

STATE OF NORTH CAROLINA

BEFORE THE NORTH CAROLINA INDUSTRIAL COMMISSION

OCTOBER 31, 2018

PUBLIC HEARING BEFORE THE FULL COMMISSION

REGARDING

PROPOSED RULEMAKING IN SUBCHAPTERS 11 NCAC 23A AND

11 NCAC 23B

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A P P E A R A N C E S

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Yolanda K. Stith, Vice-Chairman
Philip A. Baddour, III, Commissioner
Christopher C. Loutit, Commissioner
Myra L. Griffin, Commissioner
A. Robinson Hassell, Commissioner

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P R O C E E D I N G S

CHAIRMAN ALLEN: Good morning. We are on the record. Today is September 26 [sic], 2018. I am Charlton Allen, Chairman of the North Carolina Industrial Commission. In compliance with the requirements of Chapter 138A-15(e) of the State Government Ethics Act, I remind all members of the Commission of their duty to avoid conflicts of interest under Chapter 138A. I also inquire as to whether there is any known conflict of interest to the matters coming before the Commission at this time.

VICE-CHAIRMAN STITH: No.

COMMISSIONER GRIFFIN: No.

COMMISSIONER HASSELL: None, Mr. Chairman.

CHAIRMAN ALLEN: Hearing none, we will proceed. This is a North Carolina Industrial Commission public hearing on proposed rulemaking. The purpose of this hearing is to receive comments from the public regarding the proposed amendments of thirteen rules and the proposed repeal of one rule as published in the *North Carolina Register* on August 15 [sic], 2018. We have received no written - well, actually, we've received one written comment from the public thus far, and the record will be held open to receive written comments from the public through the close of business

1 on October 15, 2018. At this time, I would like to
2 introduce the other Commissioners. To my immediate
3 right is Vice-Chairman Yolanda Stith, then
4 Commissioner Philip Baddour and Commissioner Robby
5 Hassell, and to my left immediately is Commissioner
6 Christopher Loutit, and then Commissioner Myra
7 Griffin. Anyone who wishes to speak at this hearing
8 must do so by signing up with Ashley Snyder -
9 Ms. Snyder, if you would, raise your right - raise
10 your hand; thank you - so that we have the correct
11 spelling of your name and can call you in order to
12 speak. If anybody would like to speak and has not yet
13 signed up to do so, please do so now. Seeing none,
14 the first speaker will be Ashley Snyder, the
15 rulemaking coordinator for the North Carolina
16 Industrial Commission; followed by members of the
17 public. Given the number of speakers that we
18 anticipate for the public hearing, the Commission will
19 limit the time of each speaker to three minutes.
20 Also, given the number of speakers on the tort claims
21 rules versus the number - the one speaker that we're
22 aware of for the workers' compensation rules, we will
23 start with the workers' compensation rules.
24 Ms. Snyder.

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ASHLEY SNYDER

CHAIRMAN ALLEN: Will you please state your name, your position and whom you work for?

MS. SNYDER: My name is Ashley Snyder, and I'm the rulemaking coordinator for the North Carolina Industrial Commission.

CHAIRMAN ALLEN: And do you have prepared exhibits that you would like to place into the record of these proceedings?

MS. SNYDER: Yes. I have Exhibit 1, which is a copy of the proposed rules as published in the *North Carolina Register* on September 17th, 2018. Next, I have Exhibit 2, which is a copy of the fiscal notes for Rules 11 NCAC 23A .0109 and .0801, .0501, .0502, .0609 and .0620, .0619, .0701 and .0702 and 11 NCAC 23B .0206.

(Exhibits 1 and 2 are identified for the record.)

CHAIRMAN ALLEN: Would you briefly give us some background and list the rules that would be affected by the proposed rulemaking?

MS. SNYDER: We have two rules proposed for adoption, eleven rules proposed for amendment and one rule proposed for repeal. On its own initiative, the North Carolina Industrial Commission conducted an

1 internal review of its workers' compensation rules and
2 sought informal stakeholder feedback on rules in 11
3 NCAC 23A. The proposed adoptions and amendments
4 reflect changes necessary to improve and clarify the
5 rules, provide for increased efficiency, or update the
6 rules to reflect current practices. The Commission
7 also conducted an internal review of its rules
8 governing state tort claims. The proposed amendments
9 to 11 NCAC 23B reflect changes necessary to clarify
10 the rules, provide for increased efficiency, or update
11 the rules to reflect current practices. We have two
12 proposed rules for adoption: 11 NCAC 23A .0109,
13 Contact Information, and 11 NCAC 23A .0620, Written
14 Communications with the Commission. We have thirteen
15 proposed rules for amendment: 11 NCAC 23A .0501,
16 Agreements for Prompt Payment of Compensation; 11 NCAC
17 23A .0502, Compromise Settlement Agreements; 11 NCAC
18 23A .0604, Appointment of Guardian Ad Litem; 11 NCAC
19 23A .0609, Motions Practice; 11 NCAC 23A .0617,
20 Attorneys Retained for Proceedings; 11 NCAC 23A .0619,
21 Foreign Language and Sign Language Interpreters; 11
22 NCAC 23A .0701, Review by the Full Commission; 11 NCAC
23 23A .0702, Review of Administrative Decisions; 11 NCAC
24 23A .0801, Waiver of Rules; 11 NCAC 23B .0206,
25 Hearings; 11 NCAC 23B .0503, Sanctions. And one

1 proposed rule for appeal: 11 NCAC 23B .0207, Hearings
2 of Claims by Prison Inmates. The Commission proposes
3 to repeal 11 NCAC 23B .0207 because the necessary
4 contents of the rule are proposed to be added to Rule
5 11 NCAC 23B .0206. The Commission has followed the
6 permanent rulemaking procedures of the Administrative
7 Procedure Act in proposing these changes. The
8 proposed rules were filed with a notice of text to the
9 Office of Administrative Hearings on August 24th, 2018.
10 They were then published in the September 17, 2018
11 issue of the *North Carolina Register*, and on the same
12 date, the Commission published a notice of this
13 rulemaking on the Commission's website and also
14 emailed notice with a link to these proposed rules to
15 the Industrial Commission's Listserv. Copies of these
16 rules were also provided to the North Carolina League
17 of Municipalities and the North Carolina Association
18 of County Commissioners as required by statute.

19 CHAIRMAN ALLEN: All right. Do any members of the
20 Commission have questions for Ms. Snyder?

21 VICE-CHAIRMAN STITH: No.

22 COMMISSIONER HASSELL: Not at this time,
23 Mr. Chairman.

24 COMMISSIONER GRIFFIN: No, none.

25 CHAIRMAN ALLEN: Okay. With that, Ms. Snyder, you

1 wanted to briefly address our section's concern with
2 the proposed rule to .50 - .0502(e) with respect to
3 when there are prior attorneys and a current attorney
4 requesting attorney's fees. I think that the rule
5 that is currently proposed - it does not appear to
6 address the circumstance of just sort of when there is
7 one attorney and what they must do to submit a fee
8 request, so I think that part of the rule still needs
9 to be included. With respect to the other concerns,
10 we just felt that it was a little bit unclear as to
11 what the Commission was trying to get - we - so it
12 appears to our section that it - the Commission was
13 asking, you know, current counsel to obtain from prior
14 counsel information they may not have with respect to
15 a retainer agreement. With respect to a position with
16 regard to fee (phonetic), I do think it is better
17 practice for, you know, when there are attorneys with
18 a fee issue to try to work that out, and so what we
19 have submitted as a proposal is a - you know, what we
20 would suggest the Commission take up as an amendment
21 to the rule which would allow - I think puts the
22 attorneys in a similar position where they are - you
23 know, gives them instruction to reach out to prior
24 counsel to try to seek an agreement, but does not
25 place undue burden on them when they may not be able

1 to obtain the information that the Commission wants.
2 And I think the reason for that is often in these
3 settlement agreements, having practiced a number of
4 years, you may - you may be aware of a prior counsel;
5 you may not be aware of a prior counsel. You may not
6 have an opportunity to reach out to them before a
7 settlement is reached. There's usually a timing issue
8 with respect to submitting a compromise settlement
9 agreement, so if you took the Commission's current
10 proposal, it appears to maybe lead to a potential
11 delay in the submission of agreement, which is usually
12 something that the defendants would be opposed to, as
13 well as our - you know, plaintiffs. So we don't want
14 a situation when there is a delay, but we want to
15 place on the current counsel an obligation to try to
16 reach an agreement with prior counsel and an
17 obligation for prior counsel to reach out. Were there
18 any questions, Commissioners?

19 CHAIRMAN ALLEN: Any questions from the
20 Commissioners?

21 VICE-CHAIRMAN STITH: No.

22 COMMISSIONER GRIFFIN: No.

23 COMMISSIONER HASSELL: None. Thank you.

24 MR. HARBIN: Thank you, Your Honor.

25 VICE-CHAIRMAN STITH: Thank you.

1 CHAIRMAN ALLEN: Thank you, Mr. Harbin.

2 (SPEAKER DISMISSED)

3 CHAIRMAN ALLEN: Are there any other individuals
4 who wish to speak about the workers' compensation
5 proposed rules and amendments? All right. We'll now
6 move on into the tort claim proposed rules and
7 amendments and repeal. On the sheet in front of me,
8 the first name I see who wishes to speak is Gary
9 Junker. Mr. Junker, if you would approach. And also,
10 it looks like your name appears twice. You will only
11 be allowed to speak one time. Mr. Junker.

12 UNIDENTIFIED SPEAKER: Mr. Chairman, would it be
13 appropriate if Mr. Junker came at the second
14 opportunity for his name being called?

15 CHAIRMAN ALLEN: I'm calling them in the order
16 they appear on the sheet.

17 UNIDENTIFIED SPEAKER: Thank you, sir.

18 GARY JUNKER

19 CHAIRMAN ALLEN: If you would, please state your
20 name, whom you represent, if any particular
21 organization, and please identify the specific
22 proposed rule or rules you will be addressing in your
23 remarks.

24 MR. JUNKER: My name is Gary Junker. I'm the
25 Director of Behavioral Health for the North Carolina

1 Department of Public Safety/Adult Corrections, and I
2 am addressing 11 NCAC 23B .0206(a).

3 CHAIRMAN ALLEN: You'll have three minutes.
4 Meredith Henderson, the Executive Secretary of the
5 Commission, will help you keep track of your time and
6 will raise her hand at the conclusion.

