



ANDREW INJURY LAW

SERIOUS INJURY LAW

Matthew C. Andrew
Attorney licensed in Idaho

August 14, 2026

Idaho Industrial Commission
Attn: Judicial Division — Public Comment on Proposed Judicial Rules
11321 W. Chinden Blvd., Bldg. #2
Boise, Idaho 83714

Via Email: Dana.Ryden@iic.idaho.gov

Re: Public Comment — Proposed Amendments to the Judicial Rules of Practice and Procedure Under the Idaho Workers' Compensation Law

Dear Chair Sharp, Commissioner White, and Members of the Commission:

Thank you for the opportunity to comment on the proposed amendments to the Judicial Rules of Practice and Procedure ("JRP"). I am an Idaho attorney in solo practice. My practice is devoted to representing injured workers and claimants in workers' compensation and personal injury matters, and I appear before the Commission and its Referees regularly. I offer these comments in that capacity, and in the spirit in which I believe the Commission solicits them.

Let me begin with what is good in this draft, because there is a great deal of it. The Commission has undertaken a serious and largely successful effort to modernize and clarify its rules. The streamlined default procedure under Rule 6 removes a needless procedural step. The clarification of subpoena authority and service timing in Rule 9 resolves a recurring source of confusion. The added language in Rule 19.E.2.c concerning the application of the thirty percent penalty to underpayments is a sensible correction. Rule 8.D.2's express requirement that emergency hearings be recorded is exactly the right instinct. These changes will make practice before the Commission clearer and fairer, and the drafters deserve credit for them.

My concern is with a different thread that runs through the draft. Read individually, the amendments discussed below appear to be housekeeping — the tidying of loose vocabulary. Read together, they have a cumulative effect that I do not believe the Commission intends and that I do not believe the Commission has the authority to accomplish by rule: they narrow, and in several settings eliminate, the Commission's statutory obligation to make a record of what happens in matters before it.

I write to ask the Commission not to adopt those changes.

I. The statutory baseline: Idaho Code § 72-710

Idaho Code § 72-710, titled "Transcripts of proceedings," provides in full:

A stenographic or machine transcription of any proceeding or of testimony adduced at any hearing, shall be taken by the commission.

Three features of that sentence govern everything that follows.

PO Box 170, Melba, Idaho 83641

(208) 517-7670 • (877) 317-2568 • Fax (208) 205-9535 • andrewinjurylaw.com

First, the statute is written in the disjunctive. It reaches "any proceeding" *or* "testimony adduced at any hearing." Those are two distinct categories, joined by "or." If the Legislature had meant to require a record only of hearings, the first clause would do no work at all, and courts do not read statutes so as to render language superfluous. The necessary conclusion is that "proceeding" is broader than "hearing," and that the recording obligation extends beyond formal evidentiary hearings to the other matters conducted before the Commission and its Referees.

Second, the obligation is mandatory. The Legislature said the transcription "shall be taken." It did not say "may be taken," "shall be taken upon request," or "shall be taken when the Commission deems it appropriate."

Third, the obligation belongs to the Commission. The statute places the duty on the agency — "shall be taken by the commission" — not on the parties, and certainly not on the party who happens to think to ask.

II. The amendments remove the statute's operative term

The single most striking feature of this draft is that it strikes the word "proceeding" nearly everywhere it appears in the current rules and replaces it with a narrower substitute. The pattern is consistent and it is extensive:

- **Rule 2.B** (p. 4) — participating in any ~~proceeding~~ **conference or hearing**
- **Rule 5.A** (p. 10) — a pending ~~proceeding~~ **case**; failure to attend a **hearing or** conference
- **Rule 6.C** (p. 11) — a defaulted party may not participate further ~~in the proceedings~~
- **Rule 8.B.1** (p. 13) — any prehearing ~~proceeding~~ **issue**; direct that the ~~proceeding~~ **conference or hearing** be conducted by telephone
- **Rule 9.A** (p. 17) — attend as a witness in any ~~proceeding~~ **hearing**
- **Rule 10.F** (p. 19) — included in the record of ~~proceedings~~ **of the case**
- **Rule 10.I** (p. 20) — the integrity of the virtual ~~proceeding~~ **hearing**
- **Rule 14.A, C, D** (p. 25) — no further ~~proceedings~~ **action**
- **Rule 15.B, D** (p. 26) — the petitioner in the ~~proceeding~~ **case**; parties to the ~~proceeding~~ **case**
- **Rule 17.D.2–3** (p. 29) — mediation ~~proceedings~~; admissible in any ~~proceeding~~ **hearing**
- **Rule 20, Comment** (p. 43) — Change of Physician ~~proceedings~~ **hearings**
- **Rule 21.A** (p. 44) — Show Cause ~~Proceedings~~ **Hearings**

I want to be careful and fair here. I do not suggest that any individual substitution is improper in isolation, and several of them plainly improve readability. But "proceeding" is not an arbitrary word in this context. It is the operative term in the statute that obligates the Commission to make a record. When a rulebook is rewritten so that the statutory trigger word appears almost nowhere, the practical consequence is predictable: a party seeking a record of anything not labeled a "hearing" will be met with the argument that the rules contemplate no such thing.

