# Final Statement of Reasons

Subject Matter of Proposed Regulations:Title 8, California Code of Regulations, Sections 10300 through 10999.Rules of Practice and Procedure of the Workers’ Compensation Appeals Board

## **Background:**

By its authority under Labor Code sections 5307 and 5307.4 (see also Lab. Code, §§ 133, 5309 and 5708), the Workers’ Compensation Appeals Board (“WCAB” or “Appeals Board”) noticed and held a public hearing and accepted written comments on our proposal to adopt and amend certain Rules of Practice and Procedure (Rules) in Title 8, Division 1, Chapter 4.5, subchapter 2 (§ 10300 et seq.), of the California Code of Regulations. The public hearing on the initially proposed rules modifications was held on September 24, 2021. The initial written comment period also closed on that date.

The primary purpose of this rulemaking is to formalize the processes for remote hearings, electronic filing, and electronic service that developed during the novel coronavirus pandemic. To this end, we proposed adding several new rules to create processes for noticing and objecting to remote hearings, remote appearances, and remote witness testimony. We also proposed adding new definitions for “Appearance,” “Hearing,” and “Testimony,” and revising our existing rules regarding appearances, to facilitate these processes. We proposed adding new definitions for “Electronic,” “Filing,” and “Service,” and revising our existing rules regarding filing and service, to provide for expanded electronic filing and service.

We also proposed revisions to our rule regarding applications for benefits from the Subsequent Injuries Benefits Trust Fund to facilitate the efficient resolution of such claims. Additionally, we proposed correcting typographical errors in six rules.

The WCAB has considered the public hearing testimony and all of the timely written comments. The WCAB now adopts its proposed rules, with the exception of the proposed changes to WCAB Rule 10462 “Subsequent Injuries Benefits Trust Fund Application,” which, for the reasons described below, we have decided after careful consideration not to amend at this time, except for clerical changes to update rules references. We have also made a small alteration to the wording of our definition of “Testimony” in Rule 10305, corrected a clerical error in the text of the proposed changes to WCAB Rule 10635, and added clarifying language to Rule 10752. Finally, proposed changes to Rules 10400 and 10550 noted in the Initial Statement of Reasons were inadvertently not reflected in the text of the proposed regulations; this has been corrected.

In this Final Statement of Reasons (FSOR), the WCAB addresses both the written public comments it received during the written comment period and the oral comments we received at the public hearing held on September 24, 2021. In the interest of brevity, some comments expressing identical or virtually identical feedback have been grouped together for purposes of a response; in such cases, each such comment will be identified before one response is provided covering all the identified comments. Additionally, many commenters submitted identical or largely identical comments in response to multiple rules; such comments have been consolidated and are responded to only once. Finally, many commenters submitted comments that were more general in nature, rather than tied to any particular rule number, particularly on the topic of remote hearings; those comments have been consolidated and will be responded to jointly at the beginning of our responses.

By analogy to Government Code section 11346.9(b)[[1]](#footnote-1), this FSOR incorporates the Initial Statement of Reasons (ISOR). Accordingly, not all of the provisions of the adopted rules will be discussed in this FSOR. Instead, unless otherwise expressly noted, the discussion in this FSOR will relate to the proposed new rules regarding which the WCAB received oral and written comments.

### Responses to Oral and Written Comments

#### General Comments Regarding Remote Hearings

Comments: The vast majority of comments we received related to the topic of remote hearings; a list of commenters appears at the bottom of this response. The majority of comments expressed support for remote hearings, but a significant minority favored returning to in-person hearings for all or most WCAB appearances. Some commenters believed that status conferences should remain remote, but that trials should return to being conducted in person. Others believed that the rules should provide for default remote hearings, with in-person hearings only available by petition.

Those in favor of remote hearings generally emphasized the continuing nature of the Covid-19 pandemic, and the greater efficiency of remote appearances. Some commenters stated that moving to remote hearings had improved their quality of life by allowing them to avoid time spent commuting, particularly in Southern California, while others emphasized the environmental benefits of remote hearings.