7 MR. JUNKER: Thank you. My responsibilities as
8 Director of Behavioral Health include clinical and
9 administrative oversight of all behavioral health
10 services within prisons, to include alcohol chemical
11 dependency programs in prisons and two residential
12 treatment facilities for drug treatment for
13 individuals on probation. Approximately 17.4 percent
14 of prisons, thirty-six thousand offenders are
15 currently on behavioral health caseload. This equates
16 to approximately sixty-three hundred offenders of
17 which most are prescribed psychiatric medication.
18 Approximately eighty-five - eighty-five percent of our
19 psychiatric clinics are conducted by telepsychiatry.
20 On average, two thousand psychiatric encounters are
21 completed each month by teleconferencing. Psychiatric
22 clinics are coordinated at facilities that house
23 offenders with mental illness. The psychiatric - the
24 psychiatrist is housed in a remote location and
25 videoconferences into the prison to conduct their

1 clinic, and the behavioral health staff coordinate
2 with correctional services staff to have the offender
3 brought to the clinic. Those locations, the
4 teleconferencing equipment and offices are a
5 multipurpose area used for DHO hearings, ICE hearings,
6 parole hearings, in addition to tort claim hearings.
7 I just wanted to discuss briefly the impact of the
8 proposed rule change, and this rule change indicates
9 the Commission shall set the date - quote, "The
10 Commission shall set the date, time, and location of
11 the hearing and provide notice of the hearing to all
12 parties," end of quote. It may seem innocuous at
13 first, but the rule change deletes the requirement
14 that the Commission shall set the hearing, quote, "...in
15 a location deemed convenient for witnesses and the
16 Commission." Currently, the Commission works with DPS
17 in an attempt to schedule pro se inmate tort claim
18 video hearings in a manner which has the least impact
19 on other uses of this equipment and space. Due to the
20 fact that our equipment and space is already
21 overextended, we've had to limit the number of days
22 per month the Industrial Commission can conduct
23 hearings. The opposed - the proposed rule appears to
24 remove the requirement that the Commission consider
25 DPS's other uses of equipment and space. We've

1 already experienced situations where needed
2 psychiatric or psychological services were postponed
3 due to Industrial Commission hearings. These services
4 are medically necessary and a primary reason for this
5 equipment. It's imperative that we're able to provide
6 timely psychiatric treatment not only on a scheduled
7 basis, but also when emergencies arise. Tort claims
8 are scheduled weeks in advance; often do not adhere to
9 their own designated schedules, causing disruption in
10 prison operations. When a situation occurs, we're
11 unable to utilize our equipment for scheduled
12 psychiatric appointments. In addition to the offender
13 not receiving treatment, we still have to pay the
14 providers under contract. We're concerned that
15 conflicts in scheduling psychiatric clinics could lead
16 to delay in treatment and potentially bad outcomes.

17 MS. HENDERSON: Time.

18 MR. JUNKER: Thank you.

19 CHAIRMAN ALLEN: Thank you, sir. Do any members
20 of the Commission have questions?

21 VICE-CHAIRMAN STITH: No.

22 COMMISSIONER HASSELL: Not at this time, sir.

23 CHAIRMAN ALLEN: All right.

24 COMMISSIONER GRIFFIN: No.

25 COMMISSIONER BADDOUR: Thank you.

1 of all, the tort hearings are conducted in a place in
2 the prison that is completely shut off from the
3 regular population. In other words, there is no
4 access to the inmate population to that area other
5 than by escort. So the individuals that will come
6 in - the Judge, the attorneys, the recorder, et
7 cetera - would come in through our normal screening
8 process, come in through the front of the prison, go
9 up on an elevator, go into a secured area. The
10 inmates that will be brought in - each and every
11 inmate regardless of their level of security would be
12 strip searched prior to being brought down, will be in
13 direct observation, will be brought to the area of the
14 tort claim. If that inmate was a general population
15 inmate, that inmate would be allowed to testify in
16 that tort hearing without restraints unless it was
17 requested by the Judge or another person for any
18 specific reason. Other than that, if the inmate was
19 on any type of control status, that inmate would be -
20 we have a recreational table where that inmate could
21 be restrained to the table where he would not have
22 access to be mobile, so as far as from a safety
23 perspective, I take - that is my number one concern
24 with any staff member at Central Prison, to include
25 anyone that comes in to perform any duty or task,

1 especially in this capacity. Safety in my opinion is
2 not an issue. If it is an issue, I would take steps
3 to ensure that it would be resolved. Another thing
4 is, from the perspective - I was approached several
5 months ago to think outside the box on a way to make
6 these tort claims move in a more streamlined process,
7 so we started thinking outside of the box. One way
8 was to do live hearings. That way, the fifty some odd
9 prisons in the state could schedule their tort claims
10 through two to three staff members that I have
11 designated to take care of coordination, the schedule.
12 The inmates are being shipped throughout the state.
13 They come to Central Prison. They come through our
14 receiving area. They come down to their tort hearing,
15 just like I explained, into the area that is secure.
16 Their case is heard, and the process is reversed, and
17 they go outside of the prison. Whenever the
18 videoconferencing equipment is being tied up, as you
19 heard by my colleague, by mental health, medical, all
20 other things that we have for this equipment - it has
21 to be used. We figured that that was the most time
22 efficient, most efficient, safest way possible to
23 get - to get this process done, and it took a lot of
24 thought, and it's a hardship on Central Prison. In
25 other words, the other - it would be easier for me to

1 say just do it, but when thinking about everything in
2 general and what it means to the Department, there's
3 no other way that I can see in my experience, which is
4 twenty-eight plus years, to see how we could do this
5 in a more efficient way, a safer way. Thank you very
6 much.

7 CHAIRMAN ALLEN: Commissioners, do you have any
8 questions for Mr. Thomas?

9 COMMISSIONER HASSELL: No.

10 COMMISSIONER GRIFFIN: No. Thank you.

11 COMMISSIONER HASSELL: Thank you, Warden.

12 MR. THOMAS: Thank you for the time. I appreciate
13 it.

14 CHAIRMAN ALLEN: Thank you, sir.

15 (SPEAKER DISMISSED)

16 CHAIRMAN ALLEN: The next speaker will be Jodi
17 Harrison.

18 MS. HARRISON: Mr. Chairman, I yield my time.
19 Thank you.

20 CHAIRMAN ALLEN: All right. Thank you. The next
21 speaker will be Margaret McDonald.

22 MARGARET MCDONALD

23 MS. MCDONALD: Thank you, Mr. Chairman.

24 CHAIRMAN ALLEN: If you would, please state your
25 name, whom you represent, if any particular

1 organization, and please identify the specific
2 proposed rule or rules you will be addressing in your
3 remarks.

4 MS. MCDONALD: Yes, sir. My name is Margaret
5 McDonald. I'm an assistant general counsel for the
6 North Carolina Department of Public Safety. I'm here
7 today in the role as rulemaking coordinator for the
8 agency. You've already heard from two of our
9 representatives here today to discuss Rules .0206 and
10 the repeal of .0207. Likewise, I'm here to discuss
11 those rules and specifically to point out the issues
12 that we see with those rules. As you've heard, and as
13 you will continue to hear, there is an operational and
14 a safety burden when it comes to the tort claim
15 hearings that we have at our facilities, and so we
16 hope that being here today and talking to you today we
17 can justify two potential proposals for how to move
18 forward. One: To leave the rules as they are and to
19 have the departments work together to reach a viable
20 option for both agencies. Two: To find some way that
21 the Commission can take on some of the financial
22 burden that's associated with the teleconference
23 equipment and the personnel use that's required for
24 these hearings. But specifically when we're talking
25 about these rules, we're looking at - you know, we

1 start with the notice of text. The notice of text
2 says, "The Commission proposes the repeal of Rule 11
3 NCAC 23B .0207 because the necessary contents of the
4 rules are proposed to be added in Rule 11 NCAC 23B
5 .0206." However, when we look at the rule of the NCAC
6 .0206 and those amendments, we see several provisions
7 that were in the former .0207 that are no longer
8 included in .0206. Specifically, .0206(a) no longer
9 includes the option of in-person hearings. This is
10 the most beneficial and convenient option for the
11 Department because of our staffing vacancies and also
12 because of the limited availability of our
13 teleconference equipment. The more staff we have to
14 pull off of other posts to meet the safety needs of
15 these hearings, the higher the risk of danger to
16 others within the facility, and that's just a fact.
17 Accordingly, the risk of danger, as it increases, you
18 know, it's an impact to everyone in the agency, and
19 it's an impact to the state as a whole, so we would
20 ask that you keep that option for us to be able to
21 have the in-person hearings. Telephone hearings, as
22 we've experienced, have been rarely utilized, and
23 teleconference hearings, as you'll hear from our folks
24 down the way, are costly and require more DPS
25 personnel involvement. .0206 also does not include

1 the provision in .0207(b) which allows the Commission
2 to consolidate all claims for hearings in cases
3 involving multiple filings by inmates. Oftentimes - I
4 mean, as you know, we have a high volume of inmate
5 tort hearings, and oftentimes, it's the same inmates
6 who file the multiple hearings, so we would ask that
7 you keep that option for the Commission to consolidate
8 those hearings. Further, .0206 does not include the
9 provision currently in .0207(d) which incorporates the
10 Rules of Civil Procedure for the issuing of subpoenas.
11 Again, we ask that the Commission not repeal this
12 provision because doing so would remove the
13 requirement that the Rules of Civil Procedure be
14 followed. Finally, proposed amendments in 11 NCAC 23B
15 .0206 also appear to eliminate the former Rule
16 .0206(b) as provision states in pertinent part, "The
17 Commission shall set a contested case for a hearing
18 and location deemed convenient to the witnesses and to
19 the Commission." This provision is important to DPS
20 because many of the witnesses are also inmates and
21 staff who work within our facilities. We have a
22 variety of operational needs, as you've heard. Yes,
23 ma'am. And so we just appreciate your time today, and
24 we hope that as a result of this conversation, we can
25 appeal the - keep the rules as they are and continue

1 to move forward together. Thank you for your time,
2 Mr. Chairman.

3 COMMISSIONER BADDOUR: Ms. - if she---

4 CHAIRMAN ALLEN: Commissioner Baddour?

5 COMMISSIONER BADDOUR: If she has additional
6 points she wants to make since she is general counsel
7 and maybe more - has more to say possibly than some of
8 the other speakers, I don't know if she got through
9 everything or not, but it's been brief and to the
10 point, so if there's anything more she has to say, I'd
11 be interested in hearing it.

12 CHAIRMAN ALLEN: Okay. She is, as well as the
13 other speakers, can submit written comments---

14 COMMISSIONER BADDOUR: Okay. All right.

15 CHAIRMAN ALLEN: ---and either at this hearing or
16 through the public comment period.

17 MS. MCDONALD: Thank you, sir.

18 CHAIRMAN ALLEN: Are there any questions?

19 VICE-CHAIRMAN STITH: No.

20 COMMISSIONER HASSELL: Nothing further.

21 CHAIRMAN ALLEN: Okay. I do have a question.
22 It's in regards to your statements about Rule .0206 as
23 proposed.

24 MS. MCDONALD: Yes, sir.

25 CHAIRMAN ALLEN: And you indicated that it was

1 your contention that the proposed rule eliminates the
2 possibility of in-person hearings.

3 MS. MCDONALD: The rules as they were written
4 included three options. One included the former
5 .0207(a).

6 CHAIRMAN ALLEN: And I understand that. My
7 question---

8 MS. MCDONALD: Yes, sir.

9 CHAIRMAN ALLEN: ---is what in the proposed rule
10 do you contend eliminates the possibility of an
11 in-person hearing?

12 MS. MCDONALD: The proposed rule only includes two
13 options. It includes - and if I may, the proposed
14 rule in .0206 lists two options for the hearings. It
15 lists - it does - you do not see the in-person option
16 at the actual facility. You only see telephone, and
17 you only see teleconference referenced, so that to us
18 is why we are interpreting that the in-person hearings
19 would no longer be utilized.

20 CHAIRMAN ALLEN: I understand that position, but
21 when I read this particular proposed rule, it says
22 that the Commission may in its discretion order that
23 the hearing be held via videoconference or telephone
24 conference. That does not eliminate the possibility
25 in my reading of this rule the in-person hearing

1 but---

2 MS. MCDONALD: Thank you for your interpretation.

3 CHAIRMAN ALLEN: Okay. Any other questions?

4 MS. MCDONALD: Yes, sir.

5 CHAIRMAN ALLEN: Thank you. If you have any
6 written statements or comments, you can present them
7 to the court reporter or through the public comment
8 period.