Rule 10.F illustrates the point with unusual clarity. The current rule refers to "the record of proceedings." The draft deletes "of proceedings" and substitutes "of the case." The Commission is thus proposing to remove from its rules the precise phrase — a record of proceedings — that Idaho Code § 72-710 requires it to create.

Deleting a word from a rule does not delete it from the statute. Section 72-710 will continue to say what it says regardless of what these rules say. But a rulebook that is out of step with the statute it implements is

a rulebook that invites disputes, generates avoidable litigation, and — most importantly — leaves injured workers uncertain about a right the Legislature already gave them.

III. The new "may request" language inverts a mandatory duty

Two proposed additions concern me most directly. In Rule 3.F.2 (p. 6), governing motions, and again in Rule 8.B.1 (p. 13), governing prehearing and telephone conferences, the draft adds the following sentence:

If a conference or hearing is conducted, the parties may request it be recorded pursuant to Idaho Code § 72-710.

Respectfully, that sentence does not implement § 72-710. It reverses it.

The statute imposes an affirmative, self-executing duty on the Commission. The proposed rule converts that duty into a party-initiated election — a thing that happens only if someone remembers to ask for it. An agency may adopt rules that carry out a statutory command. It may not adopt a rule that makes optional what the Legislature made mandatory. Idaho Code § 72-508 grants the Commission authority to adopt "reasonable rules and regulations for effecting the purposes of this act," and provides that such rules are binding "when consistent with law." A rule that conditions a mandatory statutory obligation on a party's request is not consistent with the law it purports to implement.

The drafting problems compound the conceptual one. The proposed sentence supplies no standard for granting a request, no obligation to grant one, no timing, no procedure for making one, and no stated consequence if one is denied. It creates a request, not a right.

There is also a practical asymmetry the Commission should weigh. Sophisticated, repeat-player parties — sureties, third-party administrators, and their counsel — will know to make the request. Unrepresented injured workers will not. The rule thus allocates the benefit of a statutory protection to the party least in need of it and withholds it from the party the Workers' Compensation Law exists to protect. I do not believe that is anyone's intention, but it is the foreseeable operation of the rule as written.

IV. The selective mandate in Rule 8.D confirms the narrowing

The draft adds to Rule 8.D.2 (p. 16), governing emergency hearings, the sentence: "All hearings held pursuant to this section shall be recorded as proceedings per Idaho Code § 72-710."

That addition is correct, and I support it. But its placement is telling. When a rulebook expressly mandates recording for one category of matter and stays silent as to every other, the ordinary inference — the one opposing counsel will draw, and the one a reviewing court may draw — is that recording is *not* required elsewhere. Read alongside the permissive "may request" language in Rules 3.F.2 and 8.B.1, the draft creates a three-tier structure found nowhere in the statute: matters that must be recorded, matters that may be recorded on request, and matters as to which the rules say nothing at all.

Section 72-710 draws no such distinctions.

V. In practice: the matters that would lose their record

This is not an abstract or academic objection. Under the draft as written, the following matters — each of which can determine whether an injured worker receives medical care or income — would proceed with no assured record.

Expedited change of physician hearings (Rule 20.G, p. 42). The rule expressly contemplates that "[t]he parties shall be afforded the opportunity to present witnesses," that exhibits, affidavits, and depositions will be offered into evidence, and that the presiding officer will issue a decision within fourteen days. Yet no recording provision was added. Compounding the problem, Rule 20.H.2 provides that the decision "shall not be subject to review or appeal until all issues in the case have been determined." A worker whose access to a different physician is denied on the strength of live testimony taken months or years before any reviewable decision issues will have nothing but memory to work from.

Motions for relief under Idaho Code §§ 72-434 and 72-435 (Rule 22.C.5, pp. 45–46). These proceedings determine whether an employer may suspend or terminate an injured worker's benefits. The rule provides that "[t]he parties shall be afforded the opportunity to present witnesses at hearing." No recording provision was added, and Rule 22.C.6 again defers all appellate review. It is difficult to identify a category of matter where a record matters more and where the draft provides less.

Settlement approval hearings (Rule 18.A.6 and 18.B.2, pp. 32–33). These hearings occur precisely where the Commission's protective function is at its height — where a party is unrepresented, or where the claimant is a minor child or legally incompetent. No recording provision was added. Rule 18.B.3 then makes an order refusing approval "immediately appealed to the Idaho Supreme Court on the question of whether the Commission abused its discretion." An abuse-of-discretion appeal from an unrecorded hearing asks the Supreme Court to evaluate a discretionary decision it cannot see.

