



North Carolina Association of Defense Attorneys

The Right Affiliation. The Right Resources. The Right Reasons.

September 11, 2012

Ms. Amber Cronk
North Carolina Industrial Commission
4336 Mail Service Center
Raleigh, North Carolina 27699

RE: Comments, Objections and Recommendations Relating to Proposed Rules

Dear Ms. Cronk,

Attached please find comments, objections and recommendations of the North Carolina Association of Defense Attorneys ("NCADA") as it relates to the proposed rules published by the North Carolina Industrial Commission. NCADA member firms with a workers' compensation practice have reviewed and are in agreement with these comments, objections and recommendations as noted by their signatures below. Substantial time and effort was expended by numerous attorneys who thoroughly reviewed all of the proposed rules. Thank you for the opportunity to provide feedback on the proposed rules. Please do not hesitate to contact me should the Commission have any questions or need clarification regarding our position on the proposed rules.

Very truly yours,

Handwritten signature of Lawrence M. Baker in black ink.

Lawrence M. Baker
Chair, NCADA Workers' Compensation Group

Handwritten signature of Julia Ellen Dixon in black ink.

Julia Ellen Dixon
Vice Chair, NCADA Workers' Compensation Group

Handwritten signature of Michael Ballance in black ink.

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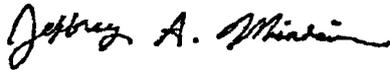
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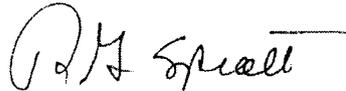
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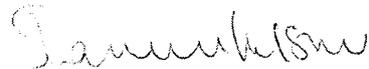
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NORTH CAROLINA INDUSTRIAL COMMISSION (“NCIC”)

PROPOSED RULE REVISIONS

**COMMENTS FROM THE NORTH CAROLINA ASSOCIATION OF DEFENSE ATTORNEYS
 (“NCADA”)**

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NCIC PROPOSED RULE REVISIONS – NCADA COMMENTS TO 10A

SECTION 0100 – ADMINISTRATION

Rule .0103 (Notice of Accident and Claim of Injury or Occupational Disease): G.S. § 150B-2(8a)d states: “‘Rule’ means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly . . . or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following: . . . d. A form, the **contents or substantive requirements of which are prescribed by rule or statute.**” (emphasis added) The NCADA asserts that many if not all NCIC forms currently in use (including, but not limited to the forms listed in current Rule 103) have “contents” and/or “substantive [procedural] requirements” that are not specifically “prescribed by rule or statute,” therefore, the NCIC should propose a rule or rules setting out the proposed content of and necessity for each form.

Rule .0105 (Electronic Payment of Costs): The proposed rule is not supported by statutory authority. The NCADA asserts that Chapter 97 does not provide authority for the requirement of electronic payment of non-medical fees and costs. G.S. § 97-81(a) is the only statute that speaks to electronic submission of documents. It notes “[t]he Commission may authorize the use of electronic submission of forms and other means of transmittal of forms and notices when it deems appropriate.” However, the statute does not speak to the electronic transmission of fees simultaneous with the submission of documents.

The proposed rule is also contrary to the Administrative Procedure Act. Chapter 150B-19.1(a)(2), notes that “in developing and drafting rules for adoption in accordance with this Article, agencies shall adhere to the following principles . . . (2) An agency shall seek to reduce the burden upon those persons or entities who must comply with the rules. The NCADA asserts that the requirement to simultaneously file electronic documents with fees will place a tremendous burden on all parties, particularly defendants. Although the NCADA is not opposed to the establishment of an electronic document and fee submission protocol as an alternative to paper submissions – i.e., checks – the NCADA recommends that the electronic submission not be required until the parties and the NCIC collaborate to create a system that will be user-friendly, efficient, secure and will not overburden one party.

The proposed rule is also contrary to Chapter 150B-19.1(a)(5) in that no technical, economic or other relevant information has been provided as to the reason it is necessary to require that documents and fees be paid simultaneously through an electronic fee portal. Based on prior reports of the NCIC, the NCADA is under the impression that well over 20,000 settlement agreements, Form 24s and Form 26A Agreements are filed annually. Further, and perhaps most importantly, the NCADA understands that the overwhelming majority of Employers/Insurance Carriers/TPAs/Defense Counsel are currently not utilizing the NCIC’s present EDFP system and that many do not have the capability to pay these case-specific processing fees electronically – they are only set up to pay via paper checks and do not have corporate credit cards. The NCIC’s

computer system seems ill equipped to manage thousands of document filings together with simultaneous electronic fee submissions.

Finally, on page 4 of the Fiscal Impact Analysis, the document does not address how Rule 105 will have an "Impact on the Private Sector."

SECTION .0300 - INSURANCE

Rule .0301(f) (Proof of Insurance Coverage): The NCADA recommends that this rule be expanded to a principal contractor, intermediate contractor, or subcontractor who has notice that the policy has lapsed, is cancelled, or is not renewed for any reason. This provision correctly places the responsibility on the contractor to notify of a change in its workers' compensation coverage. This provision will assist in a number of G.S. § 97-19 cases where a principal contractor does not have notice that there is a purported problem with an intermediate or subcontractor's workers' compensation coverage and continues to allow the intermediate, subcontractor, or employees of those entities to continue to work on the principal contractor's job site as a result.

Section 0400—DISABILITY, COMPENSATION, FEES

Rule .0404(a) (Termination and Suspension of Compensation): There is no statutory authority for the rule stating that there is a rebuttable presumption that disability continues until the employee returns to suitable employment.

Rule .404(c): There is no statutory authority for payment of the costs associated with terminating benefits via the Fee Portal. *See comments regarding Rule .0105.*

Rule .404(d): There is no statutory authority for the requirement that the NCIC “shall” refuse to accept the application to terminate benefits due to the failure to specify the number of pages attached.

Rule .404(g): The language stating that a hearing is to be set “without delay” is not consistent with the statutory mandate that a hearing shall be scheduled on a “preemptive basis.” A preemptive basis would require the hearing be scheduled in a manner which moves the matter to the head of the hearing schedule—ahead of other non-preemptively set cases. The rule appears to be interpreting “preemptive basis” to mean “without delay,” which the NCADA asserts is not proper under the APA. It is also noted that the statutory authority cited for this rule incorrectly states § 97-18(c) and § 97-18(d) instead of § 97-18.1.

Rule .0405 (Reinstatement of Compensation): There is no statutory authority for the telephonic procedure proposed in this rule. The statutory authority in G.S. § 97-18(k) only states that where an employer contests the employee’s request for reinstatement of benefits the matter shall be scheduled on a preemptive basis. Unlike the statutory authority contained in G.S. § 97-18.1, which specifically details the telephonic procedure, the legislature made no similar rule here. The fact that the legislature did not set out a specific framework for conducting an informal or telephonic hearing, as was done in §97-18.1 is evidence that the legislature did not intend such an informal telephonic hearing process to take place with the reinstatement of compensation provision. Rather, the only requirement of §97-18(k) is that a preemptive hearing be conducted, which the NCADA contends requires a full evidentiary hearing.

If it is determined that the NCIC has statutory authority to develop such informal telephonic hearing procedures for the reinstatement of benefits, those procedures should track the same timelines for suspension of benefits. Given that there is no legislative authority for the procedure, there is no basis for making the timeframes shorter for reinstating benefits as compared to those for suspending benefits. As proposed, the carrier has only 10 days to respond to a request for reinstatement of benefits (as opposed to 17 days which is provided in a Form 24 or suspension process). If an employer does not contest reinstatement, the rule requires that an administrative decision be rendered within 5 days after the expiration date for the employer to respond. Again, there is no statutory authority for this timeframe and there is no similar timeframe regarding the Form 24 suspension procedure. Finally, if the carrier or employer contest reinstatement of benefits, the rule requires that an informal hearing is scheduled within 7 days of receipt of the objection, whereas a Form 24 suspension procedure allows 25 days for the informal hearing. It is also noted that the Form 24 procedures now eliminate the requirement that

a decision be rendered within 5 days after the completion of the informal hearing. However, the 5 day requirement remains in place for rendering a decision for reinstatement of benefits.

Rule .0406 (Discount Rate to be Used in Determining Commuted Values): This rule is unclear and ambiguous and has no statutory authority. "Commutated Value" is not defined in the statute. The proposed rule ties the rates to the Internal Revenue Services applicable federal rate. These rates change on a monthly basis (e.g., ranging from 1.2% to 1.6% for the first 6 months of this year). There is no guidance on the "trigger date" to determine the applicable rate. For example, if commuted value on a death claim is being paid, would it be based on the rate at the time that the death occurs or at the time that the payments are being agreed to and paid? The changing rate would also result in different benefits being paid to two different individuals who have identical compensation rates and injuries. In addition, the statutorily defined "interest rate" (found in G.S. § 24-1) is 8%. Employers and carriers are still required to pay that interest rate on awards after a hearing. Thus, if a hearing is needed in a commuted value case, the award would be commuted to a much lower rate than the interest awarded on that same amount.

Rule .0408 (Application for or Stipulation to Additional Medical Compensation): There is no statutory authority for requiring the employer to state the grounds for and provide supporting documentation that employee is not entitled to ongoing medical treatment beyond two years. The statute requires that there be a "substantial risk" of the necessity of future medical treatment, which would be the burden of the employee to show. The proposed rule shifts the burden to the defendant to prove medical treatment is not necessary.

SECTION .0500—AGREEMENTS

Rule .0502(2)(b) (Compromise Settlement Agreements): The proposed rule lacks statutory authority. G.S. § 150B-19(1) notes an agency may not adopt a rule which “implements or interprets a law unless that law or another law specifically authorizes the agency to do so.” The proposed rule notes that where liability is denied, the employer/insurer undertakes to pay all unpaid medical expenses to the date of the agreement. The provision is overreaching and has no statutory basis in the North Carolina Workers’ Compensation Act. It rewards employees for filing frivolous claims just to get medical bills paid, because the claim cannot otherwise be settled.

Rule .0502(3)(d): The proposed rule has no legal basis in that it goes beyond the NCIC’s authority to approve settlements as set forth in G.S. § 97-17. The provision that requires the employer/insurer to provide written notification that a settlement has been approved to all unpaid medical providers is burdensome and not reasonably necessary to implement State law. Furthermore, serious questions often exist about the relatedness versus non-relatedness of certain medical treatment, such that it is frequently unclear exactly what unpaid medical treatment would fall within this provision.

SECTION .0600—CLAIMS ADMINISTRATION AND PROCEDURES

Rule .0601(b) (Employer’s Obligations Upon Notice; Denial of Liability; And Sanctions):

There is no statutory authority for requiring the defendants to send a denial to healthcare providers. The employee is in a much better position to contact the employee’s treating doctors and provide any notification needed. The NCADA has no other objections to the proposed revisions to this Rule.

Rule .0603 (Responding to a Party’s Request for Hearing): There is no statutory authority for making the defendants respond to a Form 33 but not an employee. This provision of the rule is not necessary and treats the parties to the claim differently, which is as violation of the due process clause of the United States Constitution. The NCADA has no other objections to the proposed revisions to this Rule.

Rule .0604 (Appointment of Guardian Ad Litem): Rule 17(b)(2) allows the taxing of guardian ad litem fees as costs, but only where a guardian ad litem is defending a minor in a civil suit. Rule 17(b)(1) deals with suits by a guardian ad litem in the name of a minor and there is no provision for taxing fees or costs. Therefore, the NCADA does not believe there is statutory authority for the NCIC’s proposed rule that the NCIC assess a fee against an employer or carrier to be paid to an attorney who serves as a guardian ad litem on behalf of a minor or incompetent who is also prosecuting the claim. The NCADA has no other objections to the proposed revisions to this Rule.

Rule .0605 (Discovery): The NCADA supports the addition of Rule 605(6) allowing requests for production of documents without leave of the NCIC. There has been some objection to this new rule because G.S. 97-80 provides discovery shall be “as summary and simple as reasonably may be.” Those objecting suggest discovery interests are sufficiently met by Rule 607, and that the introduction of request for production of documents will be lead to abuse. However, any such request would *only* be proper “if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” As our economy and labor markets continue to evolve, Rule 607 has become increasingly inadequate in facilitating the disclosure of unprivileged information that could have limited the need to present some factual disputes to the NCIC. Some examples include difficulties under the current scheme for obtaining income tax returns of workers paid as contractors on a Form 1099, or the difficulty in obtaining job descriptions, employment documents, and wage information for employees who have resumed work with a different employer. Therefore, the new rule is advisable because it will help to minimize the issues to be resolved at a hearing before the NCIC. Moreover, the parties will adequately be protected from abuse by their right to object and/or file motions to compel.

However, in this regard, there is no statutory authority for Rule 605(9), which states that the parties shall not submit motions to compel production of information otherwise obtainable under G.S. 97-25.6. The NCADA recommends that defendants should be able to request

medical records either directly from the medical providers or insist that the employee obtain the medical records for defendants if defendants are unable to obtain them directly. This would be applicable in all cases and especially important where there is an out of state physician.

Rule .0607 (Discovery of Records and Reports): The requirement that all employment records be produced even if there is no showing of relevance is contrary to statutory authority. The NCADA has no objections to the other proposed revisions to this Rule.

Rule .0608 (Statement of Incident Leading to Claim): There is no statutory authority that requires the recorded statement be provided within 45 days after the request for hearing. The NCADA contends that the 45 day limit is unreasonable, since defendants routinely do not have recorded statements transcribed until after a hearing request is received. In addition, the sanction for failure to produce the recorded statement within 45 days does not allow for any discretion by the NCIC. The NCADA contends that this Rule should be handled under the discovery rules in Rule 605 and that a recorded statement should be produced within 30 days after it is requested.

Rule .0609 (Motions Practice in Contested Claims): It is unclear if there is statutory authority for implementing a motions practice in contested cases, but it makes sense that the NCIC should have motions procedures. However, such motions procedures should have clearly delineated rules for each such motion within the jurisdiction of the Executive Secretary and which have met the requirements of the APA rule making process. Additionally, the NCADA contends that the section regarding not casting opposing counsel in a bad light should not be taken out of the Rule.