9 MS. MCDONALD: Thank you, sir.

10 CHAIRMAN ALLEN: Okay.

11 (SPEAKER DISMISSED)

12 CHAIRMAN ALLEN: The next speaker will be - it
13 looks like Warden Thomas.

14 COMMISSIONER HASSELL: I think he just spoke.

15 CHAIRMAN ALLEN: Okay.

16 VICE-CHAIRMAN STITH: Yeah.

17 COMMISSIONER HASSELL: Yeah.

18 CHAIRMAN ALLEN: Another duplication. I'm sorry.
19 The next will be Annie Harvey.

20 ANNIE HARVEY

21 CHAIRMAN ALLEN: If you would, please state your
22 name, tell us whom you represent, if any particular
23 organization, and please identify the specific
24 proposed rule or rules you will be addressing in your
25 remarks.

1 MS. HARVEY: My name is Annie Harvey. I'm the
2 Deputy Director of Prisons overseeing prison
3 operations. I'm here in this capacity to provide
4 information concerning the impacts proposed Rule 11
5 NCA - NCAC 23B .0206(a) and (b) will have on the
6 Department's other videoconferencing needs. Other
7 uses: This equipment used to accommodate the
8 Commission's tort claim hearings was not purchased to
9 achieve this purpose. Instead, the Department
10 purchased its equipment for its own internal use, and
11 it has spent 1.7 million dollars to do so. This
12 investment was made to benefit the Department and to
13 improve its own efficiency and relieve operational
14 burdens experiencing and managing the state's inmate
15 population. As such, the Department uses this
16 equipment for post-release and Parole Commission's
17 hearings. These hearings are extremely important.
18 They involve an individual's conditional liberty
19 interests, and they're necessary for the compliance to
20 due process requirements because they're held to
21 determine whether or not an individual will have his
22 freedom restored or whether that individual will
23 return to prison. Disciplinary hearings: These
24 hearings are also extremely important. Inmates commit
25 disciplinary infractions regularly. Each infraction

1 is investigated, and if charges ensue, the case will
2 be recommended for a hearing before a disciplinary
3 hearing officer. If the DHO determines that the
4 inmate is guilty of committing an infraction, the
5 inmate will receive disciplinary commensurate with the
6 nature of her - his or her actions. This includes
7 loss of privileges, loss of sentence reduction
8 credits, loss of visitation rights in certain
9 instances. This process is vital to effective
10 operations of state prisons. We are tasked with
11 rehabilitating those who are in our custody so that
12 they can successfully reintegrate back into society
13 when their term of imprisonment are completed. Thus, the
14 ability to issue discipline and correct improper
15 inmate behavior is key to successfully meeting these
16 goals. Because there are nearly thirty-seven thousand
17 inmates housed in the Department facilities, this task
18 is perpetual and unyielding. Director of
19 classification hearings: The director of
20 classification hearings are held in order to determine
21 whether or not an individual should be assigned to
22 temporary or long-term restrictive housing. This is
23 required in order to satisfy inmates' due process
24 rights. These hearings are also a vital function
25 because they are perpetual; a procedural mechanism

1 through which violent, assaultive and disobedient
2 inmates are placed in secure settings that can
3 properly address and correct their behavior. These
4 hearings are also required to promote an inmate that
5 has been compliant and infraction free into a less
6 restrictive environment. Tele-Psych: Ninety percent
7 of the inmate psychological encounters are
8 accomplished via videoconferencing. Training: One of
9 the Department's intended use for videoconferencing
10 equipment was to provide remote facilities access to
11 Department's training staff.

12 MS. HENDERSON: Time.

13 CHAIRMAN ALLEN: All right. Thank you, ma'am.

14 MS. HARVEY: Thank you.

15 CHAIRMAN ALLEN: Any questions from the
16 Commission?

17 COMMISSIONER HASSELL: Ms. Harvey, I just had
18 one - or maybe even two questions. Is it your
19 communication to us this morning that DPS or
20 additional prisons doesn't have the capacity to be
21 able to use this equipment for more than what you've
22 described as disciplinary hearings and classification
23 hearings and the DPS training to---?

24 MS. HARVEY: And Tele-Psych. We're already really
25 at use of our capacity, basically, with the internal

1 needs we have, and so adding to what is being
2 requested would make a situation where these other
3 things may not be able to be accomplished.

4 COMMISSIONER HASSELL: But you're not in a
5 position to say you can't do it, that you're not
6 beyond the capacity for that?

7 MS. HARVEY: I'm in a position to say that right
8 now we are already to the point where we were planning
9 to do other things, and we have not been able to
10 accomplish, such as inmate visitation---

11 COMMISSIONER HASSELL: So---

12 MS. HARVEY: ---by videoconferencing.

13 COMMISSIONER HASSELL: ---from an internal policy
14 perspective, you're saying that you want the priority
15 of the use of this equipment to be on parole hearings
16 and the other administrative things that involve your
17 inmates and not necessarily for claims they may have
18 filed to help move them along as well. Am I hearing
19 that?

20 MS. HARVEY: What I'm saying is - I think what
21 we're saying is we would like the right to be able to
22 say that we can't do it if you request it; that we
23 have something else that presses - takes precedent of
24 that need. That's what we're asking, to be able to
25 still retain the right as the rules stand now.

1 COMMISSIONER HASSELL: Well, that's just a
2 communication and accommodation issue, then, isn't it,
3 at some point---

4 MS. HARVEY: Well, I---

5 COMMISSIONER HASSELL: ---where we can work with
6 each other on that?

7 MS. HARVEY: I think it would simplify if we could
8 retain the rules as are - as they are now. I think it
9 would make it cleaner and - for us to be able to be
10 responsive to your needs, but also to the other needs
11 that we have and responsibilities that we have.

12 COMMISSIONER HASSELL: I could go on, but I think
13 I'm - we hear what you're saying. Thank you.

14 MS. HARVEY: Thank you.

15 COMMISSIONER GRIFFIN: I have a question.

16 MS. HARVEY: Yes?

17 COMMISSIONER GRIFFIN: Ms. Harvey, do you know the
18 percentage in which the teleconference equipment is
19 used for inmate tort hearings?

20 MS. HARVEY: We have someone here who could
21 probably answer that question.

22 COMMISSIONER GRIFFIN: Okay. Thank you.

23 MS. HARVEY: Okay.

24 CHAIRMAN ALLEN: Any further questions from the
25 Commissioners?

1 (SPEAKER DISMISSED)

2 CHAIRMAN ALLEN: The next will be Carlton Joyner.

3 CARLTON JOYNER

4 CHAIRMAN ALLEN: Mr. Joyner, if you would, please
5 state your name, whom you represent, if any particular
6 organization, and identify the specific proposed rule
7 or rules you will be addressing in your remarks.

8 MR. JOYNER: All right. My name is Carlton
9 Joyner. I'm the Deputy Director of Prisons for
10 Auxiliary Services. I'm here representing the
11 Department of Public Safety, and I'm going to speak in
12 regards to 11 NCAC 23B .0206(a), (b) and (e). With
13 regards to .2306 - 23B (a) and (b), the proposed
14 changes to these provisions represent a rapid
15 departure from the current hearing process. Based on
16 the language of the proposed changes, it is possible
17 the Commission will attempt to schedule video hearings
18 at their discretion regardless of the convenience and
19 the needs of the Department and its staff. Doing so
20 would further interfere with the Department's ability
21 to schedule vital functions and its own internal
22 operations. Over the past two years, the Department
23 has worked closely with the Industrial Commission to
24 accommodate their tort claim hearings. As such, we
25 have allowed Commission - the Commission to utilize

1 the Department's videoconferencing equipment and
2 assisted them in developing schedules convenient to
3 the Department's needs. In an attempt to resolve a
4 number of older cases, the Department agreed to double
5 the number of hearings it conducts on a monthly basis.
6 Following this increase, the Department agreed to
7 increase the number of hearings held each month again
8 by allowing the Commission to conduct live hearings in
9 the Central Prison parole hearing room. As a result,
10 the Department has been scheduling nearly one hundred
11 hearings per month regardless - regardless of the
12 hearing type. The majority of these hearings last
13 much longer than they are originally scheduled to run,
14 and each hearing date involves coordination with
15 multiple facilities. These hearings - these hearing
16 times fluctuations make it impossible to estimate the
17 true length of any one hearing. While the use of
18 videoconference equipment may be the most convenient
19 mechanism for the Industrial Commission to conduct
20 their hearings, the Division of Adult Corrections has
21 endured numerous scheduling problems directly related
22 to videoconferencing hearings. Scheduling overruns
23 have caused inmates to miss meals, their regularly
24 scheduled rehabilitative programming, educational
25 programming, recreation time and family visits. More

1 importantly, staff members have been required to work
2 overtime to accommodate hearings. Many of our staff
3 members are also required to supervise an inmate for
4 hours, taking them away from their regular duties. In
5 many instances, the equipment in question is operated
6 by members of our program staff. When those staff
7 members are occupied with hearings, they cannot
8 conduct programs for the population. These programs
9 are critical to our operation because they allow us to
10 develop positive inmate behavior, to exhibit
11 pro-social behavior and to reduce inmate idleness
12 (phonetic). The same is true for staff members who
13 are named as witnesses. Those individuals are
14 sequestered for the duration of the time it takes to
15 get the inmate into the room and for the Commission to
16 complete the hearings. We have had cases where second
17 shift employees have been required to stay over for up
18 to four hours after working a twelve-hour shift, only
19 to be told that the case had been continued. It's
20 time? All right.

21 CHAIRMAN ALLEN: Thank you, sir.

22 MR. JOYNER: Yes, sir.

23 CHAIRMAN ALLEN: Any questions?

24 COMMISSIONER BADDOUR: I have a question. All
25 right.

1 CHAIRMAN ALLEN: Commissioner Baddour.

2 COMMISSIONER BADDOUR: So it sounds like what
3 you're saying is that the videoconference is more
4 labor intensive for your staff than the in-person
5 hearings. Is that true?

6 MR. JOYNER: It is extremely labor intensive, and
7 part of what makes it labor intensive is the
8 scheduling piece and the amount of time that hearings
9 run. So if we have a set schedule and we know things
10 are going to run on this schedule, then you're going
11 to have staff allotted to cover that timeframe, but
12 when we go over the timeframe and things stretch out,
13 then you staff that have to be with those inmates for
14 longer periods of time. Plus, the other issue is, in
15 order to accommodate the hearings, we generally have
16 to pull staff from other regularly assigned duties and
17 stop doing something else that we need to do to make
18 sure we safe facilities.

19 COMMISSIONER BADDOUR: Well, I'm not an expert in
20 prisons, so---

21 MR. JOYNER: Uh-huh.

22 COMMISSIONER BADDOUR: ---that's why I'm wanting
23 you to help me---

24 MR. JOYNER: Right.

25 COMMISSIONER BADDOUR: ---but it sounds to me like

1 all the things you are describing are things that
2 would also apply to in-person hearings.