Motion arguments (Rule 3.F.2, p. 6), prehearing and telephone conferences (Rule 8.A–B, p. 13), declaratory ruling hearings (Rule 15.F.1, p. 27), and show cause hearings (Rule 21, p. 44). Stipulations are made in these settings. Issues are narrowed and sometimes waived. Discovery is granted and denied. Deadlines are set and cases are dismissed. Under the draft, none of it is assuredly preserved.

VI. Consequences for review, briefing, and public confidence

Appellate review becomes illusory. Article V, § 9 of the Idaho Constitution and Idaho Code § 72-724 give parties the right to review of Commission decisions in the Idaho Supreme Court, and Idaho Code § 72-732 authorizes an award to be set aside where the findings do not support the award or are not supported by substantial competent evidence. Every one of those protections presupposes a record. A right of review that cannot be exercised because no one wrote down what happened is a right in name only.

The Commission's own briefing rule becomes impossible to satisfy. Rule 11.C (p. 21) requires that whenever a party refers to hearing testimony, "such reference must include a citation to the page or pages and line or lines in the transcript," on pain of a motion to strike. A party cannot cite a transcript that does not exist. The draft would create rules that demand of practitioners something other rules in the same document make unavailable.

Ex parte protections lose their evidentiary footing. Rule 5 forbids ex parte communications and provides a remedy when they occur. But the unrecorded conference is exactly where such problems are

hardest to detect and impossible to prove. Rule 5's protections are only as strong as the record that could demonstrate a violation.

Public confidence depends on transparency. Injured workers appear before this Commission at the most difficult moments of their working lives, often without counsel, and often against an adjuster or defense attorney who has done this hundreds of times. What sustains their confidence in the process is the knowledge that what was said was written down — that the proceeding was real, official, and reviewable. A record protects the Commission and its Referees just as much as it protects the parties. It is the best answer to any later claim that something improper occurred.

VII. A rule may implement a statute, but it may not narrow one

I recognize the countervailing considerations, and I do not dismiss them. Idaho Code § 72-708 directs that process and procedure under the Workers' Compensation Law "shall be as summary and simple as reasonably may be." Court reporters are expensive, and their availability is genuinely constrained. The Commission's resources are finite. No one believes a four-minute scheduling call requires the same apparatus as a full-day hearing on causation.

But § 72-708 speaks to the *manner* of proceeding; it is not a license to dispense with the record the Legislature separately and specifically commanded in § 72-710. And the statute itself already supplies the flexibility the Commission needs: § 72-710 authorizes "machine transcription," not merely stenography. Digital audio recording of a telephone conference costs the Commission essentially nothing and can be retained without transcription unless and until a party orders and pays for a transcript under Rule 10.H. The tools to satisfy the statute inexpensively already exist and are already authorized by its text.

If the Commission believes § 72-710 imposes obligations that are impractical in the modern era, the appropriate remedy is to seek an amendment from the Legislature. It is not to reduce the statute's scope through the vocabulary of a procedural rule.

VIII. What I respectfully request

I ask the Commission to consider the following, and I offer them as concerns rather than as drafting proposals:

1. **Retain the word "proceeding"** throughout the JRP wherever the current rules use it, and particularly in Rule 10.F's reference to "the record of proceedings." The rules should speak in the same terms as the statute they implement.
2. **Withdraw the "may request" sentences** added to Rules 3.F.2 and 8.B.1. Whatever their intent, they state that a statutory duty is a party's option, and they will be read that way.
3. **Extend the correct principle already stated in Rule 8.D.2** to every matter conducted before the Commission and its Referees — including expedited change of physician hearings under Rule 20.G, motions for relief under Rule 22, settlement approval hearings under Rule 18, declaratory ruling hearings under Rule 15, show cause hearings under Rule 21, motion arguments under Rule 3.F, and conferences under Rule 8. *My position is straightforward: every hearing, conference, and matter argued before the Commission should be recorded.*

4. **Rely on machine recording, expressly permitted by § 72-710**, so that the cost of universal recording is modest and the cost of transcription continues to fall, as it does today, on the party who orders the transcript.
5. **Confirm that a party's failure to request recording does not waive the record**, and that the duty to create it remains the Commission's.

Conclusion

Nothing in these comments is meant as a criticism of the Commission's good faith, of the drafters' diligence, or of the many genuine improvements this draft contains. I am confident that the substitution of "hearing" for "proceeding" began as an editorial preference for plain and consistent language, not as a policy decision about the scope of the record.

But the effect is a policy decision all the same. Taken together, these amendments would leave the Commission's rules describing a narrower recording obligation than Idaho Code § 72-710 imposes, and would leave injured workers — the very people this system exists to protect — dependent on their own procedural sophistication to secure a record the Legislature already guaranteed them.

I urge the Commission not to regulate away, however inadvertently, its statutory obligation to make a record of what occurs in matters before it. I would welcome the opportunity to discuss these concerns further, in writing or in person, and I am grateful for the Commission's consideration.

Sincerely yours,



Matthew C. Andrew
Attorney at Law