Those opposed to remote hearings tended to believe that remote hearings are not as effective at resolving disputes as in-person hearings. Some commenters expressed fears that remote hearings would allow larger firms to displace smaller ones by taking cases outside their normal geographic area, or that remote hearings presented logistical problems for attorneys with multiple cases scheduled for the same day in front of different judges of the same district office. A few commenters expressed the belief that remote hearings denied their clients due process of law because of the alleged inability to properly assess the credibility of witnesses remotely.

Many of the comments expressed opposition to the Department of Workers’ Compensation (“DWC”)’s announced plan to return to in-person trials beginning October 1, 2021, mostly citing the Covid-19 pandemic. Some commenters expressed a belief that some district offices are not well set up for social distancing, because the courtrooms are too small, and may not have windows or adequate ventilation.

Response: At the outset, in order to dispel any possible confusion, the Appeals Board does not exercise managerial control over the district offices, and decisions about reopening district offices – whether individually or as a whole - are not within our purview, or within the scope of these rules.

Instead, these rules are intended to provide a framework for how a party may object to the format of any given hearing, or how a party may seek to appear remotely or present remote witness testimony at an otherwise in-person hearing. Our focus has been to craft rules that are easy to understand and administer, and that are flexible enough to cover any eventuality, without putting a thumb on the scales in favor of either remote or in-person hearings.

The nature of due process requires that each case be considered upon its own merits, with due consideration for the particular circumstances of the parties and their immediate surroundings, and it would therefore be inappropriate for our rules to either forbid or mandate remote hearings in all cases. The rules are designed to allow the Worker’s Compensation Judge (WCJ) presiding over a given matter (and the Presiding Workers’ Compensation Judge for the district office) the discretion to determine the best way to handle each case or hearing, based on the specific facts of the matter before them. We reject the contention that remote hearings per se deprive a party of due process of law. (See *Gao v. Chevron Corp.* (2021) 86 Cal.Comp.Cases 44.)

The WCAB is acutely aware of the continuing Covid-19 pandemic, and, if required, stands ready to issue further en banc standing orders, or to modify existing orders, with the aim of mitigating as much as is humanly possible the negative effects of the pandemic on the workers’ compensation system. However, wider issues of general policy concerning the management of district offices are best left to the management of DWC, and/or to elected officials.

Challenges such as those posed by the Covid-19 pandemic require a collective response, and we are all trying our utmost to keep the workers’ compensation system functioning at this difficult time, while also protecting injured workers, attorneys, workers’ compensation judges, interpreters, district office support staff, and everyone else whose participation is so critical to making our system work. Your continued understanding, flexibility, and level-headed support is greatly appreciated as we do our best to plot a course through these uncharted waters.

List of Commenters: Muaath Ali, Saul Allweiss, Richard Barkhordarian, Esq., Jonathan Alvanos, Diana B. Berlin, Eva Bilac, Sara Boessenecker, Kenneth Brown, Brant Bruner, Andrea Burger, Merus Case, Charlie Camareno, Jerry Chang, Shawna Clay, Shannon Cornay, Ellen Creager, Michael Diamaond, Jonathan Dodart, Diane Dubois, Aaron and Elliott Eslamboly, Shiva Farzinpour, Flores, Peter Gimbel, Kenneth Martinson Gomez, Karina Gordon, Patrick Gorman, Gregory Grinberg, Sara Grumley, Ron F. Gurvitz, Andrea Gutierrez, Robert Haag, Patrick Hawkins, Marilee Bridges Hazen, David Holzman, Melissa Kamin, John P Kamin, Grace Kang, Kathy, Harmony Kessler, Benjamin Khakshour, Asia Kowalski, Michelle Kral , Ellen Sims Langille, Esq., Jean Liao, Amber Martin, Rebecca Martinez, Shayne McDaniel, Robert McLaughlin, Monica Menendez, Armando S. Mercado, John Mikhail, Kevin Mitchell, Charles Mix, John D. Moloney, Monica, Robert A Moore, Esq., Patrick Namanny, Russ Neault, Richon Norris, Ebony Onoh, David H. Parker, Gregory Pshide, Esq., Esteban Ramirez, Anne Marie Rapolla, Ashley S. Randolph, Mindi Redden, Leonard Retter, Kristi Robles, Angelina I. Romano, Esq, Ashley Romeo-Boles, Timothy Rose, Esq, Stephanie Rosil, James Rossi, Jesse Salazar, Eric Schwartz, Pravin A. Singh, Slade Neighbors, A. Smith, Julia Smithson, Ksenia Snylyk, State Compensation Insurance Fund, Rajinder Sungu, Ahamed Syed, Brent Thompson, Debra Tobias, Lauren E. Twitchell, Ryan Vego, Carrie Weaver, M Elena Wilson, Erin Wintersteen, Paul Wolsey, George Woolverton, Zareh Zatikyan.