Rule .0609A (Medical Motions and Emergency Medical Motions): The NCADA strenuously objects to the procedures for medical motions and emergency medical motions. It appears that the NCIC is using the 2008 amendment to 97-78(f) as its authority for establishing the medical motions and emergency medical motions procedure. The statutory change indicated that the NCIC shall prepare and implement a strategic plan for accomplishing all of the following: (1) Tracking compliance with the provisions of G.S. 97-18(b), (c), and (d), and establishing a procedure to enforce compliance with the requirements of the subsections; and (2) Expediently resolving requests for, or disputes involving, medical compensation under G.S. 97-25, including selection of a physician, change of physician, specific treatment involved, and the provider of such treatment.

However, the application of these provisions has violated defendant's due process rights under the United States Constitution. The NCADA contends that the old system of having medical motions heard at the Executive Secretary level initially and then referred to a deputy commissioner if needed was adequate. The NCADA contends that the expedited telephonic hearing system, with a 30-day timeframe, is not adequate. Defendants are usually not capable of obtaining medical depositions within the given 30 day time frame, and other testimony is

normally insufficient in these cases. The proposed Rule does not mandate a 30-day deadline, but says that depositions deemed necessary shall be set on an expedited schedule and that requests for IMEs shall be denied unless there is a demonstrated need. The basic problem with the whole expedited telephonic procedure is that and the results of a medical motion ruling can usually determine the outcome of a case, yet a defendant can be denied its due process rights to cross examine witnesses and present additional testimony and evidence. In other words, if a surgery is mandated, how do you undo the surgery if it is later determined that it was not necessary or not causally related to the work related injury?

The NCADA recommends that any request for change of treating physicians, or medical treatment that includes surgery, spinal cord stimulators or some extensive and invasive medical treatment procedure be dealt with more formally by being referred to a deputy commissioner for an expedited, full evidentiary hearing. If the issue before the NCIC deals with medications, diagnostic testing, etc., the NCADA does not object to the expedited, telephonic procedure.

The NCADA contends that G.S. 97-78(f) did not provide statutory authority for setting up the expedited process established by the NCIC that essentially eliminates live, in person hearings with depositions. The concern with "informal hearings" or telephonic hearings in the expedited procedures already adopted is that they limit the defendants' due process to introduce evidence. The NCADA contends that requests for change of treating physicians and extensive and invasive medical treatment, such as surgeries and spinal cord stimulators can affect the outcome of a claim.

In addition, because these disputes almost always deal with only a portion of the claim, recent case law has indicated that these matters are interlocutory and therefore not appealable. Therefore, when you have a significant issue such as invasive surgery, (as opposed to a medication, physical therapy, diagnostic testing or a one-time evaluation), which is not only irreversible but likely to significantly impact other issues in the claim such as work restrictions, permanent impairment and/or disability, the NCADA feels that these matters should go to a full evidentiary hearing. However, the NCADA recognizes that these matters need to be handled expeditiously and that a shorter timeline is appropriate. However, given the potential dramatic impact on the claim in its entirety, at least those issues that deal with surgery or other irreversible issues, should be directed to a full hearing.

Rule .0612 (Depositions and Additional Hearings): The statutory authority to assess expert witness fees against the employer is limited. Additionally, the NCADA contends that fees should be assessed only if the employee prevails, and even in such cases the employees should bear some of the costs. The new Rule only mandates that defendants pay for the deposition of any doctor, where the defendant paid for the treatment with that doctor, but then gives the NCIC discretion to order the defendants to pay for all other experts. The NCADA contends that employees should bear the cost of deposing the experts they hire in cases. This is true especially

where the employee chooses out of state experts who provide opinions which may be contrary to generally accepted science. As further commentary and support of the NCADA's concerns regarding the proposed rules, attached please find a memorandum of law in opposition to the NCIC's current rules and practice of assessing costs and fees solely against defendants, which was filed in a current claim and is marked as **Exhibit 1**.

Rule .0613 (Expert Witnesses and Fees): The NCADA contends that the 10% penalty for failure to make payment to an expert witness within 30 days should not be mandatory but discretionary. There are incidents outside the parties' control that delay payments, such as a missing W-9 or some other problem.

Rule .0616 (Dismissals): The NCADA contends that Rule 616(c) is language that remains from current Rule 613(2) which speaks to the removal of a claim from a hearing docket and the right to pursue the claim within two years after removal, which has the effect of a tolling provision. The NCADA contends that there is no statutory authority for the NCIC to create a substantive right (i.e., tolling provision) through a procedural mechanism (i.e., removal of hearing request). Since proposed Rule 616(c) contains language from the former removal rule, the NCADA asserts subsection (c) is improper. If the subsection is allowed to remain, the NCADA recommends that the deadline for re-filing a claim under Rule 616(c) following removal of a case from a hearing docket should be one year instead of two years, which is more consistent with the Rules of Civil Procedure. Further, the deadline for re-filing a claim following a removal of a case from a hearing docket should be no different than the deadline for re-filing following a voluntary dismissal. The employee has one year from the order of a voluntary dismissal without prejudice to re-file a claim.

SECTION .0700—APPEALS

Rule .0701(b) (Review by the Full Commission): The proposed rule is unclear and ambiguous. There is no requirement for the appellant or appellee to certify receipt of the transcript. If the NCIC intends to send all transcripts and Form 44s via electronic mail to parties represented by counsel, the NCADA recommends that the NCIC establish a procedure to ensure that the e-mail has been received by the appellant/appellee. The confirmation procedure could require counsel to respond to the transcript email with a carbon copy to opposing counsel.

Rule .0701(c): The NCADA contends this rule contravenes G.S. § 97-29(c) as it relates to extended benefits.

Rule .0701(e): The proposed rule is unclear. The use of the word “paragraph” is not consistent with statutory references such as “subchapter” and “subdivision.” The NCADA recommends “in this subsection” rather than “in this Paragraph.”

Rule .0701(f): The proposed rule is unclear and ambiguous. The new sentence that begins “Motions related to the issues for review...” is confusing in that it fails to establish a clear procedure to raise a motion and be heard before the Full Commission. The NCADA recommends that the proposed rule require a motion to be filed in writing and served on opposing counsel prior to the date of the Full Commission hearing.

Rule .0701(i): The proposed rule is unclear. The requirement that exhibits be cited as “Ex 3 p 12,” for example, is superfluous since the hearing transcript issued with a Form 44 does not delineate between the transcript and exhibit pages. All transcript and exhibit pages are consecutively paginated when the evidentiary record is published. Therefore, the NCADA recommends “Ex p 12.”

Rule .0702(a) (Review of Administrative Decisions): The proposed rule is not supported by statutory authority. In line 20, the NCADA recommends that the phrase “or the reinstatement of compensation,” be deleted as G.S. § 97-18(k) addresses the right to have a reinstatement hearing, which the NCADA asserts was not intended to be an administrative hearing. The statutory authority for a Form 24 hearing pursuant to G.S. § 97-18.1 is different than 97-18(k). This argument is further detailed in response to Rule .0609A.

Rule .0702(b): The proposed rule is unclear and ambiguous. First, the rule notes a motion to stay may be filed with an Administrative Officer, Commissioner or Deputy Commissioner; however, the rule caption speaks only to review of administrative decisions. Thus, it is not clear when a motion to stay should be filed with an Administrative Officer as compared to a Commissioner or Deputy. Second, the phrase “frustrate the purposes of the order, decision, or award” that begins on line 31 is vague and suggests a motion to stay may be denied in all cases—even in situations wherein the Administrative Officer weighed evidence for one party but did not afford the other party an opportunity to present evidence before issuing the underlying decision, which could be a violation of procedural due process.

Rule .0704 (Remand from the Appellate Courts): The proposed rule is unclear. The NCADA recommends that the rule require the NCIC to issue an order setting forth a new deadline for

submitting a statement on remand when a petition for discretionary review has been filed with the Supreme Court following a remand order from the Court of Appeals.

SECTION 0800—RULES OF THE COMMISSION

Rule .0801 (Suspension of Rules): The proposed rule is not supported by statutory authority and is in violation of the Administrative Procedure Act. Chapter 150B-18(6) does not allow an administrative agency to suspend its own rules unless “the rule establishes specific guidelines the agency must follow in determining whether to waive or modify the requirement.” The proposed rule is not sufficient.

Rule .0802 (Sanctions): The proposed rule is not supported by statutory authority. None of the statutes relied upon by the NCIC to promulgate this rule endow the NCIC with generalized authority to impose broad sanctions. For example, the proposed rule notes that sanctions can be assessed for failure to comply with NCIC rules, yet the proposed rule sites to sanctions allowed per Rule 37 of the Rules of Civil Procedure that relate solely to discovery violations. G.S. § 97-80(a) and (f) specifically note that Rule 37 does not govern discovery procedures in workers’ compensation claims; therefore, broad sanctions allowed by Rule 37 should not apply in workers’ compensation claims. Moreover, while G.S. §§ 97-18 and 97-88.1 allow for sanctions, the statutes are specific and limited. Other than the specific and limited grounds for imposing sanctions there is no statutory authority for broad sanctions under the Act. Finally, the proposed rule allows for attorneys to be sanctioned rather than parties, which could damage the attorney-client relationship and is not supported by G.S. § 97-88.1.

NCIC PROPOSED RULE REVISIONS – NCADA COMMENTS TO 10B

Rule .0202(c): The proposed rule contradicts Rule 9(j) of the Rules of Civil Procedure as it relates to the time requirements to designate a medical expert.

NCIC PROPOSED RULE REVISIONS – NCADA COMMENTS TO 10C

SECTION .0100—ADMINISTRATION

Rule .0101 (Applicability of the Rules): The proposed rule is not reasonably necessary to implement State law and is contrary to G.S. § 97-32.2. The Rules for Utilization of Rehabilitation Professionals were originally drafted pursuant to G.S. § 97-25.5. G.S. § 97-32.2 was later adopted and specifically sets out the requirements for vocational rehabilitation. The portion of Rule .0101 that reads “The Rules in this Subchapter apply to: (a) cases in which the employer is obligated to provide, or is providing medical compensation . . .” suggests that vocational rehabilitation can be required in a medicals only claim, which is contrary to G.S. § 97-32.2(a) which notes an employer may engage vocational rehabilitation “in a compensable claim” only.

The NCADA also recommends that because there are now two statutes that address rehabilitation services (G.S. § 97-25.5 and 97.32.2) the rules should delineate between those that apply to medical case managers and those that apply to vocational managers.

Rule .0103(3) (Definitions): There is no statutory authority for defining “Vocational Rehabilitation” to require the goal be to “substantially increase the employee’s wage earning capacity.” Furthermore, this definition is vague and ambiguous. The NCADA suggests that the defined goal should be to return an employee to suitable employment.

The proposed rule is also unnecessary, redundant and repeats the content of a law in violation of the APA. The NCADA asserts there is no need to define “vocational rehabilitation” in the rule since G.S. § 97-32.2 already defines what vocational rehabilitation services should entail.

Rule .0103(5): There is no statutory authority for the proposed definition of “suitable employment” for claims arising before June 24, 2011. While this definition was contained in the prior rules for Rehabilitation Professionals, there was no statutory authority for that definition.

Rule .0105(d) (Qualifications Required): As written, this rule appears to require both that the rehabilitation professional possess one of the professional certifications listed and have prior employment experience with the North Carolina Department of Health and Human Services as a vocational rehabilitation provider. It would not make sense for qualified medical rehabilitation professionals to have prior experience as a vocational rehabilitation provider for the State.

It is also unclear why subsection (e) is separate from subsection (d) when both appear to enumerate the requirements to serve as a rehabilitation professional.

The NCADA will defer to the rehabilitation professionals regarding the numerous rules dealing with training and qualifications, but seek to continue to have professional and qualified individuals engaged in medical and vocational rehabilitation.

Rule .0106(a) (Professional Responsibility of the Rehabilitation Professional in Workers' Compensation Claims): The NCADA asserts the inclusion of the word "retirement" is contradictory to the Act as amended by G.S. § 97-32.2.

Rule .0106(e): The references to web sites for professional organizations are unnecessary to implement State law.

Rule .0106(g): It appears that the word "activity" in line 23 is superfluous and should be deleted.

Rule .0107(d) (Communication): There is no statutory authority that *requires* that all correspondence and reports must be sent electronically. In addition, the proposed rule is unclear. For example, is the rehabilitation professional required to e-mail and mail reports to all parties? Or is the rehabilitation professional merely required to mail or fax reports only to parties without e-mail? As written, the rule is subject to numerous interpretations because it is ambiguous.

Rule .0107(j): There is no statutory authority for the requirement that the rehabilitation professional detail in writing the actions that an employee is required to take to become compliant with vocational rehabilitation, including the "overall effect" the actions or inactions of the employee are having on the rehabilitation goals. Rehabilitation professionals should be allowed to exercise their independent judgment and should not be forced to detail actions the injured worker must take to be in compliance with vocational rehabilitation. The rule is also unnecessary because Rule .0106(a) details the scope of the rehabilitation professional's role. Further, the proposed rule would place an unnecessary burden upon the rehabilitation professional in violation of Chapter 150B-19.1(2) and potentially the ethical codes adopted by their respective professions.

Rule .0108(e) (Interaction with Physicians): There is no statutory authority for limiting the rehabilitation professional from "initiating" a second opinion on the rating, independent medical examination, second opinion and consult. Furthermore, the proposed rule is unclear and ambiguous in that "initiate" is not defined. The NCADA asserts that the rule is unnecessary since the rehabilitation professional is supposed (and even required) to exercise independent judgment on the course of care. This rule unnecessarily curtails the scope of the independent judgment of the rehabilitation professional, which the rules otherwise require the rehabilitation professional to exercise.

Rule .0108(e)(2): The proposed rule needs additional language to make clear that the rehabilitation professional is not required to assemble or forward medical records to an independent medical examiner, second opinion provider or consultant until the request is authorized by the party who has the authority to direct medical treatment pursuant to G.S. § 97-25.