3 MR. JOYNER: I would - definitely, the in-person
4 hearing - the in-person hearings are at - currently at
5 one location, which is Central Prison - Central
6 Prison, so if it's only affecting at that particular
7 time that facility and staffing at that facility
8 versus having inmates sequestered in conference rooms
9 at eight or nine facilities waiting to be seen---

10 COMMISSIONER BADDOUR: All right. But I've been
11 at the Industrial Commission for a while, so I've done
12 inmate hearings---

13 MR. JOYNER: Uh-huh.

14 COMMISSIONER BADDOUR: ---previously---

15 MR. JOYNER: Uh-huh.

16 COMMISSIONER BADDOUR: ---and we - at one point in
17 time, we were traveling around the state, going to the
18 various facilities---

19 MR. JOYNER: Right.

20 COMMISSIONER BADDOUR: ---and all the things that
21 you've described sound to me like things that would be
22 in play whether we were coming to your facility or
23 doing it by videoconference. Am I - am I missing
24 anything?

25 MR. JOYNER: I think if you were coming - one

1 thing that wouldn't be in place---

2 COMMISSIONER BADDOUR: Okay.

3 MR. JOYNER: ---is if you were coming to the
4 location, and I'm the facility head at the location, I
5 know that when you're here, and if you're not here by
6 said time, then we know that you're not here, so we
7 don't have to have a group of inmates sitting in a
8 room for an hour when you're not here, but if I'm
9 waiting for a videoconference and I haven't been told
10 that the conference is not going to be conducted,
11 oftentimes, we still have the staff in the room with
12 the inmate because we haven't been advised that
13 there's an issue or that there's not going to be a
14 hearing for this day.

15 COMMISSIONER BADDOUR: So there have been some
16 issues with you getting notification---

17 MR. JOYNER: Notified. Yes, sir.

18 COMMISSIONER BADDOUR: ---that a videoconference
19 hearing has been cancelled or---

20 MR. JOYNER: Yes, sir.

21 COMMISSIONER BADDOUR: ---postponed or---?

22 MR. JOYNER: There have.

23 COMMISSIONER BADDOUR: Okay. All right. Thank
24 you.

25 MR. JOYNER: Yes, sir.

1 CHAIRMAN ALLEN: Thank you.

2 COMMISSIONER HASSELL: Mr. Chairman?

3 CHAIRMAN ALLEN: Any other questions, Commissioner
4 Hassell?

5 COMMISSIONER HASSELL: Again, Mr. Joyner, thank
6 you for your comments---

7 MR. JOYNER: Yes, sir.

8 COMMISSIONER HASSELL: ---this morning, and I do
9 have a couple of questions in light of the remarks you
10 gave.

11 MR. JOYNER: Uh-huh.

12 COMMISSIONER HASSELL: You were concerned about
13 these inmate hearings and the time involved taking
14 away from their activities, taking away from family
15 visits and things like that that are regularly
16 scheduled. Would that not be the case even as they're
17 taken offsite to Central Prison? They're still
18 missing family visits. They're still missing that
19 type of activity that they'd otherwise be scheduled to
20 do.

21 MR. JOYNER: If they're taken to CP, would they
22 miss some of that?

23 COMMISSIONER HASSELL: Yeah. They're missing that
24 anyway, right, maybe even part of their meals? It
25 doesn't really matter where it is. They're missing

1 some of those activities, right?

2 MR. JOYNER: Well, probably so.

3 COMMISSIONER HASSELL: And, Mr. Joyner, you know,
4 I - you and I don't know each other, but, you know, I
5 was on the District and Superior Court bench for
6 almost twenty years, and before that was a young,
7 public defender. I probably sent some of my clients
8 your way---

9 MR. JOYNER: Right.

10 COMMISSIONER HASSELL: ---and through the system
11 through the years, and, you know, the dynamic of the
12 court system in the hearing process is you got
13 witnesses that can't all testify at once, but have to
14 be available to testify, and it sounds like - you
15 know, I know y'all are doing your best to accommodate,
16 but whether there's been an uptick or the scheduling
17 or the actual filing of these inmate tort claims, you
18 know, witnesses have to be available. Witnesses have
19 to be able to testify whether that's by
20 videoconference or live and in person, and I don't
21 know that eliminating, as you're saying, the priority
22 or opportunity for videoconferencing is going to make
23 it more convenient for your staff that by necessity
24 and as a matter of due process are going to have to be
25 available to testify. Would you - would you agree

1 with that, Mr. Joyner?

2 MR. JOYNER: At first, I was not saying we wanted
3 to eliminate it. I agree with Ms. Harvey. I think
4 that if we could keep the rule as it currently is.
5 One big difference - I think when you mentioned about
6 being a Superior Court Judge, I think the difference -
7 when we look at witnesses testifying in a court case
8 in the community versus in prison, in the community,
9 we've got the witnesses that are sitting in the court,
10 and nobody has to be taken away from their job
11 assignment to supervise them sitting in that - in that
12 courtroom.

13 COMMISSIONER HASSELL: Well, if they're sitting
14 there in a courtroom under subpoena, they're not at
15 their job.

16 MR. JOYNER: Right - but they don't have to have a
17 staff member that is being paid to sit in that room
18 and supervise them and are being pulled away from
19 another job.

20 COMMISSIONER HASSELL: But if the staff member is
21 called as a witness---

22 MR. JOYNER: But they do. Right.

23 COMMISSIONER HASSELL: ---they are going to be
24 away---

25 MR. JOYNER: In the courtroom, true, true.

1 COMMISSIONER HASSELL: ---whether they're in a
2 courtroom or in a courtroom that's the hearing room,
3 right?

4 MR. JOYNER: True.

5 COMMISSIONER HASSELL: And that's just the nature
6 of the beast, isn't it?

7 MR. JOYNER: That is, but there is one other
8 component to that that we could probably add in.
9 Well, we have this group of - I think you heard
10 Ms. Harvey talking about some of the unruly people
11 that we do when we have a DCC hearing.

12 COMMISSIONER HASSELL: Yes, sir.

13 MR. JOYNER: Some of the people that we have we're
14 sitting in these rooms with is supervising - and they
15 are here for a specific period of time - aren't the
16 easiest group of people to deal with, so after they've
17 been in these rooms for a period of time, they - sort
18 of emotions get sort of high and they don't really
19 necessarily want to be in there, so it causes some
20 issues for our staff as supervisor.

21 COMMISSIONER HASSELL: Well, we can sympathize
22 with that.

23 MR. JOYNER: I---

24 COMMISSIONER BADDOUR: Yeah. Just to follow-up---

25 MR. JOYNER: Yes, sir.

1 COMMISSIONER BADDOUR: ---if we take them all to
2 Central Prison, then isn't that---? It seems like
3 that's more of an imposition. At least when they're
4 at their own facility, you're saying you don't want
5 them waiting too long before their case is ready, but
6 it seems like you could judge at what point to pull
7 them. If you have to take them all to Central Prison,
8 then it seems like to me there's more security
9 involved on the bus, and then, you know, that puts a
10 burden on Central Prison. And then what do they do
11 with them? They can't put them in the Central Prison
12 population while they're waiting for their hearing, so
13 it seems like that would make the - what you're
14 describing a worse situation.

15 MR. JOYNER: I think that that would be a happy
16 medium. I think we started out to do both. I
17 mentioned we did over - do over a hundred cases a
18 month, so I don't, you know, see it would be a good
19 feasibility to be able to take that number of inmates
20 on a weekly basis to CP alone to do cases---

21 COMMISSIONER BADDOUR: Right.

22 MR. JOYNER: ---so I think we sort of got to have
23 a balancing act of maybe some doing the cases at CP
24 and some videoconferences, but at the - ultimately, we
25 as an organization have to be able to schedule the

1 hearings so we can conduct our operations in an
2 orderly manner.

3 COMMISSIONER BADDOUR: All right. Thank you.

4 CHAIRMAN ALLEN: And, sir, I understand your point
5 about y'all should be in the position to schedule the
6 hearings. Part of the issue the Commission has with
7 that is the actual statutory language of 143-297 which
8 indicates "Upon receipt of such affidavit" - the tort
9 claim affidavit - "in duplicate, the Industrial
10 Commission shall enter the case on its hearing docket
11 [...]." "Shall" - when the General Assembly writes a
12 general statute that says "shall," that means
13 something to us.

14 MR. JOYNER: Right.

15 CHAIRMAN ALLEN: What do you contend we should do
16 about that?

17 MR. JOYNER: I think we got - there's got to be a
18 communication between the Commission and prisons on
19 scheduling. So if you've got it and it says we shall
20 enter it on the docket, then communication happens
21 between prisons to say we need to have a hearing with
22 this case versus the Commission sending you a list
23 saying we're going to have twenty-five hearings on
24 this day.

25 CHAIRMAN ALLEN: Okay. Thank you, sir.

1 MR. JOYNER: All right.

2 CHAIRMAN ALLEN: Any further questions?

3 VICE-CHAIRMAN STITH: No.

4 COMMISSIONER HASSELL: Thank you very much.

5 MR. JOYNER: Yes, sir.

6 COMMISSIONER BADDOUR: Thank you.

7 CHAIRMAN ALLEN: Thank you, sir. We'll take a
8 five-minute break and go off the record.

9 (OFF THE RECORD)

10 CHAIRMAN ALLEN: We are back on the record. Today
11 is October 31st, 2018. This is the Industrial
12 Commission public hearing on rulemaking. We just took
13 a brief recess. And as a point of clarification, we
14 will receive written comments - or I should say a
15 point of correction, we will receive written comments
16 through the close of business on November 16, 2018.
17 The next speaker will be Jarrell Jordan.

18 JARRELL JORDAN

19 CHAIRMAN ALLEN: And, Mr. Jordan, if you would,
20 state your name, tell us whom you represent, if any
21 particular organization, and please identify the
22 specific proposed rule or rules you will be addressing
23 in your remarks.

24 MR. JORDAN: Yes, sir. My name is Jarrell Jordan.
25 I'm the IT support supervisor for prisons. My

1 responsibilities actually include the install and the
2 support of every tele-presence (phonetic) piece of
3 equipment that we have in our prisons and
4 administrative locations, and I'm here today to lodge
5 an objection to 11 NCAC 23B .0206(a). It's indicated
6 that - I do understand that the Commission purchased
7 equipment from Sysco so that they could connect with
8 our equipment at the facilities for the purpose of
9 conducting pro se inmate hearings. We also understand
10 that the - as of right now the equipment has not been
11 able to connect to our equipment in the facilities.
12 That is a behind-the-scenes network issue and without
13 security protocols, without self-routing (phonetic).
14 Currently, the Department is undergoing - moving
15 everything over to Voice over IP. As you know, with
16 the internet, it can be hacked. That's what our
17 number one concern is - someone hacking our system.
18 So Voice over IP will control our camera system, our
19 telephone system, our internet, our service.
20 Everything will be Voice over IP. With that being
21 said, we do not want to rush into bringing in outside
22 video equipment that's not on our network and open up
23 some kind of bridge that is able to be penetrated from
24 an outside source. That's the main thing. Right now,
25 our staff - our network engineers with Sysco and with

1 DPS are working hard to find a way to do this
2 securely, but as of today, they have not found that
3 bridge in order to connect those two, using your
4 equipment that's been purchased nor to connect to our
5 equipment at our facilities. Right now, I just heard
6 somebody ask about the percentage of torts. Right
7 now, torts get priority two out of five days of the
8 week in our facilities. If it's a tort hearing and
9 any other hearing here, the tort hearing has
10 precedence over the other hearings every Tuesday and
11 Thursday. Tort hearings does have precedence, so as
12 far as time allotment, about forty percent of our use
13 has been allotted for tort hearings. And we're saying
14 that we cannot see moving up as it will cut into the
15 other priorities from the other uses of our equipment.
16 Any questions?