#### Submission of Comments via Webform

Comment: The California Workers' Compensation Institute (CWCI) was not satisfied with the online comment submission process and urges us to permit “more traditional methods of public comment (including email submission) for these and future proposals.”

Response: We will keep this feedback in mind for future rulemaking. We note that we did receive a small number of comments via U.S. mail, and that we accepted these comments along with the comments provided via the web form.

#### Section Amended: Rule 10305, “Definitions.”

Comment: State Compensation Insurance Fund (SCIF) recommends amending the definition of “Electronic” to be limited to “any agreed upon, secured technological means.” SCIF also recommends adding a number of additional definitions for “Electronic service,” “Electronic transmission,” and “Electronic notification.”

Response: We disagree that we should limit the definition of “Electronic” to only “agreed-upon, secured technological means.” To the extent that SCIF’s objection appears to relate to electronic service rather than to the definition of the term “Electronic” itself, we address that objection in the section pertaining to Rule 10625.

Comment: CWCI recommends changing the definition of “Service” to include the word “entity” and changing the definition of “Testimony” to remove the reference to transcription.

Response: We believe the definition of “Service” is preferable the way it is, because service upon an entity is accomplished by service upon an appropriate person. We agree that it is preferable to modify the definition of “Testimony” as suggested, because the requirements of Labor Code sections 5704 and 5708 speak for themselves.

Comment: McLaughlin & Sanchez, APC believe we should include a definition for the term “Witness” in order “to make clear who is considered a witness versus an employer representative and/or a party.”

Response: We do not believe providing such a definition is necessary at this time. Employer representatives and/or parties are not ordinarily witnesses, but may become witnesses in some circumstances if their testimony is sought at a hearing. Attempting to provide a definition that would delineate all the possible situations in which a party or representative would or would not be a witness would risk creating a definition that is under- or over-inclusive, which might be used in a manner not consistent with the spirit of the rules by parties seeking an advantage.

Comment: Duane Livingston believes our definition of “District office” should be changed to emphasize the separation between the DWC and the WCAB.

Response: Our definition focuses on whether trial court proceedings occur in a given location, and is not intended to make any comment as to the division of authority between the WCAB and DWC, or the organizational ownership and management of any location.

#### Section Amended: Rule 10400, “Attorney Representatives.”

Comment: CWCI points out that our proposed change to this section – including a requirement to provide an email address – was inadvertently left off of the Text of Regulations document.

Response: We appreciate CWCI bringing this to our attention, and have corrected the final text of the regulations.

#### Section Amended: Rule 10462, “Subsequent Injuries Benefits Trust Fund Applications.”

Comment: We received comments from CWCI and Steven McGinty, Assistant Chief Counsel for the Office of the Director, expressing concerns about our proposed new rule relating to SIBTF cases.

Response: Upon reflection, it is clear that our proposed rule does not address the concerns raised by SIBTF and others in relation to the administration of SIBTF cases. Rather than attempt to reform the rule at this late stage and risk promulgating an ineffective rule, we believe it is preferable to pull back for the moment from issuing a new rule, especially in circumstances such as these, where it is unclear whether the concerns raised are best addressed through a change to the WCAB Rules of Practice and Procedure, or by DWC in its own regulations. Accordingly, with the exception of the updated rules references in subdivision (b), we will withdraw our proposed changes to the rule, and continue to monitor the situation in order to determine the best course of action.

