

September 24, 2021

Workers' Compensation Appeals Board
Attention: Julie Podbereski, Regulations Coordinator
455 Golden Gate Avenue, Ninth Floor
San Francisco, CA 94102

Re: Proposed Amendments to the WCAB Rules of Practice and Procedure

Dear Ms. Podbereski:

These comments on proposed amendments to the WCAB Rules of Practice and Procedure are presented on behalf of members of the California Workers' Compensation Institute (the Institute). Institute members include insurers writing 80% of California's workers' compensation premium, and self-insured employers with \$89B of annual payroll (33.7% of the state's total annual self-insured payroll).

Insurer members of the Institute include AIG, Allianz Global Corporate and Specialty, AmTrust North America, AXA XL Insurance, Berkshire Hathaway, CHUBB, CNA, CompWest, CopperPoint Insurance Companies, Crum & Forster, EMPLOYERS, Everest Insurance, GUARD Insurance Companies, The Hanover Insurance Company, The Hartford, ICW Group, Liberty Mutual Insurance, North American Casualty Company, Preferred Employers Insurance, Republic Indemnity Company of America, Sentry Insurance, State Compensation Insurance Fund, Travelers, WCF National Insurance, Zenith Insurance, and Zürich North America.

Self-insured employer members include Albertsons/Safeway, BETA Healthcare Group, California Joint Powers Insurance Authority, California State University Risk Management Authority, Chevron Corporation, City and County of San Francisco, City of Los Angeles, City of Pasadena, Costco Wholesale, County of Los Angeles, County of San Bernardino Risk Management, County of Santa Clara Risk Management, Dignity Health, Disneyland Resort, East Bay Municipal Utility District, Grimmway Farms, Kaiser Permanente, North Bay Schools Insurance Authority, Pacific Gas & Electric Company, Schools Insurance Authority, San Diego Gas and Electric, Shasta County Risk Management, Shasta-Trinity Schools Insurance Group, Southern California Edison, Southern California Gas, Special District Risk Management Authority, Sutter Health, United Airlines, and the University of California.

Recommended revisions to the proposed regulations are indicated by underscore and ~~strikeout~~. Comments and discussion by the Institute are identified by italicized text.

General Consideration

The Institute appreciates the efforts of the WCAB to promote the modernization of the Public Comment on these Rules. However, we are greatly concerned that the WCAB has chosen to implement a requirement that electronic comments be made on a particular, text-limited submission form or not at all. A restriction to an online form impedes upon the public's ability

to maintain a record of comments submitted. Furthermore, the notice advises that submission of written comments must be received by the close of the comment period or such comments will not be considered. Presumably, these new requirements are designed to assist the WCAB in organizing the comments received – but they do little to encourage public engagement in the regulatory process.

Additional restrictions (such as the prohibition against letterhead, color, and other graphics, and a closure of comments at 4pm instead of the customary 5pm “close of business day”) further serve to limit and restrict public participation in a process that is already shrouded from most stakeholders.

The original December 2019 release of revised rules took effect mere days afterward, and even the WCAB judges had little to no knowledge of the new rules until weeks later. Implementation of the restrictive requirements outlined above is not indicative of a valid public process as required and creates practical issues for the entire community. CWCI urges the WCAB to permit more traditional methods of public comment (including email submission) for these and future proposals.

Recommendation:

§ 10305. Definitions.

As used in this subchapter:

(t) “Service” of a document means to deliver a copy of the document in a manner permitted by these rules to a party, **entity**, or other person.

(x) “Testimony” means oral evidence given under oath **that is transcribed** pursuant to Labor Code sections 5704 and 5708.

Discussion:

Because there may be occasion where service of a document is required on a business or other non-party that is not a person, CWCI recommends additional language to ensure compliance.

In workers’ compensation proceedings, all oral testimony is taken down by a court reporter but is only rarely “transcribed.” Rule 10800 governs the transcription of testimony upon receipt of a written request accompanied by payment of a fee. In order to avoid conflict between this definition and Labor Code section 5708, the Institute recommends deletion of language limiting the definition only to testimony that is transcribed.

Recommendation:

§ 10400. Attorney Representatives.

(b)(3) The name, -mailing address, email address, and telephone number of the law firm or other entity's agent for service of process.

Discussion:

We support the addition of a requirement for email addresses as part of the opening document. The WCAB's intended change as indicated by the Initial Statement of Reasons was not correctly identified as new language in the Text of Regulations document.

Recommendation:

§ 10462. Subsequent Injuries Benefits Trust Fund Applications.

(d) After joinder of the Subsequent Injuries Benefits Trust Fund and no later than 30 days prior to the mandatory settlement conference or other hearing related to the Subsequent Injuries Benefits Trust Fund application, all parties the applicant and the representative from the Division of Workers' Compensation, Subsequent Injuries Benefits Trust Fund shall meet and confer in good faith as to the elements of Labor Code section 4751. If the meet and confer process does not result in agreement as to the elements of Labor Code section 4751, each participant shall file and serve a written position statement at least 10 days prior to the hearing.