Rule .0109(d) (Vocational Rehabilitation Services and Return to Work): The NCADA suggests that this rule needs further clarification. Given that subsection (c) sets out the priority of return to work options and lists education and training as the sixth option, we believe this

subsection should also ask the rehabilitation professional to address what efforts have been undertaken by the employee to return to work before retraining or education was requested.

Rule .0109(i): The proposed rule is not reasonably necessary to implement G.S. § 97-2(22) or 97-32.2. The definition of suitable employment does not take into account transportation needs. Nor does 97-32.2 note that a vocational rehabilitation professional should consider transportation needs when performing job placement activities

Rule .0110 (Change of Rehabilitation Professional): This rule is unclear and ambiguous in that it allows the rehabilitation professional to be removed “to prevent manifest injustice,” but provides no guidelines on the definition of “manifest injustice.” In addition, there is no statutory authority for this phrase. The statute simply states a change may be ordered “for good cause shown.”

Rule .0201 (Suspension of Rules): The proposed rule is not supported by statutory authority and is in violation of the Administrative Procedure Act. The Administrative Procedure Act does not allow an administrative agency to suspend its own rules unless “the rule establishes specific guidelines the agency must follow in determining whether to waive or modify the requirement.” The proposed rule is not sufficient.

Rule .0202 (Sanctions): The proposed rule is not supported by statutory authority. None of the statutes relied upon by the NCIC to promulgate this rule endow the NCIC with generalized authority to impose broad sanctions. For example, the proposed rule notes that sanctions can be assessed for failure to comply with NCIC rules, yet the proposed rule sites to sanctions allowed per Rule 37 of the Rules of Civil Procedure that relate solely to discovery violations. G.S. § 97-80(a) and (f) specifically note that Rule 37 does not govern discovery procedures in workers’ compensation claims; therefore, broad sanctions allowed by Rule 37 should not apply in workers’ compensation claims. Moreover, while G.S. §§ 97-18 and 97-88.1 allow for sanctions, the statutes are specific and limited. Other than the specific and limited grounds for imposing sanctions there is no statutory authority for broad sanctions under the Act. Finally, the proposed rule allows for attorneys to be sanctioned rather than parties, which could damage the attorney-client relationship and is not supported by G.S. § 97-88.1.

NCIC PROPOSED RULE REVISIONS – NCADA COMMENTS TO 10D

Rule .0100 (Rules): The proposed rule is not unclear, ambiguous and is not supported by statutory authority in that the deletion of the word “reasonably” is completely contrary to the requirements in G.S. § 97-25.2 and may allow claimants to seek approval for experimental, non-proven therapies that are not covered by the fee schedule and are extremely costly. The rule may also be construed to be in conflict with G.S. § 97-25.2 in that the statute allows for dispute resolution procedures for managed care organizations that take more time than is allowed by the rule.

Rule .0104 (Qualification and Revocation): The proposed rule is unclear and ambiguous in that it fails to define “ineffective delivery of medical services.” The proposed rule is not supported by statutory authority in that G.S. § 97-25.2 does not authorize the NCIC to suspend or revoke a managed care organization’s rights under the statute.

NCIC PROPOSED RULE REVISIONS – NCADA COMMENTS TO 10E

SECTION .0200—FEES

As it relates to all fees and costs currently established and assessed by the NCIC, whether currently delineated in the proposed rules, the NCADA notes the following: G.S. §150B-19 states an agency “may not adopt a rule that does one or more of the following: . . . (5) **Establishes a fee or other charge** for providing a service in fulfillment of a duty **unless a law specifically authorizes the agency to do so or the fee or other charge is for one of the following:**

- a. A service to a State, federal, or local governmental unit.
- b. A copy of part or all of a State publication or other document, the cost of mailing a document, or both.
- c. **A transcript of a public hearing.**
- d. A conference, workshop, or course.
- e. Data processing services.

(emphasis added) G.S. §150B-2 (8a) defines a “rule” as “any agency regulation, standard, or statement of general applicability that **implements or interprets an enactment of the General Assembly . . . or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee** and the amendment or repeal of a prior rule.”

(emphasis added) The NCADA asserts that any fee or other charge such as a cost established by the NCIC is the equivalent of the establishment of a rule and should be subject to the APA rule making procedure. Therefore, the NCADA recommends that all fees and costs currently assessed or levied against any party in any claim subject to the jurisdiction of the NCIC be noted specifically in the rules. Further, each rule should note specifically the amount of the fee/other charge/cost and the party responsible for the fee/other charge/cost.

The only statutes that grant the NCIC authority to establish a fee or other charge (i.e., cost) are G.S. §97-73 and G.S. § 97-80. G.S. § 97-73(d) notes specifically that the NCIC may impose a fee against an employer for whom the NCIC provides an educational training program. The fees noted in **Rule .0204 (Accident Prevention and Safety Educational Program Fees)** are therefore appropriate pursuant to the APA because there is specific statutory authority for said fees.

G.S. § 97-73(a) notes that the NCIC may establish a “schedule of fees” that “shall be collected in accordance with rules adopted by the Industrial Commission.” Contrary to subsection (d), which specifically notes that fees for educational training programs should be imposed on the employer, subsection (a) of G.S. 97-73 is silent as to which party shall bear the fees/other charges/costs related to “examinations conducted, reports made, documents filed, and agreements reviewed under this Article.” Since the General Assembly has shown that it will assign specific fees against employers, the NCADA asserts that had the General Assembly intended for fees related to “examinations conducted, reports made, documents filed, and

agreements reviewed under this Article” be born solely by employers, the General Assembly would have specifically noted this in the statute. Therefore, the NCADA asserts that fees related to examinations conducted, reports made, documents filed, and agreements reviewed under this Article should be shared by all parties.¹ Thus, the NCADA asserts that **Rule .0203 (Fees Set by the Commission)** should be amended to include all fees currently charged by the NCIC for examinations conducted, reports made, documents filed, and agreements reviewed and should note that the fees are to be shared by all parties.

G.S. § 97-80(b) notes the NCIC may “. . . tax [hearing] costs against the **parties . . .**” (emphasis added) G.S. § 97-80(d) speaks to deposition testimony taken in conjunction with a hearing. Both subsections (b) and (d) speak specifically to testimony taken at hearings and expert and lay witness testimony taken by deposition either prior to or after hearings, which become part of the evidentiary record. The NCADA asserts the statute requires that costs related to the taking of testimony at hearing and during deposition must be taxed against the “parties”—plural. Therefore, the NCADA asserts that all hearing costs as well as fees related to expert and lay deposition testimony (e.g., payment of medical experts, payment of court reporters, etc.) should be shared by all parties and that the rules should specifically delineate the amount of proper fees and the party or parties to bear those fees. Thus, the NCADA recommends that **Rules 10A .0611 (Hearings Before the Commission), 10A .0612 (Depositions and Additional Hearings), 10A .0613 (Expert Witnesses and Fees), 10A .0619 (Foreign Language Interpreters) and 10E .0202 (Hearing Costs or Fees)** be properly amended to comport with the Act and the APA. As further commentary and support of the NCADA’s concerns regarding the proposed rules, attached please find a memorandum of law in opposition to the NCIC’s current rules and practice of assessing costs and fees solely against defendants, which was filed in a current claim and is marked as **Exhibit 1**.

G.S. § 97-80(c) is the **only** statute that gives the NCIC broad authority to set costs—“the Commission shall determine the manner in which payment of the costs of the mediated settlement conference is assessed.” (emphasis added) Therefore, only mediation fees set out in **Rules 10G .0104 (Duties of Parties, Representatives, and Attorneys) and 10G .0104A (Foreign Language Interpreters)** are appropriate.

The NCIC currently assigns costs to employers for hearing transcripts when a claim has been appealed to the Full Commission pursuant to G.S. § 97-85 regardless of whether or not the employer filed the appeal. While G.S. § 97-79 requires the NCIC to “provide for the preparation

¹ In the Editor’s Note to G.S. § 97-17, there is reference to Session Laws 2003-284, ss. 12.6C(a)-(e) as amended by Session Laws 2004-174, s. 3 and Session Laws 2004-203, s. 77, which provided “(a) The North Carolina Industrial Commission may retain the additional revenue generated by raising the **fee charged to parties** for the filing of compromised settlements from two hundred dollars (\$200.00) to an amount that does not exceed two hundred fifty dollars (\$250.00) for the purpose of replacing existing computer hardware and software. . . .” This session law provides further support that fees for “agreements reviewed” pursuant to G.S. § 97-73(a) should be borne by all parties not just the employers.

of a record of the hearings and other proceedings,” the statute does not authorize the NCIC to charge fees related to those transcripts solely against one party. While the APA allows the NCIC to establish a fee for a hearing transcript, the NCADA asserts that G.S. § 97-80(b), which notes that hearing costs shall be taxed against the “parties,” should prevent the NCIC from assigning transcript fees solely against the employer. The NCADA asserts the transcript fees should either be shared by the parties or born by the appealing party as a matter of public policy and in an effort to encourage judicial economy. The NCADA finally asserts that the transcript fees should be limited to transcripts and not exhibit pages and that fees per page should be reasonable and in line with transcript fees of other administrative agencies subject to the APA.

Rule .0201 (Document and Record Fees): There is a typographical error on line 9 in that “the actual cost” is noted twice.

Rule .0202(b) (Hearing Costs or Fees): This rule is not supported by the statutory authority listed. Chapter 143 applies only to the NCIC’s authority to hear tort claims. It is independent and inapplicable to the NCIC’s jurisdiction under Chapter 97. Therefore, the NCADA asserts further penalties should not be allowed in workers’ compensation claims for failure to pay fees or costs. If the right to charge penalties for failure to pay fees applies only to tort claims, the NCADA recommends that the rule borrow the phrase from Rule .0203(b) which notes “In tort claims cases, . . .” Finally, Chapter 7A only applies to civil actions filed in superior and district court and is also not valid statutory authority for this rule.

SECTION .0300—RULES OF THE COMMISSION

Rule .0301 (Suspension of Rules): This rule is not supported by statutory authority and is in violation of the Administrative Procedure Act. The Administrative Procedure Act does not allow an administrative agency to suspend its own rules unless “the rule establishes specific guidelines the agency must follow in determining whether to waive or modify the requirement.” The proposed rule is not sufficient.

Rule .0302 (Sanctions): This rule is not supported by statutory authority. None of the statutes relied upon by the NCIC to promulgate this rule endow the NCIC with generalized authority to impose broad sanctions. For example, the proposed rule notes that sanctions can be assessed for failure to comply with NCIC rules, yet the proposed rule sites to sanctions allowed per Rule 37 of the Rules of Civil Procedure that relate solely to discovery violations. Because G.S. § 97-80(a) and (f) specifically note that Rule 37 does not govern discovery procedures in workers’ compensation claims, broad sanctions listed in Rule 37 provide no authority for this rule. Moreover, while G.S. §§ 97-18 and 97-88.1 allow for sanctions, they are specific and limited. Other than the specific and limited grounds for imposing sanctions there is no statutory authority for sanctions other than those specifically listed in the Act. Finally, the proposed rule allows for attorneys to be sanctioned rather than their clients, which could damage the attorney-client relationship and is not supported by G.S. § 97-88.1.

NCIC PROPOSED RULE REVISIONS – NCADA COMMENTS TO 10G

Rule .0101(b) (Mediation and Settlement Order for Mediated Settlement Conference): This rule is unclear and ambiguous. The NCADA also notes that inconsistent terms are used throughout all rules such as “plaintiff” versus “employee” versus “injured worker.”

Rule .0103(g) (Mediated Settlement Conference): The NCADA asserts this rule is unclear and ambiguous particularly as it relates to the fact “settlement agreement” is not defined.

Rule .0104(f) (Duties of Parties, Representatives and Attorneys): The NCADA asserts this rule is unnecessary in that there are several examples of settlements wherein the parties cannot submit the settlement agreement to the Commission within 20 days of the conclusion of the mediation conference (e.g., claim where parties are waiting on CMS to approve an MSA before submitting agreement to Commission).

Rule .0104A (Foreign Language Interpreters): This rule is unclear as it relates to the statutory authority that would allow the Commission to charge the employer with translation costs.

Rule .0105 (Sanctions): This rule is in violation of the APA because sanctions related to mediations are not specifically allowed by statute.

Rule .0107(b)(3) (Compensation of the Mediator): This rule is unclear and ambiguous.

Rule .0110 (Suspension of Rules): This rule is not supported by statutory authority and is in violation of the APA.

Rule .0112 (Miscellaneous): This rule violates the APA in that it repeats the content of another rule.

NCIC PROPOSED RULE REVISIONS – NCADA COMMENTS TO 10J

Rule .0101(a) (Fees for Medical Compensation): The rule is not supported by statutory authority in that G.S. § 97-26(c) sets a maximum reimbursement amount for services; however, the proposed rule suggests that in hardship cases fees in excess of that published may be allowed. In addition, the rule fails to define “hardship cases.”

Rule .0101(c): The rule does not list a methodology to determine appropriate medical fees for some medical services that were not delineated in the 1995 fee schedule.

Rule .0101: The rule should address the proper fee to be charged to an appropriate party for communication with a health care provider pursuant to G.S. § 97-25.6(i).

RECOMMENDATIONS FOR ADDITIONAL RULES

Based on the NCIC practice of enforcing unwritten procedures and adopting old minutes as informal rules, it appears the following should also be addressed in rules and should be subject to the APA rule making process:

1. We recommend that rules be promulgated to note the requirements to request and be granted secured leave and for *pro hac vice* admission before the NCIC.
2. We recommend that all procedures for case calendaring be promulgated in rules. For example, the NCIC allows claims to be special set for hearing before one of two deputy commissioners. There are unwritten rules that determine whether a claim is special set. Claimants merely need to allege a hearing will take more than a specified period of time in order to receive a special set, which allows for inappropriate forum shopping. In addition, the Full Commission panel selection process and Deputy Commissioner regional calendaring process should be promulgated in rules.
3. We recommend that all informal rules and procedures followed by the Executive Secretary's office be promulgated in rules. We recommend that rules that apply to various administrative motions be promulgated. For example, the rules should state specifically the grounds upon which a motion for consolidation will be granted. We also recommend that the rules state specifically the grounds upon which a settlement agreement will not be approved by the NCIC particularly as it relates to the different standards that are applied to unrepresented claimants. We further recommend that the rules note specifically the bases upon which a Form 18M will be granted or denied.
4. We recommend that the Form 21, Form 26, and Form 26A approval processes be promulgated in the rules.
5. We recommend that the NCIC's list of hourly fees for each medical and scientific specialty be noted in the rules.
6. We recommend that procedures related to fraud investigations and prosecutions be noted in the rules.
7. We recommend that the electronic mail retention and archiving policies of the NCIC be noted in the rules.
8. We recommend that the NCIC promulgate a rule that requires all unrepresented claimants who have filed claims with the NCIC and all attorneys practicing before the NCIC provide updated contact information to the NCIC within 10 days of a change.
9. We recommend that the NCIC promulgate a rule that addresses procedures for payment of death benefits.
10. We recommend that the NCIC promulgate rules that relate to asbestos and silica claims similar to those found in previous Minutes of the Commission published on or about October 18, 2001.