#### Section Amended: Rule 10550, “Petition to Dismiss Inactive Cases.”

Comment: CWCI points out that our proposed changes to this section were inadvertently left off of the Text of Regulations document.

Response: We appreciate CWCI bringing this to our attention, and have corrected the final text of the regulations.

Comment: Jay Shergill notes that we suspended the witness and signature requirement in Rule 10500(b) in our en banc order Misc. No. 260, and asks whether we intend to either rescind that decision or make the suspension permanent.

Response: We have no plans at this time either to rescind the suspension, or to amend Rule 10500 to remove the requirement.

#### Comments Relating to Proposed Amendments to Rule 10610, “Filing and Service of Documents.”

Comment: CWCI believes the requirement of filing a proof of service for each document filed and served is “unwarranted and unnecessary” and that it would be sufficient 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.”

Response: The rule requires filing of a proof of service precisely because experience has taught us that the suggested approach does not actually work in practice. Although we appreciate it may feel burdensome to the parties, it is essential for the WCAB to have a contemporaneous record of filing and service, because we have learned from past cases that when the parties dispute service, we cannot rely upon the serving party to have kept the proof of service records themselves. We prefer to resolve disputes on the merits, not to rely upon negative inferences that may result in findings that do not correspond to the actual facts of what occurred. We also note that this comment refers to changes made in a previous revision of the rules.

#### Comments Relating to Proposed Amendments to Rule 10625, “Service by Parties.”

Comment: We received comments from the California Applicants’ Attorney’s Association (CAAA), SCIF, Citywide Scanning, McLaughlin & Sanchez, and Stephen Schneider expressing concern over electronic service without the prior agreement and consent of the party being served. The primary points of concern appear to be: (1) that Rule 10625 is inconsistent with DWC Rule 10205.6; (2) that there are security concerns associated with electronic service and requiring parties to accept it may result in more opportunities for cybercrime; (3) that it is unclear when electronic service is effected; (4) that there will be disputes over whether service is valid when the email goes to a spam folder or otherwise is delivered but not actually viewed by the recipient; (5) that parties may use unorthodox methods of electronic service such as service via social media accounts. SCIF additionally suggested incorporating a number of additional requirements for electronic service based upon 8 Code of California Regulations section 36.7, QME Electronic Service Emergency Regulation in Response to Covid-19.

Response: First, we appreciate the concerns articulated by the parties in relation to electronic service. It must be emphasized that our intention is not to either “mandate” electronic-service, or to prefer electronic service to any other method of service. To the contrary, the changes we made to the service rule were carefully designed not to create one method of service which is preferred over any other, and to leave it to the parties to sort out among themselves the best way to serve one another. We strongly recommend that parties choose methods of service that are mutually acceptable, regardless of whether the rules technically require it – and this recommendation extends not only to electronic service, but to any other method of service. It is not ultimately in anyone’s interest to create needless disputes over service by choosing methods of service designed to inconvenience the party being served.

The experience of the pandemic has taught us that it is preferable to allow the parties the greatest possible latitude over the method of service, because rules cannot adequately anticipate the full range of possible future developments that may render their provisions ineffective in light of changed circumstances. We firmly believe that the vast majority of participants in the workers’ compensation system are capable of resolving disputes over the method of service between themselves, without the need for detailed regulatory schemes or judicial intervention. For such individuals, enacting detailed rules regarding electronic service is unnecessary and potentially burdensome, just as it is unnecessary and potentially burdensome to have detailed rules for any other method of service, because the parties have no trouble finding mutually acceptable resolutions to any issues that might arise.

Conversely, our judgment is that detailed rules regarding the method of service are more likely to empower the small number of bad actors in the system than to constrain them, by allowing them to assert frivolous, non-material violations of the rules governing the method of service as a means to gain advantage over opposing parties. For this reason, we ultimately decided against including detailed regulations regarding the method of service. We also considered allowing the parties to “opt-out” of specific methods of service by giving notice to opposing counsel, but ultimately concluded that it would be too burdensome to the parties to keep a list of which methods of service were acceptable to whom, with the result again being to empower non-material objections to the method of service even when the documents were received and there was no ill intent by the serving party.