17 CHAIRMAN ALLEN: Any questions from the
18 Commissioners?

19 VICE-CHAIRMAN STITH: No.

20 COMMISSIONER GRIFFIN: No. Thank you.

21 MR. JORDAN: Okay.

22 COMMISSIONER HASSELL: None. Thank you,
23 Mr. Jordan.

24 MR. JORDAN: Thank you.

25 CHAIRMAN ALLEN: Thank you, sir.

1 (SPEAKER DISMISSED)

2 CHAIRMAN ALLEN: The next speaker - and I
3 apologize - I am unable to read the first name here,
4 but it's a last name Philyaw.

5 MS. PHILYAW: (Inaudible).

6 CHAIRMAN ALLEN: Okay.

7 MS. PHILYAW: My first name is Twyla.

8 CHAIRMAN ALLEN: Twyla. Okay.

9 MS. PHILYAW: My first grade teacher was the only
10 teacher in school that ever said it properly, believe
11 it or not. Then after that, no one got it right so---

12 CHAIRMAN ALLEN: I understand.

13 TWYLA PHILYAW

14 CHAIRMAN ALLEN: If you would, please state your
15 name, whom you represent, if any particular
16 organization, and identify the specific proposed rule
17 or rules you will be addressing in your remarks.

18 MS. PHILYAW: Okay. Thank you. My name is Twyla
19 Philyaw, and I am the Assistant Director of
20 Administrative Services for the Division of Prisons
21 for the North Carolina Department of Public Safety. I
22 am here today in my official capacity to make a public
23 comment on the proposed amendments to Rule 11 NCAC 23B
24 .0206 and the corresponding fiscal note associated
25 with that change. The fiscal note prepared for Rule

1 11 NCAC 23B .0206 states that there is no substantial
2 economic impact to the state. However, our initial
3 analysis shows there would be, in fact, a substantial
4 economic impact to DPS if the amendment should become
5 effective because the rule change would eliminate, or
6 appears to eliminate, the option of in-person hearings
7 at the facility. In determining the economic impact,
8 if DPS moves in this direction, we reviewed
9 employment - or staffing resources, as well as
10 equipment resources and spurred by colleagues speak to
11 equipment. The equipment would be a substantial cost
12 to the state if we had to purchase additional
13 equipment. There are currently one hundred and
14 thirty-five in-point units operating within the
15 prisons videoconferencing equipment. DPS would need
16 more equipment because the equipment we have is
17 already - was purchased for other things besides tort
18 hearings, and now that would place an additional
19 burden. In order to provide the current services, DPS
20 expended \$1,715,550.90 in purchasing, managing and
21 maintaining what we currently have. The use of the
22 current equipment is at its capacity and over in some
23 cases. If the rule is adopted and we no longer have
24 the option of the in-person hearings, then we would
25 have to outlay an additional \$1,715,550.90 to fund

1 additional equipment to accommodate the court - the
2 tort hearings. This figure does not account for the
3 cost associated with infrastructure improvements or
4 system upgrades that would be necessary. With regard
5 to staffing, it is no secret that prisons has a
6 vacancy issue with regard to staffing. Nevertheless,
7 DPS is currently accommodating tort hearings within
8 facilities. To understand the current staffing burden
9 to the agency, we're going to look at the current
10 impact to the agency staffing resources. We conducted
11 a survey of our close custody facilities and
12 determined that each videoconferencing hearing
13 required two correctional officers to transport or
14 escort the inmate/plaintiff to and from the
15 videoconferencing location, two correctional officers
16 or either a program staff person, which would be a
17 total of two staff, are required to remain in the
18 videoconferencing room with the inmate during the
19 duration of the hearing, and we calculated that each
20 close custody facility expends 2.3 man hours per tort
21 hearing. On days that require eight merit hearings,
22 that totals 18.4 total man hours per one-day hearing.
23 Okay. Currently, the Industrial Commission with
24 getting five hearing days per month, that comes out to
25 a rate of 18.4 man hours per hearing or totals

1 the Department of Public Safety. I'm here to address
2 the proposed changes for 11 NCAC 23B .0206(a), in that
3 you have proposed that you simply are able to schedule
4 them by video or by telephone. Right now, we are not
5 using telephone hearings, but we would be glad to
6 explore the logistics of that. It also does away with
7 the live hearing option. And, Chairman, you asked
8 earlier what makes us think that we would not be
9 continuing with the live hearing options. Well, one
10 of the things is that in your fiscal note you
11 indicated that the use of telephone and the use of
12 video would provide more safety because personnel
13 would not be exposed to the inmates, and you cited a
14 newspaper article that mentioned an event that
15 occurred at Central Prison this past summer, so
16 because of that, we were assuming that your intention
17 is to do away with them since you deleted that as an
18 option from the prior rule. We will be asking that
19 the previous stay in effect. We have been working
20 with the Commission diligently to try to find a medial
21 whereby we can hold these hearings. We share the
22 Commission's goal to get rid of the backlog. We share
23 the Commission's goal to get rid of these cases, and I
24 want to make this clear: We are not here as a
25 defendant; we are here because we are ultimately the

1 ones that are hosting these hearings. It is our
2 equipment being used, and when it's used for tort
3 claim hearings, it cannot be used for other purposes.
4 It is our personnel that is being used. It is - we
5 use that for other things. These personnel - and we
6 have several of the fine officers here today - pulling
7 them off of their posts or pulling other officers off
8 the posts puts these officers in danger, and we have
9 severe safety concerns. Even in the article you
10 cited, it cited as one of the reasons being the
11 vacancy rate, and we are working on our vacancy rate,
12 but even right now with over a sixteen percent vacancy
13 rate, we cannot continue to do it on an unlimited
14 basis. We originally agreed to host hearings with the
15 I. C. on a double track over a year ago. Then the
16 date that will literally live in all history - October
17 12th, 2017 - Pasquotank happened. That was a wakeup
18 call. That was a severe wakeup call. We realized we
19 had to make some changes. One of those changes after
20 talking with our superintendants across the state is
21 that a lot of their officers were being used to
22 conduct these hearings so - I think my time is up
23 already, so three minutes goes fast, doesn't it? So
24 does the panel have any questions for me?

25 VICE-CHAIRMAN STITH: No.

1 COMMISSIONER BADDOUR: All right. I have the same
2 question that I had for the previous speaker. I'm
3 still - and I know - you know, that I've done these
4 hearings myself, and I think---

5 MS. STEPHENSON: And I've done them as well. Yes.

6 COMMISSIONER BADDOUR: And you've done them as
7 well. So, you know, I can picture myself going into a
8 prison facility and all that was entailed with
9 escorting me in. There were numerous officers in the
10 room. There were witnesses in, you know, a holding
11 area. I mean all the things that are being described
12 as - and being involved in the videoconference
13 hearings all take place with regard to the in-person
14 hearings as well, and so that's what---

15 MS. STEPHENSON: There's a difference.

16 COMMISSIONER BADDOUR: Okay. So what's the
17 difference?

18 MS. STEPHENSON: The difference is that whenever
19 you're doing a live hearing you're only concerned with
20 one facility and you're only dealing with officers.
21 We can schedule ahead to have a couple of officers
22 like Warden Thomas talked about - has two officers
23 there dedicated just for that. When we're doing the
24 video hearings, you're talking about bouncing around,
25 calling the ten, fifteen different facilities in the

1 day, and during that time, all of those facilities
2 have to have officers there available. And all of
3 them - and one of the things that happens in a close
4 custody, or if the inmate is in segregation - which a
5 lot of these claims do come from close custody and
6 segregation inmates - is that whenever they are moved
7 from their segregation area and transferred to the
8 program area, you're talking about three officers that
9 have to escort them. We've also got to lock down the
10 entire route. That doesn't happen at Central Prison.
11 Central Prison is not located in a programming area.
12 I am not advocating that we do everything by live
13 hearing. I think that would be impractical. What I
14 am advocating, though, is being able to continue to
15 work with you, and I understand the position, and this
16 is very similar to - Commissioner Hassell, you've been
17 a Judge - calling up you - the Industrial Commission,
18 which is a quasi judicial body, and saying, I need
19 Courtroom A, I need it ten days during this month,
20 during that time not only will I be using your
21 courtroom space, but I will be using your equipment
22 that you cannot use for other measures and I will be
23 requiring use of your personnel to escort plaintiffs
24 to and from, and you will need to lock down your
25 courthouse in order to do that. That is the exact

1 same thing that's happening in this situation.

2 COMMISSIONER BADDOUR: So, if you didn't have
3 multiple locations on the same day, it would be akin
4 to the Judge or the Deputy Commissioner coming---

5 MS. STEPHENSON: Yes. And we have actually asked
6 for that. I think there was something the Chairman
7 asked earlier about scheduling that we shall - you
8 shall schedule. I'm aware of the Industrial
9 Commission having served very - which very privileged
10 to serve as a Deputy Commissioner for nineteen years
11 with the Commission, and I understand the problems
12 that you have in scheduling hearings and everything
13 else, and that is one of the reasons that we have been
14 spending extra to try to work with you on this, but if
15 we can narrow it down rather than just go through the
16 list, we have requested narrowing down to single
17 facilities. We even said we'll give you an extra day
18 a month if we can narrow it down to one facility, and
19 I think that was done one time.

20 COMMISSIONER HASSELL: Well, since you made
21 inquiry to me, Ms. Stephenson, help me understand that
22 if your departmental preference from your speakers
23 appears to be focusing on a venue of Central Prison as
24 the live hearing menu of choice, if you get to the
25 hearing stage with these cases---

1 MS. STEPHENSON: Uh-huh.

2 COMMISSIONER HASSELL: ---and witnesses are being
3 presented from both sides at that live hearing, you're
4 talking about multiple staff people being brought in
5 to Central Prison from multiple venues around the
6 state. How is that more convenient?

7 MS. STEPHENSON: I am glad you brought that up.
8 What happens is since Central Prison is more like -
9 it's Central Prison for a reason. We have buses and
10 vans that come across the state on ordinary business
11 on a routine basis every day or so heading into
12 Central Prison. It is very easy to have that inmate
13 added to the---

14 COMMISSIONER HASSELL: I'm not talking about the
15 inmates. I'm talking about the other witnesses and
16 auxiliary staff that are often called as witnesses.

17 MS. STEPHENSON: You mean the officers?

18 COMMISSIONER HASSELL: Yes.

19 MS. STEPHENSON: There may be a situation where an
20 officer comes in.

21 COMMISSIONER HASSELL: Well, it's - once these
22 start - really start getting to the hearing stage,
23 there's not going to be a situation.

24 MS. STEPHENSON: Well, if you look at some of the
25 transcripts, you'll see that a lot of it is simply

1 paper submissions. There is not---

2 COMMISSIONER HASSELL: Incident reports and---

3 MS. STEPHENSON: ---a lot of officers.

4 COMMISSIONER HASSELL: ---that kind of thing.

5 MS. STEPHENSON: So - but it - again, we're not---

6 COMMISSIONER HASSELL: Again, though, if a
7 prisoner - if the plaintiff/prisoner has the right to
8 call witnesses and---

9 MS. STEPHENSON: Yes, sir.

10 COMMISSIONER HASSELL: ---identifies witnesses and
11 they are placed either by subpoena or otherwise - and
12 that's another conversation - and they're brought to
13 the hearing and are available to testify, and they're
14 not in Sanford or they're not in Sandy Ridge or
15 they're not at Western Piedmont Correctional, but they
16 all layover here in Raleigh, you know, they're not
17 tied up for an hour or two at a time. They're tied up
18 for the whole day.