11. It is unclear if fees for independent medical examinations have been addressed in the rules.
12. We recommend a rule that sets out how credits for overpayments shall be secured.

EXHIBIT 1

Memorandum of Law Regarding the “Traditional” Taxing of Costs for Expert Witness Fees in Workers’ Compensation Claims Based on Alleged Authority in Current Rules of the North Carolina Industrial Commission

It has been suggested that “by tradition” defendants have customarily paid expert witness fees for testimony by deposition or at a hearing and that the Full Commission has “traditionally” awarded a reasonable amount of time for expert preparation and for providing testimony. The NCADA objects in equity to having the defendant fund litigation against itself on the basis of a tradition that is not supported by the current Workers’ Compensation Rules or is prohibited by North Carolina statutes. Moreover, defendants objects to being assessed costs related to the testimony of an employee’s experts without a finding that employee has a work related injury or illness. Such a “tradition,” if it could be the basis of such cost shifting, provides no protection for an employer from unfounded and unsupported claims filed against it by employees or their counsel, because the employer is simply being forced to fund an employee’s litigation.

1. Workers’ Compensation Act

There are several statutes in the Workers’ Compensation Act that address the current authority of the Industrial Commission to assess the costs of hearings or depositions against a party in an occupational disease claim. As the three statutes indicate, there is no automatic or “traditional” mechanism by which costs should be assessed solely against defendants.

First, N.C. Gen. Stat. § 97-80(b) provides that “the Commission...shall have the power ... to tax costs against the parties” including costs of the depositions ordered to be taken by the Commission pursuant to § 97-80(d). Section 97-80(b) provides authority to

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tax costs against “the parties”—not just against defendants. Subsection (d) of this statute provides:

(d) The Commission may order testimony to be taken by deposition and any party to a proceeding under this Article may, upon application to the Commission, which application shall set forth the materiality of the evidence to be given, cause the deposition of witnesses residing within or without the State to be taken, the costs to be taxed as other costs by Commission. . . .

Based on the authority conferred in § 97-80(b), the Commission previously promulgated Rule 612 which provides:

When additional medical testimony is necessary to the disposition of a case, the original hearing officer may order the deposition of medical witnesses, such depositions to be taken on or before a day certain not to exceed sixty (60) days from the date of the ruling, provided the date may be postponed for good cause shown. The hearing officer shall issue a written order setting time within which such deposition shall be taken. The costs of such depositions shall be borne by the defendants for those medical witnesses whom defendants paid for the initial examination of the plaintiff, and in those cases where defendants are requesting the depositions, and in any other case in which, in the discretion of the Commission or Deputy Commissioner, it is deemed appropriate.

As a matter of law, the Industrial Commission rules must conform to the statutory mandate. See § 97-80 (a), and *Evans v. Asheville Citizens Times Co.*, 246 N.C. 669, 100 S. E. 2d (1957). As noted above, Rule 612 currently in effect notes the Commission may assess deposition costs to defendants for medical depositions of doctors who examine plaintiff at the defendant’s expense or for medical depositions taken at the defendants request, when deemed necessary by the Deputy Commissioner and so ordered. While the current rule is not supported by statutory authority, the rule only provides for the defendant to be required to pay for the deposition of a treating physician where the defendant paid for the initial exam—which, by definition would occur either in an admitted claim, or a pay without prejudice claim, or as a result of an independent medical

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evaluation requested by defendant or agreed to be financed by defendant—such as a panel exam in an occupational disease claim.

Only two cases could be found in North Carolina in which the Industrial Commission awarded an expert witness fee as deposition costs pursuant to N.C. Gen. § 97-80. In *Grantham v. R.G. Barry*, 115 N.C. App. 293, 444 S.E.2d 659 (1994), plaintiff requested expert fees for its expert witness, Dr. Schiller. Citing to §97-80(a), the Court stated that N.C. Gen. Stat. § 97-80(a) (1991 & Supp.) gives the “Commission or any member thereof, or any person deputized by it, . . . the power, for the purpose of [the Workers' Compensation Act], to tax costs against the **parties** . . .” (emphasis added) The Court upheld the Deputy Commissioner’s refusal to grant the request for fees of \$3,197.60 on the grounds that these charges were “charges incurred by plaintiff to prosecute her claim. Defendants are not responsible for paying bills incurred by plaintiff to obtain expert toxicological support for her claim.” *Id.* at 302.

Harvey v. Raleigh Police Dep’t, 85 N.C. App. 540, 355 S.E.2d 147 (1987) is the other case in which deposition costs have been assessed based on N.C. Gen. § 97-80. In *Harvey*, the Court did not find that the Deputy Commissioner abused his discretion when he assessed the costs of plaintiff’s expert’s deposition against the defendant. The opinion does not reflect whether an expert witness fee was awarded or just the cost of the deposition. Thus, *Harvey* and *Grantham* do not set forth a tradition suggesting that defendants should pay all costs for all experts, win or lose.

Second, as it relates solely to occupational disease claims for asbestosis and silicosis, pursuant to N.C. Gen. Stat. § 97-74, “the Industrial Commission shall tax as a part of the costs in cases in which compensation is awarded a reasonable allowance for

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the services of members of the advisory medical committee attending such hearings...”

The purpose of the Advisory Medical Committee (“AMC”), whose members were selected by the state, was to provide independent and unbiased opinion as to the existence of an occupational disease. Nevertheless, it is significant that § 97-74 only allows the Industrial Commission to tax such costs for the involvement of the AMC when “**compensation is awarded**” to an employee. This statute is consistent with N.C. Gen. Stat. § 6-1, which allows costs to be awarded to “[t]he party for whom judgment is given...” Costs are not awarded to a party who does not prevail. *See generally* N.C. Gen. Stat. § 6-18, 6-19.

Third, pursuant to N.C. Gen. Stat. § 97-88.1, the Industrial Commission may assess costs and attorney’s fees if it determines that “any hearing has been brought, prosecuted, or defended **without reasonable ground[.]**” (emphasis added) “In determining whether a hearing has been defended without reasonable ground, the Commission (and a reviewing court) must look to the evidence introduced at the hearing. ‘The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness.’” *Cooke v. P.H. Glatfelter/Ecusta*, 130 N.C. App. 220, 225, 502 S.E.2d 419, 422-23 (1998) (quoting *Sparks v. Mountain Breeze Rest.*, 55 N.C. App. 663, 665, 286 S.E.2d 575, 576 (1982)). Thus, it is not proper to assess all costs against defendants unless there has been a showing that the claim was defended without reasonable ground.

Defendants object to being assessed costs of trial and deposition testimony that it did not request. Such cost shifting means that defendants are required to fund all claims. Further, it ensures that employee’s counsel incur no financial risk for bringing claims

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against employers and instead rewards an employee for bringing any action whether valid or not. The expense of litigation is a major consideration to defendants—even where defendants know the claim is unjustified by the facts at issue. Often experts are not treating physicians—but experts selected by the employee to develop his claim for trial.

2. North Carolina General Statutes Limit The Definition of Costs

In addition to the issue of whether defendants should be forced to bear the costs of all discretionary expert fees, a second issue arises as to what constitutes “costs.” There is no definition of “costs” contained in the Workers’ Compensation Act or in the current Workers’ Compensation Rules. However, costs related to civil actions are specifically defined by the North Carolina General Statutes. Under North Carolina law, costs can only be reimbursed when expressly allowed by specific statutory authority. *See, e.g., Estate of Smith v. Underwood*, 127 N.C. App. 1, 12, 487 S.E.2d 807, 815 (1997). The items enumerated in Section 7A-305(d) “are complete and exclusive and constitute a limit on the trial court’s discretion to tax costs.” N.C. Gen. Stat. § 7A-305(d) (2011). While the costs included in Section 7A-305(d) are costs the court is “required to assess,” *Springs v. City of Charlotte*, 704 S.E.2d 319, 327 (N.C. Ct. App. Jan. 18, 2011) (citation omitted), those costs include “[r]easonable and necessary fees of expert witnesses *solely* for actual time spent providing testimony at trial, deposition, or other proceedings.” N.C. Gen. Stat. § 7A-305(d)(11) (emphasis added). There is “no authority in the current statutes authorizing the trial court to assess costs for an expert witness’ preparation time.” *Springs*, 704 S.E.2d at 328. The *Springs* holding is consistent with the reasoning in *Grantham v. R.G. Barry*, 115 N.C. App. 293 (1994), *supra*, in which the Deputy

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Commissioner found that fees associated with obtaining expert support for plaintiff's claim would not be proper to assess against defendants.

In summary, neither courts nor the Industrial Commission have authority to award any and all expert fees and costs solely to defendants.

September 10, 2012

Ms. Amber Cronk, Agency Legal Specialist
North Carolina Industrial Commission
4336 Mail Service Center
Raleigh, NC 27699-4336

Sent via e-mail to amber.cronk@ic.nc.gov

Dear Ms. Cronk:

Healthsystems provides workers compensation payers with powerful technology platforms and innovative solutions for pharmacy and ancillary benefits management. We are in support of many of the proposed changes to 4NCAC Chapters 10A through J, as posted in the July 16, 2012 State Register. Please accept these brief comments in support of the proposed rule change and specifically in regard to the following proposed amendments:

Chapter 10F.0101 Electronic Medical Billing and Payment Requirement

Healthsystems fully supports the Industrial Commission's proposal to require all medical providers to send and all carriers to accept electronic billing. Though we are a strong supporter of the proposed rule, we must also ask the Commission to carefully consider the existing landscape of medical billing while these new rules are being promulgated. It appears this section will require compliance on or before January 1, 2014. However this also presumes the rule is adopted by January 1, 2013. It appears that there may be some inconsistency in the effective dates in this section, as compared to section 10F.0109 where the effective date is March 1, 2014. We recommend harmonizing the dates by utilizing a single effective date which is 12 months after the date the new rules are officially adopted. This timeframe will allow participants sufficient lead time to either seek out an appropriate e-bill vendor or to program and test internal e-billing systems.

Chapter 10F.0103 – FORMATS FOR ELECTRONIC MEDICAL BILLING PROCESSING

Currently, there are many carriers, third party administrators and medical providers who were early adopters of electronic medical billing and some of these payers have long standing relationships which were customized based on their unique data platforms. It may be advantageous for the Commission to acknowledge the existing connectivity between these parties and consider the capital which has been invested by so many system participants to facilitate electronic billing, before these e-billing rules were being contemplated. The costs associated with re-programming medical bill review systems and carrier claims systems could be significant, and would not add any efficiency for payers, providers or bill review entities who have already successfully implemented e-billing into their day to day business processes.

We urge the Commission not to penalize these early adopters by requiring system changes to comply with the standards as published by IAIABC. We recommend the Commission explicitly permit mutually agreed upon non-standard formats for electronic billing and remittance. This can be accomplished by adding the following new subsection (c) to NCAC 10F.0103:

Nothing in this subchapter shall prohibit payers and healthcare providers from utilizing mutually agreed upon non-standard billing and remittance formats.

Healthsystems anticipates these two recommendations will both add clarity to the rules and ensure no additional costs will be borne by those who proactively embraced processes as part of their current business operations. These recommendations also allow payers, providers, medical bill reviewers and vendors who were ahead of the "e-bill" curve to focus their IT resources on other innovative projects which will add overall system efficiency and quality care to the injured worker. Please do not hesitate to call upon us with any questions or comments for additional discussion on our comments.

Sincerely,



Sandy Shtab
Senior Government Relations Manager
Healthsystems, LLC



September 6, 2012

Amber Cronk
North Carolina Industrial Commission
4336 Mail Service Center
Raleigh, NC 27699

Re: Comments on Proposed Amendments to 4 NCAC 10F – Addition of Electronic Billing Rules

PMSI appreciates the opportunity to provide our input into the continued efforts of the North Carolina Industrial Commission (NCIC) in working with impacted stakeholders during development of eBilling regulations. As way of background, PMSI is a provider of pharmacy and other ancillary medical services explicitly for the workers' compensation marketplace. PMSI currently provides services in all 50 states, and we have extensive knowledge of the many regulatory requirements impacting delivery of pharmacy and medical services provided to injured workers, including eBilling.

PMSI continues to support the development of eBilling rules and guidance in North Carolina and other states. Additionally, PMSI supports utilization of IAIABC eBilling standards and guidance as well as utilization of the ASC x12 – 835-5010 standards for medical care (professional and institutional providers) and the NCPDP D.0 standards for pharmacy care (retail and mail-order pharmacies).

PMSI would like to comment on key points within the proposed rule which we believe need additional examination and consideration prior to adoption to ensure a smooth implementation and ongoing administration of eBilling in North Carolina for workers' compensation. Our comments, concerns and requests for clarification are as follows:

1. We urge the NCIC to review the proposed rule and ensure usage of consistent compliance dates. We have found instances where dates for system participants to be compliant seem to conflict. Some state January 1, 2014; others state March 1, 2014.
2. We urge the NCIC to insert a definition of healthcare provider, provider agent, and/or third party biller or assignee in the proposed rules. There is a proposed definition for "payer" and "payer agent" in proposed 4 NCAC 10F .0102, but no such analogous terms defined for providers and other associated billing entities. Recent workers' compensation eBilling rule developments and implementations in other states include some form of these definitions. We would encourage the NCIC to look to definitions used by the California Division of Workers' Compensation in their eBilling regulations and companion guide as good examples for inclusion of these related terms. There are multiple entities involved in eBilling and bill processing that should be recognized and accounted for to ensure their continued participation and to add clarity to the overall process.