Turning to the specific concerns articulated in the comments, some commenters stated that the amendments to Rule 10625 are inconsistent with DWC Rule 10205.6, which allows the parties to agree to methods of service between one another, and provides for first-class mail as the default method of service in the absence of agreement. We note that existing Rule 10625 allows service by a range of methods other than first-class mail, even in the absence of an agreement between the parties; the proposed amendments are therefore no more inconsistent with DWC Rule 10205.6 than the existing rule.

With regard to the security concerns associated with electronic service, although we do not dispute that e-mail attachments can be a vector for viruses or other forms of malware, we do not believe that the amendments to Rule 10625 are likely to substantially increase this risk. The vast majority of participants in the workers’ compensation system already utilize email routinely in the course of business, and are aware of the need to take precautions against infection.

To address concerns regarding the effective date of service for electronic service, we note that Rule 10605 applies the same timeframes for service via e-mail as for service via mail and fax. We do not believe that it is advisable to attempt to include specific provisions related to documents blocked by spam filters or otherwise sent but not actually received, just as the rules do not include specific provisions for mail service; such situations are better addressed on a case by case basis according to the specific facts involved.

We do not believe that parties will attempt to serve other parties via social media accounts or other similar methods. Just as it would be unreasonable and in bad faith for a party to attempt to serve another party via mail at a holiday home, it would be unreasonable and in bad faith to attempt to electronically serve a party via a social media account.

We note that in the event that the parties are unable to resolve a dispute as to the method of service despite their best efforts at informal resolution, either party always has the option to file a petition pursuant to Rule 10510 seeking the assistance of the WCAB in resolving the dispute.

Finally, although as expressed above we do not believe that the proposed changes to this rule will prove as problematic in practice as the commenters believe, we will be carefully monitoring the situation. If we are mistaken in our predictions and the amendments to this rule produce significant confusion and problems for the workers’ compensation community, we stand ready to revisit the issue and to clear up any problems that do arise.

Comment: CWCI believes that subsection (d) should not require re-service on all parties when a party gets notification that service failed upon a particular party, nor should it allow for provision of a courtesy copy to that party in lieu of such re-service. Instead, CWCI recommends retaining the prior requirement to re-serve the party upon whom service failed.

Response: The purpose of the rule is to provide a uniform date for all served parties; it is problematic for the WCAB when different parties have different effective dates of service, particularly when it is not obvious from the proof of service that service upon a given party has failed. The amendment provides for a single date of service because if all parties are re-served, the date of service becomes the new date. Conversely, if service was properly made but the serving party becomes aware that a party did not actually receive service, providing a courtesy copy allows the original date of service to remain the date of service for all parties.

Note that the provision of a courtesy copy is not intended to allow a party to circumvent the service rules or retroactively “cure” service that was improper in the first instance. The section’s reference to service having “failed” anticipates a situation where the party served the document in question properly according to the service rules (and where there is a proof of service documenting this proper service), but where there is reason to think that a party being served did not actually receive the document despite this procedurally proper service. The intent of the rule is to make sure parties actually receive the documents they were served with where there is any reason to think they may not have, in the hopes that in most cases this will obviate the need for litigation over peripheral service issues that do not directly touch the merits of the case.

#### Section Amended: Rule 10635, “Duty to Serve Documents.”

Comment: The 4600 Group and Boehm & Associates believe that we mistakenly substituted the word “and” for the word “or” in subsection (d), because either a “physician” as defined in Labor Code section 3209.3 or an entity described in Labor Code sections 4903.5(d)(7) and 4903.06(b) may request service of medical reports; as written, the rule would require meeting both criteria rather than either.

Response: We agree with this comment, and appreciate the commenter bringing it to our attention. We have changed the “and” to “or” to make clear that an entity needs to meet only one of the two possible criteria in order to be able to request service of medical reports, as in the previous version of the rule.

#### Section Amended: Rule 10752, “Appearances Required.”

Comment: CWCI believes we should continue to require personal attendance by the applicant or dependent at all Mandatory Settlement Conferences (MSCs).