19 MS. STEPHENSON: Much the same way it is in
20 Superior Court.

21 COMMISSIONER HASSELL: Yes.

22 MS. STEPHENSON: And they would be there.

23 COMMISSIONER HASSELL: And how is that more
24 convenient than doing it onsite?

25 MS. STEPHENSON: Because whenever you do it

1 onsite, you're required to use more people that are on
2 standby almost the entire day, so you're talking about
3 several different sites. Whenever you're talking
4 about a subpoena of a witness coming in, we're talking
5 about someone that has planned ahead, and we know
6 exactly that day they will need to be at Central
7 Prison. When you're talking about a video hearing,
8 that video hearing may go off at nine or it may go off
9 at noon, so you have to have all those people on
10 standby and all those officers interrupted from their
11 ordinary duties.

12 COMMISSIONER HASSELL: But that's true whether
13 it's a live hearing or whether it's a video hearing.

14 MS. STEPHENSON: There are - I'm not saying it's
15 the - it's the most - and, in fact, all of these
16 hearings are inconvenient. We're trying to find out
17 the least inconvenience and the least intrusive to our
18 operations because it got to the point that we could
19 not do ten video hearings a month, and that's when we
20 went and said, "We can give you four video hearings a
21 month. We can give you four or five live hearings a
22 month. We can give you an additional day if we limit
23 it at the one facility," and it's my understanding
24 right now even not all the live hearings so - are
25 being utilized that we have offered you. It's -

1 there's no simple solution, but in changing this
2 rule - I think if we left the rule the way it was, it
3 would be better. I know it's been - the problem is
4 the way DPS sees it is if the rule is changed, then it
5 takes away y'all talking with us. It puts us in a
6 position where you simply order it and do it at your
7 convenience and do not consider our convenience, and
8 then we're lost in a situation where we're deciding
9 between Tele-Psych, getting medical treatment for
10 somebody, or having a parole hearing for somebody, or
11 we're defaulted.

12 CHAIRMAN ALLEN: Any further questions?

13 VICE-CHAIRMAN STITH: Yes, I do. I have a
14 question.

15 MS. STEPHENSON: Yes.

16 VICE-CHAIRMAN STITH: Help me to understand that
17 if the rule is left the way it is how is that going to
18 improve the backlog that we have because what I'm
19 hearing from the speakers is that what you currently
20 are doing is not efficient and effective? So help me
21 understand how it's going to improve with us leaving
22 the rule as it is.

23 MS. STEPHENSON: The speakers were speaking to the
24 point that if we did not have any input and we did not
25 have any discretion on the operation and the

1 utilization of our own equipment - which by the way
2 there are statutes which indicate the Secretary shall
3 have authority over the equipment, so we went into a
4 little bit of conflict of laws there.

5 VICE-CHAIRMAN STITH: So, no, I'm not talking
6 about equipment. I'm talking about the relationship
7 that will ensure that these tort claims are heard in
8 an efficient and effective manner.

9 MS. STEPHENSON: I'm still a little confused.

10 VICE-CHAIRMAN STITH: If we leave the rule the way
11 it is---

12 MS. STEPHENSON: Right.

13 VICE-CHAIRMAN STITH: ---we have not been able to
14 hear the claims that need to be heard based upon what
15 the statute tells the Commission they need to do.

16 MS. STEPHENSON: We have set---

17 VICE-CHAIRMAN STITH: If we leave it the way it
18 is, how will that relationship improve, and how will
19 these cases be heard---

20 MS. STEPHENSON: We have set---

21 VICE-CHAIRMAN STITH: ---efficiently?

22 MS. STEPHENSON: Okay. We have set every single
23 solitary case. In fact, it's Cliff Nichols in my
24 office that helps set those cases. We have never
25 refused to set a case that has been given to us.

1 VICE-CHAIRMAN STITH: That doesn't answer my
2 question.

3 MS. STEPHENSON: Well, it indicates---

4 VICE-CHAIRMAN STITH: How will it improve? How
5 will it improve?

6 CHAIRMAN ALLEN: Please allow the Vice-Chairman to
7 ask her question.

8 MS. STEPHENSON: Okay.

9 VICE-CHAIRMAN STITH: How will it improve? I'm
10 not talking about the past. I'm talking about going
11 forward.

12 MS. STEPHENSON: If we go back to the old rule?

13 VICE-CHAIRMAN STITH: If we leave the rule as you
14 are asking, how will the relationship improve so that
15 those cases will be heard in an efficient and
16 effective manner?

17 MS. STEPHENSON: If you leave the rule the way it
18 is and we work together on this, I think we can, but
19 we have set everything that you have given us, so I'm
20 a little confused as to how we had played a role in
21 the backlog or preventing any setting of cases.

22 VICE-CHAIRMAN STITH: Thank you.

23 MS. STEPHENSON: Yes, Chairman?

24 CHAIRMAN ALLEN: Isn't it true that there have
25 been conversations with the Commission about other

1 in-person locations?

2 MS. STEPHENSON: Yes, there have.

3 CHAIRMAN ALLEN: Has DPS provided any of those
4 other locations as options?

5 MS. STEPHENSON: I think they've already been
6 provided Polk. There have been hearings that have
7 been held at Polk, and we were exploring some of the
8 others whenever this proposed rule came out.

9 CHAIRMAN ALLEN: Okay. And is it your position
10 that the Commission and DPS are working together at
11 the present time under the current rule to set these
12 hearings?

13 MS. STEPHENSON: Yes - because you send us a list
14 of the names and---

15 CHAIRMAN ALLEN: Not me personally, but the
16 Commission.

17 MS. STEPHENSON: Right, certainly. We are sent a
18 list of the names, and we establish dates - or you
19 give us the dates, actually, and we establish and
20 facilitate making sure the arrangements are made for
21 the hearings, and you designate which ones for live
22 and which ones for telephone, so, yes.

23 CHAIRMAN ALLEN: Is that current practice
24 problematic with the Department?

25 MS. STEPHENSON: My department?

1 CHAIRMAN ALLEN: The Department you represent.

2 Yes.

3 MS. STEPHENSON: There are some problems, but not
4 as many problems as there would be as if we did not
5 have input.

6 COMMISSIONER HASSELL: Well, Ms. Stephenson, is it
7 the Department's position that if these rules are
8 amended as announced that the North Carolina
9 Industrial Commission and the Department of Public
10 Safety will not work together or continue to
11 communicate to improve the delivery and administration
12 of justice moving forward?

13 MS. STEPHENSON: Absolutely not - because it has
14 always been our policy to try to help. In fact, I
15 found that prisons tend to be over helpful. Whenever
16 y'all went to Central Prison for a tour, I was called
17 the next day saying, "Do y'all have a spare
18 refrigerator? One of the [Commissioners or one of
19 the] ones taking the tour wants a refrigerator,"
20 because they just bend over backwards trying to help,
21 and that's what we're trying to do, but you've got to
22 understand we're under statutory obligations as well,
23 and we have to serve our inmates and we have to serve
24 and we are dedicated to the safety of our employees,
25 and those are things we have to think about as well.

1 COMMISSIONER HASSELL: But you agree that DPS and
2 the Industrial Commission will continue to work
3 together in the future no matter what these rules are
4 going to be, right?

5 MS. STEPHENSON: We will continue to work together
6 to the extent that the I. C. will allow us to because
7 the proposed rule change pretty much takes us out of
8 the picture.

9 COMMISSIONER HASSELL: So it is your position that
10 you don't think that we would have a dialogue and
11 communicate and work with each other in the future
12 based on the rule change?

13 MS. STEPHENSON: Well, I---

14 COMMISSIONER HASSELL: Is that how you see it,
15 really?

16 MS. STEPHENSON: I'm not a fortune teller, so I
17 can't tell you what the I. C. would do in the future,
18 but just by the wording of the statute, by taking out
19 the word "convenience" to us and in prior
20 conversations and in prior meetings lends us to
21 believe that y'all would be able - or y'all would go
22 ahead and set it regardless, so we would be facing ten
23 days of video hearings a month, or more. Now if that
24 is not the case---

25 COMMISSIONER HASSELL: And you don't think a

1 couple of conversations would be able to absolve that
2 concern?

3 MS. STEPHENSON: I don't know. That would be
4 something we'd be certainly willing to do. We're
5 always willing to talk, and for a while, we were
6 meeting almost weekly.

7 COMMISSIONER HASSELL: Okay. All right. Thank
8 you.

9 CHAIRMAN ALLEN: Any further questions?

10 MS. STEPHENSON: Anything else?

11 VICE-CHAIRMAN STITH: No.

12 CHAIRMAN ALLEN: All right.

13 MS. STEPHENSON: All right.

14 CHAIRMAN ALLEN: Thank you.

15 MS. STEPHENSON: Thank you. Oh. And we will be
16 providing a written comment.

17 CHAIRMAN ALLEN: Thank you.

18 (SPEAKER DISMISSED)

19 CHAIRMAN ALLEN: The next speaker will be Kenneth
20 Lassiter.

21 KENNETH LASSITER

22 CHAIRMAN ALLEN: Mr. Lassiter, if you would, state
23 your name, whom you represent, if any particular
24 organization, and please identify the specific
25 proposed rule or rules you will be addressing in your

1 remarks.

2 MR. LASSITER: I'm Kenneth Lassiter with the
3 prisons - North Carolina Department of Public Safety.
4 I'll be speaking on the proposed changes to .0206(a),
5 (b) and (e), and I will get straight to it because my
6 three minutes is going to be short. The heroes behind
7 me - the men and women, both uniform and non-uniform
8 are why we're here today. These new rule changes -
9 prisons has what we call structure, and in somewhere
10 in the language of these rules changes it talks about
11 the flexibility of the Commission. Well, in prisons,
12 we can't have flexibility. Flexibility to us means
13 unsafe acts in our staff and the people that we are
14 charged to be responsible for are in an unsafe
15 atmosphere, and so flexibility is a good thing to have
16 and convenience in a real - in the private sector and
17 the world, it sounds great. Prisons can't have
18 convenience or flexibility. They have structure.
19 They have structure for a reason. Right now, in
20 prison, we're about to start (unintelligible) in every
21 one of the fifty-five prisons. Why? Because we have
22 to do it in a uniform manner; if not, we're out of
23 control. It's chaos, and the inmates actually run the
24 asylum, (phonetic) as people say. So the
25 conversations have been around what the prisons - DPS

1 wants. We want the rules to stay the same. I was
2 present at some of these recent meetings last year
3 when we brought about the live hearings at CP. We
4 brought about - talking about continuing on. And the
5 next thing you know, I'm served with this saying we
6 want to change the rules. If the collaboration you're
7 speaking about, Commissioner, was in place, we
8 wouldn't be here today. There would be no need for
9 the changing of the rule if there was a true dialogue
10 between the two agencies and public safety was at the
11 forefront of it. I think, Commissioner, you mentioned
12 about live hearings and moving inmates. That's what
13 we do, and so the ability to move them to a central
14 location, whether it's one, two, three, or four, a
15 lot - and we're not advocating for only live hearings.
16 We're just saying we can't withstand, one, the ability
17 to increase them without no [sic] resources, and I
18 think the - actually, the document that was proposed
19 says that there wouldn't be a cost on DPS. Well,
20 that's an untrue statement from our part because we
21 have to have more machines. We have to have more
22 staff. The technology wasn't in play when we set out
23 staffing patterns, so right now, when it was mentioned
24 about moving inmates and we say we have a hearing - or
25 close custody inmate, there's two staff per inmate.