3. We urge the NCIC to specifically state and allow “mutually agreed upon alternative formats” between providers and payors which are different from the state-prescribed eBilling formats. All workers’ compensation eBilling efforts implemented to date specifically allow providers and payors to use alternative formats. There are many payors and providers who are already engaged in eBilling practices and are utilizing long-standing electronic billing formats and connectivity which differ from the proposed standards. Additionally, many providers, bill processors, clearing houses and PBMs have national contracts with insurance carriers and TPAs and are currently billing globally on alternative standards or iterations of the national standards. To not allow the usage of “alternative” standards would force these entities to change processes only for North Carolina as all other eBilling developments to date have included the usage of alternative standards. These proposed, and any final adopted, rules should not punish these “ahead of the curve” stakeholders.
4. We urge the NCIC not to mandate eBilling but rather, as with other states, make eBilling voluntary for providers but require payors to be capable of properly handling, processing and reimbursing any eBill sent from a provider. At a minimum, we urge the state to (if they wish to mandate eBilling) allow a transition time of at least two years or provide exemptions for providers and payors who handle very limited numbers of workers’ compensation claims/patients.
5. We urge the NCIC to clarify if they will be adopting an eBilling “companion guide” to provide additional clarification. There appears to be only one vague reference to “the” companion guide in proposed 4 NCAC 10F .0105(b)(4)(F). To date other state efforts to implement eBilling requirements have included the subsequent publication of an associated eBilling “companion guide” to provide more comprehensive instructions that may include certain technical or state-specific nuances that may differ from the nationally accepted standards.
6. We request the NCIC to clarify their intent to adopt specific standards related to attachments (such as medical reports or notes) for medical services. The language in proposed 4 NCAC 10F .0105(a)(1)(C) appears to be vague – only requiring payors and their agents to “support methods to receive electronic documentation required for the adjudication of a bill,” leaving it uncertain as to what is or is not required. Later proposed detail also only addresses documentation in the form of electronic mail. This leaves us with the following questions for clarification:
 - a. Is this the only permissible form of documentation submission, or are others, such as fax, permitted?
 - b. If other forms of documentation are permitted, what data is required to be present on those other modes of submission – as the proposed rules only address content for email?
7. We request the NCIC to clarify what date is to be used as the “received” date for an electronic bill. Proposed 4 NCAC 10F .0105(c)(9) states that proof of the received date is to be the transmission of an Implementation Acknowledgement and acceptance of a complete file, but proposed 10F .0106(b) states that the received date is the actual date all of the contents of a



complete eBill are successfully received by the claims payor – which, by the proposed rule’s own time frames, can be two different dates. PMSI believes clarification is warranted to explain if the received date is to be the day actually received or the day the receipt acknowledgement is sent to the bill submitter by the claims payor.

8. We request the NCIC to clarify payment and remittance notification time frames. We found instances where these time frames conflict within the proposed rules and with existing payment time frames. For example, proposed 4 NCAC 10F .0106(i) states that payment is to be made “within 30 days;” however, this seems to conflict with the existing statutory language that establishes a 60-day payment time frame under § 97-18 of the Workers’ Compensation Act. Is the NCIC proposing a shortened payment time frame specifically for electronic bills, and if so, how does that coincide or conflict with the existing statutory time frame?
9. We urge the NCIC to address the usage of remittance advice codes for pharmacy transactions and to provide clarification as to their intent to utilize standard NCPDP reject and ASC X12 835-5010 referenced CARC and RARC codes. PMSI poses the following question for clarification by the NCIC: Is it the intent of the proposed rules to require use of only the NCPDP reject codes in submitting remittance notification to a pharmacy in the 835 format and use of only the other code sets (CARC, RARC, etc.) in submitting remittance notification to a professional or institutional provider?

The proposed language in 4 NCAC 10F .0105(e)(3) appears to state such, but that conflicts with what some other states have adopted in their rules. Other states have only referenced the NCPDP reject codes in relation to acknowledgements, leaving use of only the CARC and RARC codes for actual remittance notification and only conveyed through use of the 835 format.

Finally, we **strongly urge** the NCIC to utilize national codes, avoiding a “one-off” situation with only North Carolina eBilling, and to provide clarity around what context they are or are not to be used.

10. As mentioned in the above point, we **strongly urge** the NCIC to avoid creation and utilization of state-specific remittance advice codes. Such “one-offs” create a substantial burden on providers, payors and their systems in order to properly use, store and crosswalk unique codes to more commonly accepted code sets used nationally in the industry.
11. We urge the NCIC to insert language into the proposed rule providing a lead time and clarification on utilization of the HIPAA-prescribed standards. Since workers’ compensation is exempted from HIPAA standards, providers and payors in that market are not as cognizant of changes to HIPAA standards. Thus, insertion of language which allows a 12 to 18-month lead time (from implementation of a HIPAA standard change) for eBilling and processing will give impacted stakeholders time to properly update all systems and processes.



We again appreciate the opportunity afforded to provide these written comments, and we look forward to a continued relationship with the NCIC during the continued rule-making process. PMSI supports eBilling efforts for workers' compensation but believes that for any electronic billing initiative to be successful it must ensure limited additional costs related to implementation, avoid business interruption and equally serve the interest of the payor and the provider. But most importantly, any eBilling initiative must ensure continued delivery of quality and timely care to injured workers. Should you have any questions concerning our comments, please free to reach out to me.

Sincerely,

A handwritten signature in black ink, appearing to be "Kevin C. Tribout", is written over a long, thin horizontal line that extends across the page.

Kevin C. Tribout
Executive Director of Government Affairs, PMSI

cc: File

Cronk, Amber

From: Harvey, James M. <James.Harvey@sedgwickcms.com>
Sent: Saturday, August 25, 2012 6:17 PM
To: Cronk, Amber
Cc: Tolbert, Desiree; Howell, Jeannine; Werntz, Theda; Gilbertson, Chandra; Garka, Zona
Subject: North Carolina Proposed E-billing Rules - Subchapter 10F

Amber,

In the area indicating that payment for all uncontested portion of a complete medical bill has to be made within 30 calendar days of receipt of the original bill, it is our recommendation that this be amended to 45 days, after the proper submission of a medical bill. This would allow additional time that may be necessary for bill adjudication, including potential clinical review for complex medical bill review.

Please let me know if you need additional information.

Thank you.

JAMES M. HARVEY | Vice President | Managed Care Practice
Sedgwick, Inc.
Direct 214-922-0715 | Fax 770-901-3360
Cell 312-835-5729 | Email James.Harvey@sedgwickcms.com
www.sedgwickcms.com | *The leader in innovative claims and productivity management solutions*

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Cronk, Amber

From: Tammy Dixon <tdixon@carolinacasegmt.com>
Sent: Tuesday, August 21, 2012 12:05 PM
To: Cronk, Amber
Subject: Proposed new rules for rehab professionals

Hi,

I wanted to offer my support in regards to the concerns about the proposed rule changes presented by IARP recently. I stand in favor with IARP of all items of concern mentioned and believe all rehabilitation professionals should be offered the respect of the commission to please make note and address these concerns.

Thank you in advance for your time and consideration in this matter.

Please note new office phone and fax #'s.

Tammy Dixon, RN, MSN, COHN-S

Supervisor

Carolina Case Management

118 Wind Chime Court

Raleigh, NC 27615

Local Office: 1-336-709-9568

Toll Free: 1-800-546-9636 Ext. 237

FAX: 1-866-651-8523

Email: tdixon@carolinacasegmt.com

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Cronk, Amber

From: Pam Teague <pteague@carolinacasemgmt.com>
Sent: Monday, August 20, 2012 8:16 AM
To: Cronk, Amber
Subject: Revision to Rehab Rules

Importance: High

I would just like to voice my opinion regarding the changes to the NC Industrial Commission Rules for Rehabilitation Professionals. As a Rehabilitation Professional I agree with all of the recommendations that have been presented by the International Association of Rehabilitation Professionals and feel they speak for us as a profession. As these are rules for us as a profession I feel this organization's opinions should be highly considered and respected when addressing these changes.

Thank you,

Pamela Teague, BSN, RN, CCM
Case Manager
Carolina Case Management
336-944-5910 (PLEASE NOTE THIS IS A NEW PHONE NUMBER)
800-853-5612 Fax

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Cronk, Amber

From: David Steinbeck <dsteinbeck@carolinacasemgmt.com>
Sent: Monday, August 20, 2012 7:34 PM
To: Cronk, Amber
Subject: Note on the revision to the Rehabilitation Rules.

I am a vocational case manager with Carolina Case Management and a former member of the Rehab Advisory Committee with the Industrial Commission. I am also a member of the North Carolina chapter of IARP. I am writing in support of the recommendations made by IARP concerning the Rules revision. I have been in the rehabilitation field for over 30 years and the Rehabilitation Rules affect us in our job on a daily basis. I wanted to voice my support for the revision as listed through the IARP and I believe it is very important that these revisions be approved. Thank you for your time and consideration of this issue.

David A. Steinbeck, MS, CRC
Senior Case Manager
Carolina Case Management & Rehabilitation Services, Inc.
Telephone: (336) 944-5878
Fax: (888)244-0985
dsteinbeck@carolinacasemgmt.com

Please note new office telephone number (336) 944-5878

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IARP of the Carolinas
Position Statement Regarding the Proposed Rehabilitation Rules Changes

IARP of the Carolinas is the local chapter of the International Association of Rehabilitation Professionals. We have approximately 200 members with approximately 85% of the membership residing in and working in North Carolina. The current officers of the chapter include:

President	Carla Marshburn, RN, CCM
President Elect	Kathy Thaman, MS, CRC, CLCP, MSCC
Secretary	Adele Doering, MS, CCM, CVE, CEAS,
Treasurer	Tonya Ballard, MS, CDMS
Members At Large:	Michelle Morgan, MS, CRC
	George Page, CCM, CDMS, CVE, PVE
	Cindy Boyd, RN, BSN, CRRN, CCM, CBIS
	Donna Irby, RN, CCM
	Chad Betters, PhD, CRC, CVE, PVE, CDMS

IARP of the Carolinas has reviewed the Proposed Rehabilitation Rule Changes related to reforms in the Workers' Compensation law of North Carolina. We appreciate the amount of work the North Carolina Industrial Commission has put into revising the Rules to make them applicable to the revised workers' compensation law. We do not respond regarding the law or legal implications, rather the membership has provided the following comments related to our concerns about the proposed rules from the perspective of rehabilitation practitioners.

Subchapter 10C – North Carolina Industrial Commission Rules for Utilization of Rehabilitation Professionals in Workers' Compensation claims

Section .0103

Definitions

(2) Medical Rehabilitation

(a) Case assessment: The words "including a personal interview with the injured worker" have been struck in the proposed change. We strongly believe the wording requiring a personal interview should remain. Neither a rehabilitation nurse nor vocational case manager can provide a good assessment for case management purposes without a personal interview with the injured individual. Telephonic medical case managers are able to do a personal interview with the injured worker by telephone.

(3) “Vocational rehabilitation means the delivery and coordination of services..... return to suitable employment as defined by Item (5) of this Rule or applicable statute. ~~and to substantially increase the employee’s wage earning capacity.~~

We propose to strike “and to substantially increase the employee’s wage earning capacity and include the following: “... or applicable statute, achieve the employee’s wage earning capacity to the extent that is possible based on the injured worker’s unique abilities, aptitudes, education, skill level, and geographically specific job market.”

Comment: The purpose of vocational rehabilitation has never been to substantially increase an individual’s wage earning capacity. The purpose of vocational rehabilitation is to assist an individual with identifying his/her skills, aptitudes, and interests and help the individual identify appropriate employment within the identified skill set/aptitudes/interest and in accordance with what is available in the local job market. While every vocational case manager would be delighted to work with an individual whose return to the job market resulted in substantially increased wage earning capacity, this is not possible for every individual and should not be set forth as a legal expectation.

.0105 (d) To qualify as a qualified rehabilitation professional, a rehabilitation professional must:” We propose to add the following:
meet Qualification 1) **OR** 2). We feel it is important to distinguish that the rehabilitation professional not have to meet both of these categories, rather meets Category 1 with one of the appropriate certifications or Category 2.
Under .0105 (d) Section (1) we recommend:
Leave (1) A-H as written

ADD another certification as letter I. PVE Professional Vocational Evaluator This is a relatively new designation. There are a number of PVEs in North Carolina and it makes sense to add this credential because the CVE, Certified Vocational Evaluator is no longer very well supported at a national level and its numbers have declined. When CCWAVES (Commission on Certification of Work Adjustment and Vocational Evaluation Specialists) ceases to exist in September 2008, professional vocational evaluators were no longer able to obtain a CVE credential. The Vocational Evaluation and Work Adjustment Association and the Vocational Evaluation and Career Assessment Professionals association worked together to create a new credential, the PVE. This allows

evaluators to obtain a credential to certify their training and expertise in the field of Vocational Evaluation. People who had obtained a CVE are able to maintain it through the Commission on Rehabilitation Counselor Certification, but the CRCC does not offer the CVE exam.

.0106 Professional Responsibility of the Rehabilitation Professional in Workers' Comp Claims

- (d) Recommend striking: ~~“As case consultants or expert witnesses”~~. This is a Rule about CASE MANAGEMENT services which help coordinate rehabilitation of injured workers. We do not feel it should encompass consultants or expert witnesses. Consultants and expert witnesses are not providing a direct rehabilitation case management service to the injured worker. The expert witness or consultant is generally serving as an educator to the Court/Commission, or provides a professional opinion about a particular aspect of a case.

Also under (d) we have some concerns about the Codes of Ethics, particularly the potential for a Code of Ethics statement/requirement to conflict with a North Carolina workers' compensation statute. We request clarification that in such a situation, the North Carolina law will be the prevailing requirement.