Response: We do not believe there is a compelling reason for a blanket rule requiring only applicants to personally appear at all MSCs, because the nature of representation assumes that an attorney is permitted to appear in the stead of the represented party. We removed the ability to sanction the applicant for failing to personally appear (except if unrepresented) in our last set of revisions to Rule 10755; this change is in accord with that reality. We anticipate that in most cases applicants will continue to appear personally at MSCs because it will serve the interests of all parties.

That said, the WCJ may order the personal appearance of any party pursuant to subsection (e), and nothing prevents the defendant from seeking to secure the applicant’s personal appearance at an MSC either through voluntary coordination with applicant’s counsel or by serving a notice to appear pursuant to Rule 10642, if the defendant believes it would be useful to have the applicant personally present. We have added clarifying language to subsection (d) to make clear that a notice to appear can be employed in these circumstances.

#### Comments Relating to Proposed Amendments to Rule 10759, “Mandatory Settlement Conferences.”

Comment: Citywide Scanning believes that subsection (c) should not allow defendants to list multiple Explanation of Benefits (EOB) letters as a single exhibit.

Response: The only change we proposed to this portion of the rule was renumbering to account for other changes. We will keep this comment in mind for future rulemaking.

Comment: CWCI, McLaughlin & Sanchez and Jamie Sanderson believe we should include a time limit on how far in advance of the MSC the parties must meet and confer.

Response: We considered including such a requirement when drafting the rule, but ultimately decided that including a defined requirement to confer a particular amount of time prior to the MSC would not ultimately be likely to improve the efficacy of the meet and confer efforts, which ultimately depend more on the good faith of the parties engaging in such discussions than anything that can be mandated via a temporal requirement.

Comment: Mix and Namanny suggest that if the parties to a matter jointly request an electronic hearing the request should automatically be granted without the need to show good cause.

Response: Although we certainly believe that the WCJ should carefully consider stipulated requests for an electronic hearing, we do not believe it is advisable to completely divest the WCJ of decision-making authority even where the parties agree among themselves. (See Rule 10330 [authority of workers’ compensation judges]; Rule 10745 [authority to set the case]; and Rule 10835 [findings and orders may be based on stipulations].)

Comment: Catherine Martinez requests guidance as to when the PTCS must be completed by, and suggests that the parties should be required to exchange the PTCS between themselves “well in advance” of the MSC to iron out any issues. She also requests that language in the rule requiring specificity of exhibits should be “much more forceful.”

Response: The rule requires the PTCS to be completed by the end of the MSC; as noted below, this does not necessarily mean it must be filed by the end of the MSC, but the content should be finalized by that point. Although we certainly encourage parties to communicate well in advance of the MSC, we do not believe it is necessary to include a specific temporal requirement at this time. Regarding specificity of exhibits, as noted by the commenter, the rule already requires such specificity; we do not think modifying the language is likely to improve compliance.

Comment: Mehr and Associates believes that it is unnecessary to require the filing of the Pre-trial Conference Statement (PTCS) by the close of the MSC, suggesting that the requirement should be to file the PTCS 20 days prior to trial, or that the judge should have discretion to modify the requirement.

Response: The rule does not actually require the *filing* of the PTCS by the close of the MSC; instead, it requires that the PTCS be *completed* by the end of the MSC, with the WCJ to file the PTCS in the record of proceedings subsequently.

Comment: Jamie Sanderson suggests that subsection (e) should contain guidance as to how the PTCS is to be filed at the MSC if the MSC is conducted electronically, noting that different district offices currently enforce different requirements related to the PTCS.

Response: As noted above, the requirement is to complete the PTCS by the end of the MSC; actual filing of the PTCS by the WCJ may occur afterward. In the case of a remote MSC, we think it is best left to the discretion of the WCJ as to how to best coordinate the necessary procedures to be able to file the PTCS in as timely a manner as possible. The intent of the rule is that the *content* of the PTCS be finalized by the end of the MSC.

#### Comments Relating to Proposed New Rule 10815, “Electronic Hearings Before the Workers’ Compensation Appeals Board.”

Comment: CWCI suggests that subsection (b) should include a requirement to serve the objection to an electronic hearing on all parties. CWCI further believes that the default for all hearings should be electronic, and that subsections (c) and (d) should be modified accordingly, and to allow the presiding judge to deny an objection to setting the matter for an electronic hearing without the necessity for a hearing.