1 That's not a staffing pattern. Our staffing pattern
2 is one inmate per fifty-five for close custody, so
3 that means that I've taken a staff member that's
4 supposed to be having the back of another staff member
5 and put him or her over here with one individual. Now
6 that makes that room safe, but it makes the rest of
7 the prison unsafe, and so, therefore, what we're
8 talking about is the safety aspect of it, not just the
9 aspect of how many cases we hear. We understand the
10 statutes, what you're required to do. We've had some
11 robust meetings about making sure that we're doing
12 just the maximum as we can. Mr. Jarrell Jordan, I'm
13 telling you I've bent over backwards and tell him,
14 "Give them the space. They can take it. Let's do
15 what we can do," so we're about the collaboration and
16 continuing on with this, but this rule change, if it's
17 as written, it gives - it takes us out of the picture
18 by the mention of what's written. Now I don't know
19 what the intent of it was, but by the way it's
20 written, it takes us out of the picture and we have no
21 say. I think the Commissioner mentioned about
22 "shall." It's the same as a courtroom that says
23 "shall," but you still have to communicate with the
24 Clerk of Court, so if that "shall" means that - with
25 that and that's the intentions of it, then we accept

1 that mainly. We can still work together. My time is
2 up.

3 COMMISSIONER HASSELL: Thank you, Mr. Lassiter.

4 CHAIRMAN ALLEN: Any questions?

5 VICE-CHAIRMAN STITH: No.

6 COMMISSIONER GRIFFIN: No.

7 CHAIRMAN ALLEN: Okay. No questions. Thank you,
8 sir.

9 MR. LASSITER: Thank you.

10 (SPEAKER DISMISSED)

11 CHAIRMAN ALLEN: Now, according to the list I have
12 here, that is all the folks who have signed up to
13 speak, and if I'm in error, please speak up now. We'd
14 be happy to hear from you. All right. If any of the
15 speakers have summaries of their remarks, please
16 present those to the court reporter who is to my left,
17 your right. Thank you all for participating in the
18 public hearing. The period for written comments will
19 be held open through the close of business on November
20 16, 2018. Again, November 16, 2018. So if you have
21 further comments, please send them to Ashley Snyder as
22 directed in the hearing notice in the *North Carolina*
23 *Register* and on the Commission's website. I would
24 strongly encourage anyone intending to submit a
25 written public comment to do so at your earliest

1 convenience. The written comments and the comments
2 made at the hearing today will be made part of the
3 public record of these proceedings. We would like to
4 include in the transcript of these proceedings the
5 materials submitted by Ms. Snyder as Exhibits 1 and
6 Exhibit 2.

7 (Exhibits 1 and 2 are admitted
8 into evidence.)

9 CHAIRMAN ALLEN: And any additional matters or
10 comments that are submitted to the court reporter will
11 be entered - well, entered into the record as exhibits
12 in sequential numbered order. Are there any further
13 matters to come before this public hearing? If not,
14 this hearing is adjourned. Thank you and thank you to
15 all the state employees and other members of the
16 public for attending.

17 (WHEREUPON, THE HEARING WAS ADJOURNED.)

18 RECORDED BY MACHINE

19 TRANSCRIBED BY: Lisa D. Dollar, Graham Erlacher and
20 Associates

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1 STATE OF NORTH CAROLINA

2 COUNTY OF GUILFORD

3 C E R T I F I C A T E


4 I, Kelly K. Patterson, Notary Public, in and for the
5 State of North Carolina, County of Guilford, do hereby
6 certify that the foregoing sixty-six (66) pages prepared
7 under my supervision are a true and accurate transcription
8 of the testimony of this trial which was recorded by Graham
9 Erlacher & Associates.

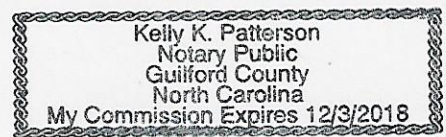
10 I further certify that I have no financial interest in
11 the outcome of this action. Nor am I a relative, employee,
12 attorney or counsel for any of the parties.

13 WITNESS my Hand and Seal on this 9th day of November
14 2018.

15 My commission expires on December 3, 2018.

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NOTARY PUBLIC



NORTH CAROLINA REGISTER

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September 17, 2018

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Link to agency website pursuant to G.S. 150B-19.1(c): <https://www2.ncdhhs.gov/dss/sscommission/index.htm>

Proposed Effective Date: March 1, 2019

Public Hearing:

Date: November 14, 2018

Time: 10:00 a.m.

Location: NC Department of Social Services, 820 Boylan Avenue, McBryde Building 1st Floor, Room 151, Raleigh, NC 27603

Reason for Proposed Action: Session Law 2017-41 requires that the Social Services Commission shall adopt rules governing the obligations of counties to contribute financially to regional social services departments in accordance with G.S. 108A-15.3A(e).

NC Session Law 2017-41 (House Bill 630), Rylan's Law/Family/Child Protection and Accountability Act requires the Department of Health and Human Services (DHHS) to establish a regional system for supervision of county departments of social services to improve accountability and state oversight of social services programs. Specific emphasis is placed upon improving outcomes for families and children involved with child welfare services. Recent federal and statewide reviews have identified troubling gaps and flaws in North Carolina's child welfare system that place children's safety at risk and transforming the child welfare systems is necessary to better ensure the safety, permanency, and well-being of children and families. The evaluations of the child welfare system have concluded that counties require performance improvement in several areas.

Additionally, county social services agencies are facing significant resource and administration challenges in areas other than child welfare, such as public assistance and adult services, and are not meeting standards for timeliness and accuracy.

Among a host of other provisions to improve child welfare and other social services programs, Rylan's Law gives counties authority to voluntarily consolidate programs or whole departments of social services. If one or more counties choose to consolidate, this option creates a regional department of social services (RDSS). Pursuant to N.C.G.S. 108A-15.3A(a), "a regional social services department, including more than one county, may be formed upon agreement of the county boards of commissioners and, if applicable, either the county board of social services or consolidated human services board having jurisdiction over each of the counties involved."

A RDSS will be its own governmental entity and function separately from the counties. The option to create a RDSS allows counties the flexibility to combine resources to improve the provision of social services amongst more than one county.

Proposed Rule 10A NCAC 67A .0301 is responsive to the overarching goal of giving counties maximum flexibility to meet the administrative and programmatic needs of their social services agencies and regions. The proposed rule considers the myriad of potential options to combine county resources to improve the provision of services to citizens in their respective regions.

Comments may be submitted to: Belivia Spaulding, 820 South Boylan Avenue, MSC 2402, Raleigh, NC 27603; phone (919) 527-6335; fax (919) 334-1198; email SSCommission@dhhs.nc.gov

Comment period ends: November 16, 2018

Procedure for Subjecting a Proposed Rule to Legislative Review:

If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal impact (check all that apply).

- State funds affected
- Environmental permitting of DOT affected
- Analysis submitted to Board of Transportation
- Local funds affected
- Substantial economic impact (≥\$1,000,000)
- Approved by OSBM
- No fiscal note required by G.S. 150B-21.4

CHAPTER 67 - SOCIAL SERVICES - PROCEDURES

SUBCHAPTER 67A - GENERAL ADMINISTRATION

SECTION .0300 - REGIONAL SOCIAL SERVICES DEPARTMENTS

10A NCAC 67A .0301 REGIONAL DEPARTMENTS OF SOCIAL SERVICES FINANCIAL OBLIGATIONS OF COUNTIES

Counties creating or joining a regional social services department pursuant to G.S. 108A-15.7, shall enter into a written agreement that sets forth, at a minimum, the following financial obligations and the amount or method in which each county will appropriate funds to the regional social services department for:

- (1) the administration of programs of social services and public assistance;
- (2) the county share of public assistance program costs;
- (3) any recoupments following fiscal or program monitoring or audit findings.

Authority G.S. 108A-15.7; 143B-153(9).

TITLE 11 – DEPARTMENT OF INSURANCE

Notice is hereby given in accordance with G.S. 150B-21.2 that the Industrial Commission intends to adopt the rules cited as 11 NCAC 23A .0109, .0620, amend the rules cited as 11 NCAC 23A .0501, .0502, .0604, .0609, .0617, .0619, .0701, .0702, .0801; 23B .0206, .0503, and repeal the rule cited as 11 NCAC 23B .0207.

Pursuant to G.S. 150B-21.17, the codifier has determined to impractical to publish the text of rules proposed for repeal unless the agency requests otherwise. The Text of the rule(s) are available on the OAH website at <http://reports.oah.state.nc.us/ncac.asp>.

Link to agency website pursuant to G.S. 150B-19.1(c): <http://www.ic.nc.gov/proposedGroup2Rules.html>

Proposed Effective Date: January 1, 2019

Public Hearing:

Date: October 31, 2018

Time: 10:00 a.m.

Location: Room 240, 2nd Floor, Department of Insurance, Albemarle Building, 325 North Salisbury Street, Raleigh, NC 27603

Reason for Proposed Action: On its own initiative, the Industrial Commission ("Commission") conducted an internal review of its workers' compensation rules and sought informal stakeholder feedback on rules in 11 NCAC 23A. The proposed adoptions and amendments reflect changes necessary to clarify the rules, provide for increased efficiency, or update the rules to current reflect practices.

The Commission also conducted an internal review of its rules governing State tort claims. The proposed amendments to 11 NCAC 23B reflect changes necessary to clarify the rules, provide for increased efficiency, or update the rules to reflect current practices.

The Commission proposes to repeal Rule 11 NCAC 23B .0207 because the necessary contents of the rule are proposed to be added to Rule 11 NCAC 23B .0206.

Comments may be submitted to: Ashley B. Snyder, 1233 Mail Service Center, Raleigh, NC 27699-1233; phone (919) 807-2524; email Ashley.snyder@ic.nc.gov

Comment period ends: November 16, 2018

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule.

The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal impact (check all that apply).

- State funds affected 11 NCAC 23A .0109, .0501, .0502, .0609, .0619, .0620, .0701, .0702, .0801; 23B .0206
- Environmental permitting of DOT affected Analysis submitted to Board of Transportation
- Local funds affected 11 NCAC 23A .0109, .0501, .0502, .0609, .0619, .0620, .0701, .0702, .0801
- Substantial economic impact (≥\$1,000,000)
- Approved by OSBM
- No fiscal note required by G.S. 150B-21.4 11 NCAC 23A .0604, .0617; 23B .0207, .0503

CHAPTER 23 – INDUSTRIAL COMMISSION

SUBCHAPTER 23A – WORKERS COMPENSATION RULES

SECTION .0100 - ADMINISTRATION

11 NCAC 23A .0109 CONTACT INFORMATION

(a) "Contact information" for purposes of this Rule shall include telephone number, facsimile number, email address, and mailing address.

(b) All attorneys of record with matters before the Commission shall inform the Commission in writing of any change in the attorney's contact information via email to dockets@ic.nc.gov.