- (g) We recommend striking the language, “during his or her assignment in the case”. We propose to never be involved in claims negotiation or investigative activities whether during or after closure of a case as this may represent a violation of the various Codes of Ethics/Codes of Conduct.

.0107 Communication

- (a) IARP recommends an addition to this section to include the following: “The Commission will forward a letter to the injured worker and attorney, if represented, to document the Commission’s expectation of cooperation with the rehabilitation program.” By adding this requirement to cooperate with rehabilitation efforts at the beginning of the process, a great deal of time and wasted money can be avoided. The Commission will have fewer motions to comply to deal with and such items would not crowd their calendar. Employers/Carriers will not waste money on attempts at rehabilitation efforts; rather the Injured Worker and Rehabilitation Professional will work together at the outset.

- (b) We recommend inclusion of “a Summary of the Rules”. We do not believe a majority of injured workers want or may be able to fully comprehend the full set of Rules. While it should be available to the Injured Worker if requested, the Summary is a more user friendly document for the Injured Worker. The Commission developed the Summary for this reason. We understand that inclusion of a Summary will mean additional work for the Commission in order to bring the Summary in line with the pending changes in the Rules for the Utilization of Rehabilitation Professionals and with the changes in the Statute that passed in the Legislature last year. While the time demands on the Commission will increase to complete the task of revising the Summary, the Summary appears to have been helpful to Injured Workers since it became available.
- (f) “The rehabilitation professional shall make periodic.....completely the rehabilitation activity of the case.” The current writing of this proposed rule takes what is perceived by IARP as a very negative perspective and appears to insinuate that rehabilitation professionals are hiding information. Everything a Case Manager does is, and should be, “rehabilitation activity”. The current Rules for the Utilization of Rehabilitation Professionals have been instrumental in helping to assure that all communication is open communication.

IARP recommends additional language to this section that compliments the Statute’s recognition of the employer’s ability to obtain “other” medical information that may be relevant to the current workers’ compensation claim. In the opinion of the IARP membership, language that makes the following point would be appropriate: “Rehabilitation Professionals are allowed to obtain medical information outside of the immediate claim treatment records when the parties are in agreement for the rehabilitation professional to facilitate the gathering of such information.”

Therefore, when a situation presents itself and a need for medical information outside of the workers’ compensation injury itself, for example need for a cardiac clearance for surgery, the case manager would be able to obtain the needed information when the Injured Worker/attorney, if represented, and Employer/Insurance Carrier are in agreement for the case manager to obtain said information.

- (i) We believe this should remain as originally written and state, "The initial meeting of the injured worker and rehabilitation professional SHALL IF REQUESTED by the injured worker's attorney, take place at the office of the injured worker's attorney and shall occur within 20 days of the request." We disagree that there should be a legal mandate for every initial meeting to occur in the office of the attorney. There are a number of plaintiff attorneys who have good working relationships with certain rehabilitation professionals and it should be left to the discretion of the attorney as to whether or not his/her client will benefit by having the first meeting in the office of the attorney. If the attorney does not find this to be necessary, the first meeting may take place at another appropriate venue.
- (j) We believe that this section does NOT apply to rehabilitation professionals. Compliance is a legal issue and should be addressed by the attorneys and/or the Commission. It is not the responsibility of the rehabilitation professional to prove or disprove the compliance of an individual with the statute.

.0109

Vocational Rehabilitation Services and Return to Work

- (d) "When an employee requests retraining..... which includes an evaluation of:"
We propose adding:
 - (6) the rehabilitation professional's assessment of the Injured Worker's ability to successfully complete the requested education or training and obtain related work at the completion of the education/training.
- (e) Sentence structure is confusing in this section. Request clarification
- (h) Should remain as it was in the existing Rules for the Utilization of Rehabilitation Professionals

The Dictionary of Occupational Titles (DOT) is completely outdated. The United States Department of Labor opted not to pursue a revision nor complete another DOT. There are many modern jobs that do not appear in the last revision of the DOT. While the Social Security Administration continues to use the DOT in determining an applicant's ability to earn a wage, SSA has decided to try to do its own update of the DOT because the US Dept of Labor is not going to do an update. No one knows how many years this will take. The Handbook for Analyzing Jobs was a companion document to the DOT. These resources are

useful in many cases and while they are the current standard for Social Security Disability Determination, it would be foolish to adopt only these two (2) resources knowing they will be changing. Excellent on site Job Analysis, both written and digital, are available in the market place now and are a more reasonable scenario in providing an appropriate Job Analysis to help a physician make a determination regarding the appropriateness of the injured worker returning to a given job. We recommend adding, "Job Analysis may also incorporate the independent professional judgment of the rehabilitation professional."

.0110 Change of Rehabilitation Professional

- (a) The membership of IARP takes exception to the term "manifest injustice", and cannot imagine any sort of issue or occurrence in a workers' compensation rehabilitation case that would warrant such language.

We recommend adding the word, "simultaneously" regarding serving the Executive Secretary, the parties, and the rehab professional with motion to remove to read, "with the Executive Secretary's Office and served upon all parties, including the rehabilitation professional simultaneously." The addition of this word insures that the individual filing the motion with the Executive Secretary will copy the rehabilitation professional at the same time that the motion is sent to the Executive Secretary.

.0200 Suspension of Rules

We find the addition of this section to the Rules unnecessary and very inappropriate. Why would the State of North Carolina grant any Commission the power and authority to ignore any part of the Workers' Compensation Statute or any law of the State. The Rules for the Utilization of Rehabilitation Professionals are to be followed by rehabilitation professionals.

.0202 Sanctions

- (a) "failure to respond to lawful orders.....the Commission shall MAY prohibit or restrict a rehabilitation professional, or group of rehabilitation professionals, further participation by particular workers, employers, health care providers, groups or classes of them, or all of them."

We believe the following should be struck: "~~further participation by particular workers, employers, health care providers, groups or classes of them, or all of them.~~"

The IARP membership suggests completing the sentence as follows:
“rehabilitation professionals or rehabilitation companies.”

We see no reason to include health care providers, whether they are physicians, therapists, etc. or employers in the subsection that is dealing with the Rules for the Utilization of Rehabilitation Professionals. Health care providers are not providing rehabilitation case management services. The Rules were originally designed to provide parameters for case management services and are not appropriate to apply to direct health care providers and therapists.

We object strenuously to the term “manifest injustice” anywhere in this document. In the opinion of the IARP membership, this is not appropriate in workers’ compensation.

Respectfully Submitted:

Kathy Thaman, President Elect

On behalf of IARP of the Carolinas

AUG 15 '12

SOUTHERN REHABILITATION NETWORK, INC.

NC Industrial

August 14, 2012

To: The NC Industrial Commission
Re: August 6, 2013 Hearing on Rehab Rules.

My name is Jane Rouse and I am President of Southern Rehab Network, a medical and vocational case management company. I am speaking for Southern Rehab.

I am an RN and have a Masters in Rehab Counseling with certifications of CCM, CRC, CDMS and LPC. I have been a Rehab Professional for 31 years. I was around with the original start of the Rules and would like to stress the "Spirit of the Rules" They were a joint effort by all parties to establish Guidelines to promote cooperation and promote the Professionalism of Rehabilitation of the Injured worker. In paraphrasing a National Rehab definition, it is an effort to return an injured individual to as normal a life as possible that they had prior to injury. We now have credentialed, experienced Rehab Professionals both medical and vocational, with the intent of assisting the Injured worker in their recovery and return to the work place.

For the most part, we like the Rules. It gives everyone an idea of our job and gives us Guidelines and backup when we are asked to do things outside our boundaries or are not allowed to do things in a timely manner.

I agree with the IARP of the Carolinas recommendations of the updated Rules.

Also of note are a couple of additions: under interaction with MD's 10C 0108 line 3 we suggest use of a company ID or Professional Business card as proof of ID and this is very appropriate and should be mandated upon entry to the office. Due to Privacy issues and Identity theft, I would not recommend my folks present a driver's license. Also line 29 mentions consent. This should be oral or written consent, as much of the time oral is what is given due to time constraints. Also I see no mention of Summary of the Rules. This has been a very valuable tool. The complexity of the wording is confusing and most folks prefer the simple explanation. If the full version is requested, by all means it is available.

In regards to vocational placement: I don't know of any vocational person that would not like to have the perfect case and help someone become much more than they were when they got hurt. The adjuster for sure would have a better case to settle. Yet we have to deal with what we have and by using all criteria in an assessment to get them the best possible outcome. The Vocational Hierarchy that was included in the old Rules is the standard that all should abide by for Vocational placement.

To promote a cooperative effort and do what we could to improve our industry, we met 7-8 years ago with the Commissioners and gave them our plan to assist in this effort.

Number 1: Establish a Registry of all Rehab Professionals and this has been done. It helps keep folks credentialed and licenses up to date. Also if you are not on the Registry, you cannot work files.

Number 2: Education of all Rehab Professionals. A program was established and approved by all parties for a class to teach the Rules and give feedback to promote cooperation. We started the classes about 3 years ago and to date there are over 830 some folks that have taken the course and 100 plus enrolled for a Webinar on Oct 8. Most of the Webinar folks are out of state

(telephonic). This has been an eye opening experience to see the number of people that were not aware of the Rules. There are also companies that I have never heard of, so no doubt more will register over the next 9 months to comply with the Mandate for completion by June of 2013. Now they know about the Rules and laws of NC and I am sure a much better percentage of cooperation, will be established. There are folks from as far as Washington State, Texas, New York, Florida managing Work Comp Case Management. To date I would estimate at least 200 that are out of state telephonic that have taken, are scheduled to take or on list to take the next class.

Number 3: Peer Review. If there is a question, we have the NC Advisory Committee to help determine appropriateness of the Rehab actions.

In conclusion, we as Rehab Professionals have over the years tried to promote our occupation and we only want respect, input and acknowledgement that we are experts in our field just like PTs, OTs, etc. We don't want to be adjusters or lawyers. We just want to do our jobs and help the injured worker to return to his/her pre-injury status.

I stand behind our professional organization and I am proud of my employees and trust that they are out to do the right thing. All we ask is to let us do our jobs, give us reasonable Rules and the injured worker will hopefully benefit beyond the claim.

Respectfully submitted,

Jane Rouse 

Jane Rouse
President
Southern Rehab Network, Inc



August 6, 2012

Amber Cronk
amber.cronk@ic.nc.gov
North Carolina Industrial Commission
420 North Salisbury Street
Raleigh, NC 27603

Re: PMSI Testimony and Initial Comments to Proposed North Carolina eBilling Rules – 4 NCAC 10F .0101, .0103, .0104, .0105, .0106, .0107, .0108 and .0109

Good morning, my name is Kevin Tribout and I am the Executive Director of Government Affairs for PMSI, a provider of pharmacy services and medical equipment explicitly for the workers' compensation marketplace. PMSI currently provides pharmacy services (PBM retail pharmacy and mail-order pharmacy) in all 50 states, and we have extensive knowledge of the many regulatory requirements impacting delivery of pharmacy and medical services provided to injured workers. Additionally, PMSI is a member of CompPharma, a trade association and advocacy group representing workers' compensation PBMs and assisting public policy makers in development of public policies relating to provision of pharmacy services in the workers' compensation marketplace.

First and foremost, PMSI and CompPharma appreciate the ability to speak today and the continued efforts of the North Carolina Industrial Commission in working with impacted stakeholders during development of these eBilling rules. Second, PMSI continues to support the development of eBilling rules and guidance in North Carolina and other states. Additionally, PMSI supports utilization of IAIABC eBilling standards and guidance as well as utilization of the ASC x12 – 835-5010 standards for medical care and the NCPDP D.0 standards for pharmacy care.

My goal today is to provide insight and comments on key points within the proposed rule which need additional examination and consideration prior to adoption to ensure a smooth implementation and ongoing administration of eBilling in North Carolina. PMSI will also file written comments which also include these points and expand upon other additional points of comment and concern.

- 1- We urge the NCIC to review the proposed rule and ensure usage of consistent effective dates. We have found instances where effective dates seem to conflict.

- 2- We urge the NCIC to create a definition of provider, provider agent, third party biller or assignee in the proposed rules. Recent eBilling rule development and implementations in all states includes these specific definitions.
- 3- We urge the NCIC to specifically state and allow “mutually agreed upon alternative formats” between providers and payors which are different than the state indicated eBilling formats. All workers’ compensation eBilling efforts implemented to date specifically allow providers and payors to use alternative formats. There are many payors and providers who are already engaged in eBilling practices and are utilizing long-standing electronic billing formats and connectivity which differ from the proposed standards. These proposed, and any final adopted, rules should not punish these “ahead of the curve” stakeholders.
- 4- We urge the NCIC not to mandate eBilling, but rather as with other states, make eBilling voluntary for providers but require payors to be capable of properly handling, processing and reimbursing any eBill sent from a provider. At a minimum, we urge the state to (if they wish to mandate eBilling) allow a transition time of at least 2 years or provide exemptions for providers and payors who handle very limited numbers of workers’ compensation claims.
- 5- We urge the NCIC to clarify if they will be adopting an eBilling “companion guide” to provide additional clarification. To date other state efforts to implement eBilling requirements have included the subsequent publication of an associated eBilling “companion guide.”
- 6- We request the NCIC to clarify their intent to adopt specific standards related to attachments (such as medical reports or notes) for medical services. The current language appears to be vague.
- 7- We request the NCIC to clarify payment and remittance time frames. We found instances where these time frames conflict within the proposed rule and with existing payment time frames.
- 8- We urge the NCIC to address the usage of remittance codes for pharmacy transactions and to provide clarification as to their intent to utilize standard NCPDP and ASC X12 835-5010 codes. We strongly urge the NCIC to utilize these national codes and avoid creation and utilization of state specific codes
- 9- We urge the NCIC to insert language into the proposed rule providing a lead time and clarification on utilization of HIPAA standards. Since workers compensation is exempted from HIPAA standards, providers and payors are not as cognizant of changes to HIPAA standards. Thus, insertion of language which allows a 12 to 18 month lead time (from implementation of a HIPAA standard change) for eBilling will give impacted stakeholders time to properly update all eBilling systems and processes.

