businesses were not directly involved in developing the rule amendments concerning denial language under OAR 438-005-0055, small businesses will have an opportunity to submit comment on the proposed amendments for the Board's consideration.

**Administrative Rule Advisory Committee consulted?**


As noted above, an Advisory Committee was created to consider the rule concept regarding OAR 438-005-0055. The Committee submitted a report recommending amendments to the rule, which the Members considered, along with public comment at their May 16, 2024, meeting in proposing the amendments to the rule.

A separate Advisory Committee was created to review OAR 438-015-0050 and OAR 438-015-0052. The Committee submitted a report recommending amendments to the rules, which the Members considered, along with public comment at their May 16, 2024, meeting in proposing the amendments to the rules.

Dated this 3 day of June, 2024.

**WORKERS' COMPENSATION BOARD**

by:

  
Joy Dougherty, Board Chair

  
Sally Anne Curey, Board Member

  
Jenny Ogawa, Board Member

  
Moisés R. Ceja, Board Member

  
Roger Ousey, Board Member

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