Discussion:

The requirement that "all parties" participate in a meet and confer process related to SIBTF claims is far too broad. There is ordinarily no reason for parties such as the employer, insurer, claims administrator, or lien claimants to continue to participate in the case at the SIBTF stage, much less in an informal discussion as to whether the applicant has met the requirements of Labor Code section 4751. Conversely, the SIBTF is sometimes joined early in the case, long before SIBTF-related proceedings are undertaken. We recommend that the required participants to a meet and confer process under this rule be limited to the relevant parties and that such process be delayed until SIBTF issues are at hand.

In order for the meet and confer process to serve the intended purpose and to provide the assigned judge with the necessary information to effectively manage the hearing, the Institute recommends that additional formality be required via the filing of a written position statement.

Recommendation:

§ 10550. Petition to Dismiss Inactive Cases.

(e) The following documents shall be filed with a petition to dismiss:

- (1) A copy of the letter required by subdivision (a)(b) of this rule; and
- (2) Any reply to the letter required by subdivision (a)(b) of this rule.

Discussion:

The WCAB's intended changes as indicated by the Initial Statement of reasons were not correctly identified in the Text of Regulations document.

Recommendation:

§ 10610. Filing and Service of Documents.

Unless a statute or rule provides for a different method, a requirement to “file and serve” a document means that the document must be filed as set forth in rule 10615 and served as set forth in rule 10625, and a proof of service of the document must be filed with it. The Workers' Compensation Appeals Board may order the filing of a proof of service of a document.

Discussion:

Existing rule 10629 already requires a party designated to serve an order to also file a proof of service of that order. The associated burden of compliance, administration, postage, etc. of the existing rule typically falls to the defense.

Expansion of the requirement to now file a proof of service for every document that is filed and served is unwarranted and unnecessary. A better solution, while still accomplishing the desired result, would be to require the party to maintain the original proof of service until and unless ordered to file it at the WCAB -- if and when a dispute arises.

If appropriate, the recommended language could be coupled with a negative inference rule (i.e., failure to produce a Proof of Service permits an inference that the document was not served as alleged, or perhaps an evidentiary preclusion), which would encourage reliable recordkeeping.

Recommendation:

§ 10625. Service by Parties.

(d) Where a party receives notification that the service to one or more parties failed, the server shall re-serve the document on all intended recipients the recipient on whom service failed and execute a new proof of service, or provide a courtesy copy to the recipient on whom service failed, within a reasonable amount of time.

Discussion:

Multiple service of a document on all parties, including those to whom service was correctly effected, is unnecessary, cumbersome, and expensive. Conversely, provision of a courtesy copy does not provide an adequate record of when service was actually and correctly effected. The Institute recommends a more simple solution of requiring corrected service with a new proof of service that confirms the correction.

Recommendation:**§ 10752. Appearances Required.**

(b) Each required party shall have a person available with settlement authority at all hearings. A represented injured employee or dependent shall personally appear at any mandatory settlement conference.

Discussion:

The proposal has eliminated subsection (c), requiring the presence of the injured worker or their dependent. The whole point of the mandatory settlement conference is for the parties to engage in frank negotiations and resolve their disputes if possible. All parties, and even the WCAB itself, are well-served by a successful MSC that results in a settlement. But unlike the defense side, where the defense attorney has the power to bind their principal by signing a settlement document on the principal's behalf, the in-person appearance of an injured worker is absolutely necessary to complete and sign a settlement document at the MSC. For MSCs conducted virtually, it is nevertheless preferable to have the injured worker appear so that a meeting of minds can be confirmed and even documented in the Minutes of Hearing. The Institute is not aware of widespread difficulties created by this long-standing rule of personal appearance nor of any pressing need to change the practice, and urges the WCAB to reconsider eliminating the requirement so that the very purpose of the MSC is not thwarted.

Recommendation:**§ 10759. Mandatory Settlement Conferences.**

(b) The parties shall meet and confer at least one business day prior to the mandatory settlement conference. Failure to respond to a good faith effort to meet and confer under this subsection may result in sanctions pursuant to 8 CCR 10421, at the discretion of the conference judge. ~~and, a~~ Absent resolution of the dispute(s), the parties shall complete a joint Pre-Trial Conference Statement setting forth the issues and stipulations for trial, witnesses, and a list of exhibits by the close of the mandatory settlement conference. A defendant that has paid benefits shall have a current computer printout of benefits paid available for inspection at every mandatory settlement conference.

Discussion:

The ISOR suggests that this amendment requires a meet and confer process that will assist the parties in properly framing the issues so that trials can be conducted more efficiently. The Institute is in favor of encouraging the parties to get a head start on the process of identifying and framing the issues in dispute. However, without inclusion of deadlines or consequences, the “requirement” intended by the proposed language will not be effective.

Recommendation:

§ 10815. Electronic Hearings Before the Workers’ Compensation Appeals Board.

(b) Any party may object to an electronic hearing by filing **and serving** a written objection showing good cause **within ten business days** after service of a notice that a hearing will be conducted electronically.