Again, we appreciate the opportunity to speak today on these key issues and we look forward to a continued relationship with the NCIC during rule-making. PMSI and CompPharma support eBilling efforts for workers' compensation but believe that for any electronic billing initiative to be successful, it must ensure limited additional costs related to implementation, it avoids business interruption and equally serves the interest of the payor and the provider. But most importantly, any eBilling initiative must ensure continued delivery of quality and timely care to injured workers.

We look forward to providing additional and more in-depth comments on the entirety of the proposed rule by the September 14, 2012.

Sincerely,

A handwritten signature in black ink, appearing to be 'Kevin C. Tribout', with a long horizontal line extending to the right.

Kevin C. Tribout
Executive Director of Government Affairs, PMSI

cc: File



North Carolina Association of Defense Attorneys

The Right Affiliation. The Right Resources. The Right Reasons.

MEMORANDUM

TO: North Carolina Industrial Commission
FROM: North Carolina Association of Defense Attorneys
RE: Comments to Industrial Commission Proposed Rule Changes
Date: August 6, 2012

The NCADA appreciates the opportunity to be heard on the proposed rules of the North Carolina Industrial Commission. Below is a list of rules to which the North Carolina Association of Defense Attorneys will provide written comment before September 14, 2012. The NCADA anticipates that we will not be able to address all of our concerns during the public hearing on August 6, 2012 due to the time constraints affiliated therewith.

RULES 10A

Rule .0102 (Official Forms): The NCADA asserts that forms must be revised as part of the Administrative Procedure Act (APA) rule making process.

Rule .0105 (Electronic Payment of Costs): The proposed rule is not supported by statutory authority and is contrary to the APA.

Rule .0301(f) (Proof of Insurance Coverage): The NCADA recommends that this rule be expanded to a principal contractor, intermediate contractor, or subcontractor who has notice that the policy has lapsed, is cancelled, or is not renewed for any reason.

Rule .0404(a) (Termination and Suspension of Compensation): There is no statutory authority for the rule.

Rule .0404(c): There is no statutory authority for payment of costs associated with terminating benefits via the Fee Portal.

Rule .0404(d): There is no statutory authority for the requirement that the Commission "shall" refuse to accept the application to terminate benefits due to the failure to specify the number of pages attached.

Rule .0404(g): The language stating that a hearing is to be set "without delay" is not consistent with statutory authority and attempts to interpret the law without statutory authority, which is a violation of the APA.

Rule .0405 (Reinstatement of Compensation): There is no statutory authority for the telephonic procedure proposed in this rule. If it is determined that the Commission has statutory authority to develop such informal hearing procedures for the reinstatement of benefits, those procedures should track the same timelines for suspension of benefits.



North Carolina Association of Defense Attorneys

The Right Affiliation. The Right Resources. The Right Reasons.

Rule .0406 (Discount Rate to be Used in Determining Commuted Values): This rule is unclear and ambiguous and has no statutory authority.

Rule .0408 (Application for or Stipulation to Additional Medical Compensation): There is no statutory authority for requiring the employer to state the grounds for and provide supporting documentation that the employee is not entitled to ongoing medical treatment beyond two years. The proposed rule also improperly shifts the burden to the employer.

Rule .0502(2)(b) (Compromise Settlement Agreements): The proposed rule lacks statutory authority.

Rule .0502(3)(d): The proposed rule has no legal basis in that it goes beyond the Commission's authority to approve settlements as set forth in G.S. 97-17.

Rule .0601(b) (Employer's Obligations Upon Notice; Denial of Liability; And Sanctions): There is no statutory authority for requiring the defendants to send a denial to healthcare providers.

Rule .0603 (Responding to a Party's Request for Hearing): There is no statutory authority to make the employer respond to a Form 33 but not an employee. This provision of the rule is not necessary and treats the parties to the claim differently, which is a violation of the due process clause of the US Constitution.

Rule .0604 (Appointment of Guardian Ad Litem): The NCADA asserts there is no statutory authority for the Commission's proposed rule to assess a fee to be paid by the employer to an attorney who serves as a guardian ad litem on behalf of a minor or incompetent.

Rule .0605 (Discovery): There is no statutory authority for Rule 605(9), which states that the parties shall not submit motions to compel production of information otherwise obtainable pursuant to G.S. 97-25.6.

Rule .0607 (Discovery of Records and Reports): The required production of all employment records, even if there is no showing of relevance, is contrary to statutory authority.

Rule .0608 (Statement of Incident Leading to Claim): There is no statutory authority that requires the recorded statement be provided within 45 days after the request for hearing. The NCADA contends that the recorded statement should be subject to discovery rules, namely Rule 605, and that a recorded statement should be produced within 30 days after it is requested.

Rule .0609 (Motions Practice in Contested Claims): There is no statutory authority for implementing a motions practice in contested cases.



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Rule .0609A (Medical Motions and Emergency Medical Motions): The NCADA contends that G.S. 97-78(f) did not provide statutory authority for setting up the expedited process established by the Commission that essentially eliminates live, in person hearings with depositions.

Rule .0612 (Depositions and Additional Hearings): The NCADA contends that there is no statutory authority to charge all deposition fees against the employer.

Rule .0613 (Expert Witnesses and Fees): The NCADA contends that the 10 percent penalty for failure to make payment to an expert witness within 30 days is not supported by statutory authority.

Rule .0616 (Dismissals): The NCADA contends that there is no statutory authority for the deadline for re-filing a claim under Rule 616(c) following removal of a case from a hearing docket.

Rule .0701(b) (Review by the Full Commission): The proposed rule is unclear and ambiguous. The NCADA further contends this rule contravenes G.S 97-29(c) as it relates to extended benefits.

Rule .0701(e): The proposed rule is unclear. The use of the word “paragraph” is not consistent with statutory references such as “subchapter” and “subdivision.”

Rule .0701(f): The proposed rule is unclear and ambiguous. The new sentence that begins “Motions related to the issues for review...” is confusing in that it fails to establish a clear procedure to raise a motion and be heard before the Full Commission.

Rule .0701(i): The proposed rule is unclear. The requirement that exhibits be cited as “Ex 3 p 12,” for example, is superfluous since the hearing transcript issued with a Form 44 does not delineate between the transcript and exhibit pages. All transcript and exhibit pages are consecutively paginated when the evidentiary record is published. Therefore, the NCADA recommends “Ex p 12.”

Rule .0702(a) (Review of Administrative Decisions): The proposed rule is not supported by statutory authority.

Rule .0702(b): The proposed rule is unclear and ambiguous. The phrase “frustrate the purposes of the order, decision, or award” that begins on line 31 suggests a motion to stay may be denied in all cases.

Rule .0704 (Remand from the Appellate Courts): The proposed rule is unclear.

Rule .0801 (Suspension of Rules): The proposed rule is not supported by statutory authority and is in violation of the APA.



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Rule .0802 (Sanctions): The proposed rule is not supported by statutory authority. None of the statutes relied upon by the Commission to promulgate this rule endow the Commission with generalized authority to impose broad sanctions.

RULES 10B

Rule .0202(c): The proposed rule contradicts Rule 9(j) of the Rules of Civil Procedure as it relates to the time requirements to designate a medical expert.

RULES 10C

Rule .0101 (Applicability of the Rules): The proposed rule is not reasonably necessary to implement State law and is contrary to G.S. § 97-32.2. The NCADA also recommends that because there are now two statutes that address rehabilitation services (G.S. 97-25.5 and 97.32.2) the rules should delineate between those that apply to medical case managers and those that apply to vocational managers.

Rule .0103(3) (Definitions): There is no statutory authority for defining “Vocational Rehabilitation” to require the goal be to “substantially increase the employee’s wage earning capacity.” The definition is vague and ambiguous. The proposed rule is also unnecessary, redundant and repeats the content of a law in violation of the APA.

Rule .0103(5): There is no statutory authority for the proposed definition of “suitable employment” for claims arising before June 24, 2011.

Rule .0105(d) (Qualifications Required): As written, this rule appears to require both that the rehabilitation professional possess one of the professional certifications listed and have prior employment experience with the North Carolina Department of Health and Human Services as a vocational rehabilitation provider. It would not make sense for qualified medical rehabilitation professionals to have prior experience as vocational rehabilitation professionals for the State.

It is also unclear why subsection (e) is separate from subsection (d) when both appear to enumerate the requirements to serve as a rehabilitation professional.

Rule .0106(a) (Professional Responsibility of the Rehabilitation Professional in Workers’ Compensation Claims): The NCADA asserts the inclusion of the word “retirement” is contradictory to the Act as amended by G.S. 97-32.2.

Rule .0106(e): The incorporation by reference to web sites for professional organizations is unnecessary to implement State law.

Rule .0106(g): It appears that the word “activity” in line 23 is superfluous and should be deleted.

Rule .0107(d) (Communication): There is no statutory authority that requires all correspondence and reports to be sent electronically. In addition, the proposed rule is unclear.



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Rule .0107(j): There is no statutory authority for this rule. The rule is also unnecessary because Rule .0106(a) details the scope of the rehabilitation professional's role. Further, the proposed rule would place an unnecessary burden upon the rehabilitation professional in violation of G.S. 150B-19.1(2) and potentially the ethical codes adopted by the respective professions.

Rule .0108(e) (Interaction with Physicians): There is no statutory authority for limiting the rehabilitation professional from "initiating" a second opinion on a rating, independent medical examination, second opinion and consult. Furthermore, the proposed rule is unclear and ambiguous in that "initiate" is not defined.

Rule .0108(e)(2): The proposed rule is unclear.

Rule .0109(d) (Vocational Rehabilitation Services and Return to Work): The NCADA suggests that this rule needs further clarification.

Rule .0109(i): The proposed rule is not reasonably necessary to implement G.S. 97-2(22) or 97-32.2.

Rule .0110 (Change of Rehabilitation Professional): This rule is unclear and ambiguous in that it allows the rehabilitation professional to be removed "to prevent manifest injustice," but provides no guideline on the definition of "manifest injustice." In addition, there is no statutory authority for this phrase.

Rule .0201 (Suspension of Rules): The proposed rule is not supported by statutory authority and is in violation of the APA. The APA does not allow an administrative agency to suspend its own rules "unless a rule establishes specific guidelines the agency must follow in determining whether to waive or modify the requirements." *See* G.S. 105B-19(6).

Rule .0202 (Sanctions): The proposed rule is not supported by statutory authority. None of the statutes relied upon by the Commission to promulgate this rule endow the Commission with generalized authority to impose broad sanctions.

RULES 10E

Rule .0201 (Document and Record Fees): There is a typographical error on line 9 in that "the actual cost." is noted twice.

Rule .0202(a) (Hearing Costs or Fees): The proposed rule is not supported by statutory authority. The rule does not specify which party shall bear the costs/fees for a given action.

Rule .0202(b): This rule is not supported by the statutory authority listed. Chapter 143 applies only to the Industrial Commission's authority to hear tort claims. It is independent and inapplicable to the Commission's jurisdiction under Chapter 97.



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Rule .0203 (Fees Set By Commission): The NCADA notes the objections to Rule .0202 apply to .0203.

Rule .0301 (Suspension of Rules): This rule is not supported by statutory authority and is in violation of the APA.

Rule .0302 (Sanctions): This rule is not supported by statutory authority. None of the statutes relied upon by the Commission to promulgate this rule endow the Commission with generalized authority to impose broad sanctions.

RULES 10G

Rule .0101(b) (Mediation and Settlement Order for Mediated Settlement Conference): This rule is unclear and ambiguous. The NCADA also notes that inconsistent terms are used throughout all rules such as “plaintiff” versus “employee” versus “injured worker.”

Rule .0103(g) (Mediated Settlement Conference): The NCADA asserts this rule is unclear and ambiguous particularly as it relates to the fact “settlement agreement” is not defined.

Rule .0104(f) (Duties of Parties, Representatives and Attorneys): The NCADA asserts this rule is unnecessary in that there are several examples of settlements wherein the parties cannot submit the settlement agreement to the Commission within 20 days of the conclusion of the mediation conference (e.g., claim where parties are waiting on CMS to approve an MSA before submitting agreement to Commission).

Rule .0104A (Foreign Language Interpreters): This rule is unclear as it relates to the statutory authority that would allow the Commission to charge the employer with translation costs.

Rule .0105 (Sanctions): This rule is in violation of the APA because sanctions related to mediations are not specifically allowed by statute.

Rule .0107(b)(3) (Compensation of the Mediator): This rule is unclear and ambiguous.

Rule .0110 (Suspension of Rules): This rule is not supported by statutory authority and is in violation of the APA.

Rule .0112 (Miscellaneous): This rule violates the APA in that it repeats the content of another rule.

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Ms. Amber Cronk
North Carolina Industrial Commission
4336 Mail Service Center
Raleigh, NC 27699

Re: Objection to Proposed Rules

Ms. Cronk:

In accordance with the recent Notice of Rule Making, please accept the following as objections to Subchapter 10C, North Carolina Industrial Commission Rules for Utilization of Rehabilitation Professionals in Workers' Claims. I am a Board Certified Specialist in North Carolina Workers' Compensation Law and have practiced for more than 35 years.

The Industrial Commission Rules for Rehabilitation Professionals published in 2000 were the product of extensive work and discussion. They represent a consensus of opinions from defense attorneys, plaintiff's attorneys, Industrial Commission participants and the rehabilitation professional community. While some changes are necessary to tailor the rules to statutory changes, wholesale revisions are not.

The most constructive change would be for the Industrial Commission to assign all rehabilitation providers and tax the cost to the employer/insurance carrier. This would neutralize a process which has become unnecessarily adversarial. I understand the state of Washington has adopted this practice.

Specific proposals are discussed below:

4 NCAC 10C.0102 should not be repealed. Indeed the fact that the Industrial Commission would propose repealing a rule indicating that the primary concern and commitment of an RP should be to the medical and rehabilitation of the injured worker rather than to the financial interest of the parties and stating that "these Rules are to be interpreted to promote frank and open cooperation" is deeply troubling.