Response: We believe that it is sufficiently clear from the context of the rule that any objection to holding an electronic hearing must be served upon other parties to the litigation, in the same manner that other objections must be served as well as filed. For the reasons described in our responses to general comments, we disagree with making all hearings electronic by default. We disagree with allowing the presiding judge to summarily rule on an objection, because we believe the parties have a due process right to present argument if they desire, whether at a hearing set specifically to consider the question, or at the underlying hearing itself if no such hearing has been set.

Comment: Stephanie M Smith believes that good cause for an electronic hearing should be defined in the rules, and that there should be a method to object to an in-person hearing.

Response: We believe that any attempt to define “good cause” in the rules would unnecessarily restrict the discretion of the WCJ, and that the good cause determination in any given case is so inherently dependent upon the facts of that specific case that it would be unwise to attempt to provide generalized guidance. With regard to a procedure to object to an in-person hearing, we note that Rule 10816 allows any party to file a request to appear electronically at an otherwise in-person hearing.

#### Comments Relating to Proposed New Rule 10816, “Electronic Appearances Before the Workers’ Compensation Appeals Board.”

Comment: Mix & Namanny questions why there is a need for subsection (b).

Response: Subsection (b) is meant to clarify that parties need not seek leave to appear electronically when a hearing has been designated as being conducted electronically, and that the section is applicable only when a party seeks to appear electronically at a hearing which is not otherwise being conducted electronically.

Comment: Jay Shergill requests guidance as to what constitutes good cause for an electronic appearance, and asks whether any further steps must be taken after filing a petition to appear electronically, what happens if the WCJ fails to respond to such a petition, and whether it is possible to conduct a hearing where some but not all parties appear electronically.

Response: It is certainly possible to conduct a hearing where some but not all parties appear electronically, and the intent of Rule 10816 is to allow for that by allowing parties to seek to appear electronically on a party-by-party basis even where a hearing is set to occur in person.

We believe that any attempt to define “good cause” in the rules would unnecessarily restrict the discretion of the WCJ, and that the good cause determination in any given case is so inherently dependent upon the facts of that specific case that it would be unwise to attempt to provide generalized guidance.

After filing a petition to appear electronically, no further steps are required from the petitioning party unless the WCJ requests further information or otherwise takes some action other than approving or denying the petition. Parties should make sure to file their requests to appear electronically well in advance of the hearing in question, in order to give the WCJ sufficient time to issue a ruling ahead of the hearing. If the WCJ takes no action on the petition prior to the hearing, the party should raise the issue with the WCJ at the hearing and obtain a ruling at that time.

#### Comments Relating to Proposed Amendments to Rule 10818, “Recording of Proceedings.”

Comment: CWCI suggests requiring that any request to record proceedings be lodged at least 30 days prior to the hearing, and that subsection (b), allowing recording for personal use only with the permission of the WCJ, should be struck entirely as unnecessary because “the only official recording under subsection (e) is that of the designated court reporter, and any other recording is by definition for personal use.”

Response: Subsection (a) governs requests from the media or other non-parties to record proceedings for purposes other than those intrinsic to the workers’ compensation system, while subsection (b) provides a mechanism by which parties may request to record proceedings for their own personal notetaking purposes; the two subsections therefore cover very different situations and accordingly differ in their particulars. Although the amount of advance notice provided is certainly a factor to be considered in deciding whether to grant a request to record proceedings, we do not see a compelling reason to set a deadline of 30 days prior to the hearing for the filing of such a petition.

1. As discussed more thoroughly in the ISOR (at p. 1, fn. 3), the WCAB is not subject to the rulemaking provisions of Article 5 (Gov. Code, § 11346 et seq.), Article 6 (id. § 11349 et seq.), Article 7 (id. § 11349.7 et seq.), and Article 8 (id. § 11350 et seq.) of the Administrative Procedure Act (APA), with one exception not relevant here. [↑](#footnote-ref-1)