(c) After an objection to a notice that a hearing will be conducted electronically is filed, the presiding workers’ compensation judge of the district office having venue **may overrule the objection, or** may set the issue of whether the hearing will be conducted electronically for a hearing.

(d) If the presiding workers’ compensation judge of the district office having venue takes no action on the objection before the hearing, it will be deemed deferred as an issue for the **electronic** hearing before the assigned workers’ compensation judge.

Discussion:

*In light of the dangers presented by the ongoing pandemic, the Institute believes that it is premature to require parties or witnesses to attend any hearing in person, absent good cause to the contrary. We recognize that the DWC has issued a proclamation that all trials held on or after October 1, 2021, shall be in-person. **We have serious concerns about this action from a public health standpoint, and will support any solution from the WCAB that permits it to continue without interruption its present (and proven successful) practice to hold hearings via virtual platforms, absent a showing of good cause.***

In subsection (b), we suggest that any objection filed also be served on the other parties, so that all involved may be apprised of developments. In subsection (c), we recommend that the presiding judge be granted the discretion to rule on the issue of good cause forthwith and maintain the hearing as electronic if appropriate, in addition to the option to set the question for hearing. Finally, we recommend additional language in subsection (d) in order to clarify that no action by the presiding judge results in the electronic hearing as noticed.

Recommendation:

§ 10816. Electronic Appearances Before the Workers' Compensation Appeals Board.

(a) If a party intends to appear electronically at any hearing, they shall file and serve a notice no later than fifteen days prior to the scheduled hearing. Any party may object to such notice by filing a petition showing good cause pursuant to rule 10510.

Discussion:

Under the continuing circumstances of the global pandemic, and as supported by sound public health policy, the Institute believes that the opportunity to appear electronically should be as a matter of right, and suggests that the burden to show good cause be placed on a party opposing such electronic appearance. As presently written, the rule would impose too high of a burden and require too much formal litigation, particularly when it is considered that these proposed rules have been suggested precisely because a system for appearing electronically is in place and is working well. A sunset clause may be appropriate.

Recommendation:

§ 10817. Electronic Testimony Before the Workers' Compensation Appeals Board.

(a) If a witness intends to testify electronically, the witness or the party offering the witness's testimony shall file and serve a notice identifying the witness and containing the witness's full legal name, mailing address, email address, and telephone number no later than fifteen days prior to the scheduled hearing. Any party may object to such notice by filing a petition showing good cause shall be filed pursuant to rule 10510 by the witness or by the party offering the witness's testimony before the hearing, and shall identify the witness and contain the witness's full legal name, mailing address, email address and telephone number.

Discussion:

Under the continuing circumstances of the global pandemic, and as supported by sound public health policy, the Institute believes that the opportunity for a witness to appear electronically should be as a matter of right, and suggests that the burden to show good cause be placed on a party opposing such electronic appearance. As presently written, the rule would impose too high of a burden and require too much formal litigation, particularly when it is considered that these proposed rules have been suggested precisely because a system for appearing electronically is in place and is working well. A sunset clause may be appropriate.

Recommendation:

§ 10818. Recording of Proceedings.

(a) Recording of proceedings shall be permitted only on written order by the Workers' Compensation Appeals Board. Any person who wishes to record a proceeding shall file a

written petition showing good cause pursuant to rule 10510 no later than thirty business days prior to the scheduled hearing. The Workers' Compensation Appeals Board may hold a hearing on the request or rule on the request without a hearing. The Workers' Compensation Appeals Board may condition the order permitting recording of the proceedings on the requestor's agreement to pay any increased costs incurred by DWC resulting from recording the proceeding.

~~(b) Any person proposing to record the proceedings for personal use shall obtain advance permission from the workers' compensation judge. The recording shall not be used for any purpose other than as personal notes.~~

(e) Only the recordings described in Labor Code sections 5704 and 5708 are the official recordings of a proceeding.

Discussion:

In subsection (a), we recommend that a deadline be attached to the timing of a petition to record proceedings in order that other parties may be kept apprised and provided with sufficient time to register an objection. Unofficial recordings of court proceedings have always been discouraged, and we question why a shift to virtual hearings might necessitate a relaxation of rules surrounding this practice.

In this same vein, we recommend striking subsection (b) in its entirety. It is in apparent conflict with subsection (a), in that (a) requires permission from the WCAB while (b) considers permission from the judge. If it is truly the WCAB's intent here to allow either a recording authorized by the WCAB or a recording for personal use authorized by the judge, then the Institute questions the need for a separate subsection addressing personal use, inasmuch as the only official recording under subsection (e) is that of the designated court reporter, and any other recording is by definition for personal use.

Thank you for the opportunity to comment, and please contact us if additional information would be helpful.

Sincerely,

Ellen Sims Langille

Ellen Sims Langille, General Counsel
ESL/pm

cc: George Parisotto, DWC Administrative Director
Katrina Hagen, DIR Executive Director
CWCI Claims Committee
CWCI Medical Care Committee
CWCI Legal Committee
CWCI Regular Members
CWCI Associate Members