4 NCAC 10C.0106 deletes a section in paragraph (A) stating, "the RP shall realize that the attending physician directs the medical care of an injured worker." This statement is consistent with both case law and the Rules of the Industrial Commission for Worker's Compensation claims. Merely adding a sentence stating "it is not the role of the Rehabilitation Professional to direct medical care" does not settle the issue. The proposed change injects confusion into a settled area of the law for no good reason. The rules should clearly state that an authorized treating physician directs the medical care of an injured worker, not the adjuster. Physicians tell me one of the most frustrating aspects of treating a workers' compensation patient is micro management of medical care by adjusters. The insurance carrier and/or employer have the right to direct initial medical care. However, they clearly do not have the right to

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interfere with care determined reasonably necessary and prescribed by the authorized treating physician. A truly inordinate amount of time and money is spent by counsel and the Industrial Commission dealing with these issues as a direct result of the Industrial Commission's reluctance to enforce its own rules. Certainly, a rule change further confusing the issue is not in anyone's best interest.

4 NCAC 10C.0107 proposes that paragraph (F) allowing an RP to verbally advise an unrepresented worker of developments and saying that the worker has the right to request a copy of the reports being provided to the employer/carrier. This change from the present rule requiring periodic written reports to be provided to all parties at the same time would simply be an invitation for abuse. There is no good reason all parties should not receive all reports at the same time and by the same means. There should be no question as to what information was provided and when. Any deviation from the present, successful rule would simply invite misunderstandings and disputes which could easily be avoided.

In fact, the rule does not go far enough. Counsel and the Commission are aware of instances in which rehabilitation companies allow insurance adjusters direct access to their rehabilitation professional's files and notes by use of a password or other device. At the same time, the injured worker and counsel are simply not provided this access. Another example is the billing process. Rehabilitation professional billing may indicate activities inconsistent with the rules for which have not been disclosed. All billing from rehabilitation professionals and their employers should be disclosed to all parties at the same time.

A further abuse occurs when the charges for medical and vocational rehabilitation are reported as medical charges rather than administrative expenses of the insurance carriers. In the vast majority of cases, the rehabilitation professional is assigned by the insurance carrier to save themselves money rather than because of any legitimate medical reason. In 35 years of practice, I can not recall a physician prescribing or requesting assignment of a rehabilitation professional for anything other than coordinating post-operative care. Given this reality, the Industrial Commission should require costs of any rehabilitation professional not prescribed by the authorized treating physician to be reported as an administrative expense. This will ensure proper accounting of expenses which are truly medical as opposed to expenses which are discretionary with the insurance carrier.

The injured worker should not be compelled to request disclosure of records which are already being provided to the employer/carrier.

4 NCAC 10C.0108

Paragraph (D) (7) should be deleted. If an injured worker failed to attend a scheduled appointment or arrived at a time other than the scheduled appointment time, that is not an excuse for an ex-parte communication by the rehabilitation professional with the physician. The rule should also make it clear that communications with the physician's staff should be subject to the same disclosure requirement as communication with the physician. I have personally had cases which telephone messages were left for doctors saying "FCE" and "employer has light duty work available." These notes

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were found in the medical doctor's files in the course of a deposition - which probably would have been unnecessary if the improper communication with the physician via his staff had not occurred.

4 NCAC 10C.0109 dealing with the vocational rehabilitation services and return to work should include at paragraph (d) "(6) the results of appropriate vocational testing evaluating the skills, educational functioning, interests and aptitudes." Vocational testing of this type is routinely used by the Division of Vocational Rehabilitation. In preparing vocational evaluations, these testing services are readily available. Their use should be encouraged by the Industrial Commission to improve the likelihood of a successful placement and reduce the likelihood of litigation which might be avoided.

4 NCAC 10C.0110 , Change of Rehabilitation Professional, would provide at paragraph (b) that an RP could be removed only "to prevent manifest injustice." This is a radical, unnecessary change. The term "manifest injustice" is not defined. The proposed rules also do not describe whether rehabilitation services are to be continued while a motion to remove a rehabilitation professional is pending, whether a stay may be issued by the Industrial Commission, or in paragraph (c) how long the effect of an order may be delayed by requesting reconsideration or by appealing.

This rule should clearly state that when the provisions of paragraph (a) are not met, the decision of the Industrial Commission to remove a rehabilitation professional is discretionary and interlocutory on a no-fault basis. Sometimes there are simply personality conflicts which make it difficult for rehabilitation providers and recipients to work together. In these instances, the Industrial Commission should not deprive itself of authority to make a constructive change without ascribing fault to either party. By simplifying and neutralizing the process, continuity of care can be preserved and results fair to all parties obtained.

Thank you for your consideration of this. These proposed rules are of great importance of the parties appearing before the Industrial Commission. The changes suggested are intended to be constructive and to help ensure an effective and cooperative rehabilitation environment.

Sincerely yours,

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July 30, 2012

Via e-mail only (amber.cronk@ic.nc.gov)

Chair Pamela T. Young
Attention: Amber Cronk, Legal Assistant
North Carolina Industrial Commission
4336 Mail Service Center
Raleigh, North Carolina 27699-4336

Re: NCAJ Workers' Compensation Section's
Comments on and Objections to Proposed Rules
Public Hearing on August 6, 2012

Dear Chair Young:

Please accept this letter as the comments and objections by the Workers' Compensation Section of the North Carolina Advocates for Justice to the proposed rules that are the subject of the public hearing scheduled for August 6, 2012. I am the current Chair of the Workers' Compensation Section.

The Workers' Compensation Section is grateful to the Commission for its hard work in the rulemaking process. In reviewing the proposed rules, we focused on whether they discriminated on either a procedural or substantive basis and, of course, whether they were consistent with the statutes they implement. We have listed our specific comments and objections below and have organized them by subchapter of the proposed rules.

Workers' Compensation Rules (Subchapter 10A)

4 NCAC 10A.0402(a)—OBJECTION. The proposed rule, as currently worded, is not enforceable because it does not give a deadline in which employers must provide the Form 22. We would respectfully recommend a 30-day compliance period, consistent with the former Industrial Commission Rule 607.

4 NCAC 10A.0404(c)—OBJECTION. The proposed rule requires service of the Form 24 to unrepresented parties by regular United States mail. However, we would propose that service upon unrepresented parties take place by certified mail, return receipt requested, to ensure receipt and notice of the Form 24 upon the unrepresented parties.

In addition, 4 NCAC 10A.0404(c) affirmatively requires that any objection to a Form 24 “shall be accompanied by all currently available supporting documentation.” This mandate is contrary to the language of N.C. Gen. Stat. § 97-18.1(c), which provides an “opportunity to state their position and to submit documentary evidence”—that is, in a non-mandatory way. The mandatory aspect of the proposed rule places unrepresented employees at a distinct disadvantage, since they do not normally have the documentation needed to combat a Form 24 Application in an expedient fashion, and might be relevant to appellate proceedings on whether the decision on the Form 24 was appropriate.

4 NCAC 10A.0404(f)—OBJECTION. The proposed rule deletes the “good cause” exception for extending the time in which the Commission can hold a Form 24 hearing. However, the language of N.C. Gen. Stat. § 97-18.1(d) specifically calls for that standard.

4 NCAC 10A.0404A(b)—OBJECTION. The proposed rule states that the employee “shall” complete and file with the Industrial Commission a completed Form 28U, and that the Form 28U “shall be completed by the physician who imposed the restrictions or one of the employee’s authorized treating physicians....” To the contrary, the Court of Appeals has already held that the submission of a Form 28U is not a mandatory requirement for reinstatement of compensation. See Barbour v. Regis Corp., 167 N.C. App. 449, 458 n.2, 606 S.E.2d 119, 126 n.2 (2004); Burchette v. East Coast Millwork Distrib., 149 N.C. App. 802, 808-809, 562 S.E.2d 459 S.E.2d 459, 463 (2002).

4 NCAC 10A.0501(d)—COMMENT. The language of the proposed rule states that “when the employee signs the forms.” We would recommend, however, that the language should be “when the employee *or appropriate beneficiary* signs the forms,” as the case may be. For example, an employee cannot sign a Form 26D.

4 NCAC 10A.0502(b)(7)—OBJECTION. For the most part, we agree with the proposed rule. However, N.C. Gen. Stat. §44-49 and § 44-50 only require the payment of a prorated amount, and not the full amount, of medical bills during a settlement disbursement. The proposed rule should clarify that the notification to the medical providers will specify the amount of the unpaid medical expenses being paid through the settlement, as approved by the Commission, and the amount of any balance remaining after such payment, if this is the case.

4 NCAC 10A.0601(b)—OBJECTION. The proposed rule deletes the former requirement of a “detailed” statement explaining the denial of benefits. To the contrary, N.C. Gen. Stat. § 97-18(c) requires a “detailed statement of the grounds upon which the right to compensation is denied.”

4 NCAC 10A.0610(a)—COMMENT. The second sentence of the proposed rule (“The parties have 15 days following the hearing within which to schedule the taking of medical depositions unless otherwise extended by the Commission in the interest of justice and judicial economy.”) is duplicative of, or in the very least, belongs in 4 NCAC 10A.0613(a).

4 NCAC 10A.0614(k)—OBJECTION. The proposed rule cites to N.C. Gen. Stat. § 97-90.1(b). However, there are no subparts to N.C. Gen. Stat. § 97-90.1.

4 NCAC 10A.0616(c)—OBJECTION. The proposed rule does not differentiate between requests for hearings in denied claims versus admittedly compensable claims. In denied claims, it makes sense to for a dismissal to be available if the claim is not prosecuted within 2 years. In admitted claims, however, the proposed rule—specifically subsection (c)—makes no sense. For example, if an employee files a Form 33 on the issue of average weekly wage and then removes the case from the hearing calendar, the currently proposed rule appears to allow the employer to move to dismiss the entire claim, even though the Form 33 did not affect the issues of compensability and liability.

4 NCAC 10A.0702(a)—OBJECTION. The first sentence is awkward and difficult to understand. We would suggest clarifying it with additional enumeration, punctuation, and language, such as the following underlined examples:

Administrative decisions include orders, decisions, and awards made in a summary manner, without findings of fact, including decisions on (1) applications to approve agreements to pay compensation and medical bills, (2) applications to approve the termination or suspension or the reinstatement of compensation, (3) applications for change in treatment or providers of medical compensation, (4) applications to change the intervals of payments, and (5) applications for lump sum payments of compensation. Administrative decisions shall be reviewed upon the filing of a Motion for Reconsideration with the Commission addressed to the Administrative Officer who made the decisions or may be reviewed by requesting a hearing within 15 days after receipt of the decision or receipt of the ruling on a Motion to Reconsider. These issues may also be raised and determined at a subsequent hearing.

4 NCAC 10A.1001(i)—OBJECTION. The proposed rule allows peer review from doctors who are licensed in states other than North Carolina. While this is acceptable practice if the doctor practices medicine in the same state in which the employee resides, the reliance upon those doctors' recommendations for patients residing in states in which the doctor is not licensed most likely constitutes the unauthorized practice of medicine if those opinions disrupt the course of medical treatment by a duly licensed medical provider, depending on the laws of the forum state. See, e.g., N.C. Gen. Stat. § 90-1.1(5) (defining "practice of medicine" under North Carolina law.)

Rehabilitation Professionals (Subchapter 10C)

4 NCAC 10C.0110(b)—OBJECTION. The proposed rule states that a rehabilitation professional may be removed "to prevent manifest injustice." This standard is contrary to the plain language of N.C. Gen. Stat. § 97-32.2(b), which allows removal for "good cause."

Managed Care Rules (Subchapter 10D)

No comments or objections.

Administration (Subchapter 10E)

4 NCAC 10E.0201(b)—OBJECTION. There appears to be superfluous language at the end of the proposed rule (“the actual cost”). Furthermore, the subsections go from (b) to (f) with no subsections (c) through (e) between them.

Electronic Billing (Subchapter 10F)

4 NCAC 10F.0101—OBJECTION. The proposed rule requires compliance with the new electronic billing procedures by all medical providers. However, unlicensed medical providers, such as family members providing attendant care services or transportation companies providing “sick travel” under N.C. Gen. Stat. § 97-2(19), should not be compelled to submit their bills electronically. The current proposal does not accommodate these non-professional providers, and an exception should be made to do so.

4 NCAC 10F.0106(i)—OBJECTION. The 30-day period under the proposed rule is inconsistent with the 60-day period under N.C. Gen. Stat. § 97-18(i) when it comes to the 10% penalty.

4 NCAC 10F.0107(b)—COMMENT. The proposed rule misspells “utilize” as “utilizen.”

Mediated Settlement (Subchapter 10G)

10 NCAC 10G.0101(b)—OBJECTION. The proposed rule contains a “contrary to the interests of justice” standard for ordering the case to a mediated settlement conference. However, this standard appears to conflict with the standard set forth set in 4 NCAC 10G.0101(f) (“interest of justice or judicial economy” or “good cause”) for reasons for which the parties or the Commission can dispense with mediation. The two standards should be commensurate with each other.

Medical Fees Compensation (Subchapter 10J)

General—COMMENT. Although it does not appear to do otherwise, the medical fee schedule should confine itself to the establishment of fees for the provision of medical compensation. It should not, as prior opinions from the appellate courts have observed, go beyond this scope and, for example, impose any other conditions on medical compensation, such as preapproval in the section of the fee schedule struck down by *Forrest v. Pitt County*, 100 N.C. App. 119, 394 S.E.2d 659 (1990), *aff’d*, 328 N.C. 327, 401 S.E.2d 366 (1991) (per curiam). See also *Godwin v. Swift & Co.*, 270 N.C. 690, 155 S.E.2d 157 (1967) (restricting prior opinion of *Hatchett v. Hitchcock Corp.*, 240 N.C. 591, 83 S.E.2d 539 (1954), when it comes to preauthorization of attendant care services, based on prior Industrial Commission rule now found in Section 14 of the Medical Fee Schedule).

Thank you for your consideration of these comments and objections. We look forward to discussing them with the Commission on August 6, 2012.

With kindest regards, I am,

Very truly yours,

A handwritten signature in black ink, appearing to read 'V. Sumwalt', written in a cursive style.

Vernon Sumwalt
Chair, NCAJ Workers' Compensation Section

VRS:vrs

cc: WC Section Executive Committee