(c) All unrepresented persons or entities with matters pending before the Commission shall advise the Commission upon any change to their contact information in the following manner:

- (1) All employees who are not represented by counsel shall inform the Commission of any change in contact information by filing a written notice via the Commission's Electronic Document Filing Portal ("EDFP"), electronic mail, facsimile, U.S. Mail, private courier service, or hand delivery.
- (2) All non-insured employers that are not represented by counsel shall inform the Commission of any change in contact information by filing a written notice via the Commission's Electronic Document Filing Portal ("EDFP"), electronic mail, facsimile, U.S. Mail, private courier service, or hand delivery.

Authority G.S. 97-80.

SECTION .0500 – AGREEMENTS

11 NCAC 23A .0501 AGREEMENTS FOR PROMPT PAYMENT OF COMPENSATION

(a) To facilitate the payment of compensation within the time prescribed in G.S. 97-18, the Commission shall accept memoranda of agreements on Commission forms.

(b) No agreement for permanent disability shall be approved until the relevant medical and vocational ~~records~~ records, including a job description if the employee has permanent work restrictions and has returned to work for the employer of injury, known to exist in the case have been filed with the Commission. When requested by the Commission, the parties shall file any additional documentation necessary to determine whether the employee is receiving the disability compensation to which he or she is entitled and that an employee qualifying for disability compensation under G.S. 97-29 or G.S. 97-30, and G.S. 97-31 has the benefit of the more favorable remedy.

(c) All memoranda of agreements shall be submitted to the Commission. Agreements conforming to the provisions of the Workers' Compensation Act shall be approved by the Commission and a copy returned to the employer, carrier, or administrator, and a copy sent to the employee, unless amended by an award, in which event the Commission shall return the award with the agreement.

(d) The employer, carrier, administrator, or the attorney of record, if any, shall provide the employee, beneficiary, or attorney of record ~~employee's attorney of record or the employee, if any, unrepresented~~, a copy of a Form 21 Agreement for Compensation for Disability, a Form 26 Supplemental Agreement as to Payment of Compensation, a Form 26A Employer's Admission of Employee's Right to Permanent Partial Disability, a Form 26D Agreement for Payment of Unpaid Compensation in Unrelated Death Cases, and a Form 30 Agreement for Compensation for Death, when the employee or appropriate beneficiary signs the forms, upon submission to the Commission of the executed form or agreement.

(e) All memoranda of agreements for cases that are calendared for hearing before a Commissioner or Deputy Commissioner shall be addressed sent directly to that Commissioner or Deputy ~~Commissioner~~ Commissioner, and filed in accordance with Rule .0108 of this Subchapter. Before a case is calendared, or once a case has been continued or removed, or after the filing of an Opinion and Award, all memoranda of agreements shall be ~~directed~~ addressed to the Claims Section of the ~~Commission~~ Commission, and filed in accordance with Rule .0108 of this Subchapter.

(f) After the employer, carrier, or administrator has received a memorandum of agreement that has been signed by the employee and the employee's attorney of record, if any, the employer, carrier, or administrator has 20 days within which to submit the memorandum of agreement to the Commission for review and approval or within which to show cause for not submitting the memorandum of agreement signed only by the employee.

Authority G.S. 97-18; 97-80(a); 97-82.

11 NCAC 23A .0502 COMPROMISE SETTLEMENT AGREEMENTS

(a) The Commission shall not approve a compromise settlement agreement unless it contains the following information:

- (1) The employee knowingly and intentionally waives the right to further benefits under the Workers' Compensation Act for the injury that is the subject of this agreement.
- (2) ~~The employer, carrier, or administrator will pay all costs incurred. The parties' agreement, if any, as to the payment of the costs due to the Commission pursuant to 11 NCAC 23E .0203, and any mediation costs pursuant to 11 NCAC 23G .0107. If there is no agreement as to the payment of some or all of these costs, the compromise settlement agreement shall include the credits, including the amounts, to be applied by the employer or carrier against the settlement proceeds.~~
- (3) No rights other than those arising under the provisions of the Workers' Compensation Act are compromised or released by this agreement.
- (4) ~~The Whether the employee has, or has not, returned to work, a job or position at the same or a greater average weekly wage as was being earned prior to the injury or occupational disease.~~
- (5) If the employee has returned to work, whether the employee is earning the same or greater average weekly wage.
- ~~(5)(6) Where~~ If the employee has not returned to work a job or position at the same or a greater wage at a lower average weekly wage, as was being earned prior to the injury or occupational disease, the employee has, or has not, returned to some other job or position and, if so, the a description of the particular job or position, the name of the employer, and the average weekly wage earned. This Subparagraph does not apply where the employee or counsel certifies that partial wage loss due to an injury or occupational disease is not being claimed. if the employee is represented by counsel or if the employee certifies that partial wage loss due to an injury or occupational disease is not being claimed.
- ~~(6)(7) Where~~ If the employee has not returned to work, a job or position at the same or a greater average weekly wage as was being earned prior to the injury or occupational disease, a summary of the employee's age, educational level, past vocational training, past work experience, and any emotional, mental, or physical impairment that predates the current injury or occupational disease. This Subparagraph does not apply upon a showing of if:
 - (A) it places an unreasonable burden upon the parties;
 - (B) the employee is represented by counsel; or
 - (C) even if the employee is not represented by counsel, where the employee or

~~counsel~~ certifies that total wage loss due to an injury or occupational disease is not being claimed.

(b) No compromise settlement agreement shall be considered by the Commission unless the following requirements are met:

- (1) The relevant medical, vocational, and rehabilitation reports known to exist, including those pertinent to the employee's future earning capacity, are submitted with the agreement to the Commission by the employer, carrier, administrator, or the attorney for the employer.
- (2) The parties and all attorneys of record employee, the employee's attorney of record, if any, and an attorney of record or other representative who has been given the authority to sign for the employer, carrier and administrator, have signed the agreement.
- (3) In a claim where liability is admitted or otherwise has been established, the employer, carrier, or administrator has undertaken to pay all medical expenses for the compensable injury to the date of the settlement agreement.
- (4) In a claim in which the employer, carrier, or administrator has not agreed to pay all medical expenses of the employee related to the injury up to the date of the settlement agreement, the The settlement agreement contains a list of all known medical expenses of the employee related to the injury to the date of the settlement agreement. ~~agreement, including medical expenses that the employer, carrier, or administrator disputes, when the employer or insurer has not agreed to pay all medical expenses of the employee related to the injury up to the date of the settlement agreement. This list shall include:~~
 - (A) All known medical expenses that have been paid by the employer, carrier, or administrator;
 - (B) All known medical expenses that the employer, carrier, or administrator disputes;
 - (C) All known medical expenses that have been paid by the employee;
 - (D) All known medical expenses that have been paid by a health benefit plan;
 - (E) All known unpaid medical expenses that will be paid by the employer, carrier, or administrator;
 - (F) All known unpaid medical expenses that will be paid by the employee.
- (5) ~~The settlement agreement contains a list of the unpaid medical expenses, if known, that will be paid by the employer, carrier, or administrator, if there are unpaid medical expenses that the employer or carrier has agreed to pay. The settlement agreement also contains a list of unpaid medical expenses, if known, that will be paid by the employee, if there are unpaid~~

~~medical expenses that the employee has agreed to pay.~~

- ~~(6)~~(5) The settlement agreement provides that a party who has agreed to pay a disputed unpaid medical expense will notify ~~in writing~~ in writing the unpaid health care provider in writing of the party's responsibility to pay the unpaid medical expense. Other unpaid health care providers will be notified in writing of the completion of the settlement by the party specified in the settlement agreement:
 - (A) when the employee or the employee's attorney has notified the unpaid health care provider in writing under G.S. 97-90(e) not to pursue a private claim against the employee for the costs of medical treatment, or
 - (B) when the unpaid health care provider has notified ~~in writing~~ in writing the employee or the employee's attorney in writing of its claim for payment for the costs of medical treatment and has requested notice of a settlement.
- ~~(7)~~(6) Any obligation of any party to pay an unpaid disputed medical expense pursuant to a settlement agreement does not require payment of any medical expense in excess of the maximum allowed under G.S. 97-26.
- ~~(8)~~(7) The settlement agreement contains a finding that the positions of the parties to the agreement are reasonable as to the payment of medical expenses.
 - (c) When a settlement has been reached, the written agreement shall be submitted to the Commission upon execution in accordance with Rule .0108 of this Subchapter. All compromise settlement agreements shall be ~~directed to the Office of the Executive Secretary for review or distribution~~ distributed for review in accordance with Paragraphs (a) through (c) of Rule .0609 of this Subchapter. Any changes or addenda to the agreement submitted to the Commission shall be served upon the opposing party contemporaneously with submission to the Commission.
 - (d) ~~Once a compromise settlement agreement has been approved by the Commission, the~~ The employer, carrier, or administrator shall furnish an executed copy of the agreement to the employee's attorney of record or the employee, if unrepresented.
 - (e) ~~An employee's attorney seeking that seeks~~ fees in connection with a ~~Compromise Settlement Agreement~~ compromise settlement agreement shall submit ~~to the Commission~~ a copy of the attorney's fee agreement between the employee and the employee's previous attorney, then with the client. at the time of submission of a compromise settlement agreement, the employee's current attorney shall advise the Commission of the employee's fee agreement with the previous attorney and note whether an agreement has been reached between counsel as to the division of attorney's fees.

Authority G.S. 97-17; 97-80(a); 97-82.

SECTION .0600 – CLAIMS ADMINISTRATION AND PROCEDURES

11 NCAC 23A .0604 APPOINTMENT OF GUARDIAN AD LITEM

(a) Minors or incompetents may bring an action only through their guardian ad litem. Upon the written application on a Form 42 Application for Appointment of Guardian Ad Litem, Ad Litem, the Commission shall appoint the person as guardian ad litem, if the Commission determines it to be in the best interest of the minor or incompetent. The Commission shall appoint the guardian ad litem only after due inquiry as to the fitness of the person to be appointed.

(b) No compensation due or owed to ~~the minor or an~~ incompetent shall be paid directly to the guardian ad ~~litem.~~ litem, unless the guardian ad litem has authority to receive the money pursuant to an Order from the General Courts of Justice. No compensation due or owed to a minor shall be paid directly to the guardian ad litem, except that a parent, legal guardian, or legal custodian may receive compensation on behalf of a minor in his or her capacity as parent, legal guardian, or legal custodian.

(c) The Commission may assess a fee to be paid by the employer or the insurance carrier to an attorney who serves as a guardian ad litem for actual services rendered upon receipt of an affidavit of actual time spent in representation of the minor or incompetent as part of the costs.

Authority G.S. 97-50; 97-79(e); 97-80(a); 97-80(b); 97-91.

11 NCAC 23A .0609 MOTIONS PRACTICE IN CONTESTED CASES

- (a) Motions and responses before a Deputy Commissioner:
- (1) in cases that are currently calendared for hearing before a Deputy Commissioner shall be filed in accordance with Rule .0108 of this Subchapter.
 - (2) to reconsider or amend an Opinion and Award, made prior to giving notice of appeal to the Full Commission, shall be addressed to the Deputy Commissioner who authored the Opinion and Award and filed in accordance with Rule .0108 of this Subchapter.
- (b) Motions and responses shall be filed with the Office of the Executive Secretary in accordance with Rule .0108 of this Subchapter:
- (1) when a case is not calendared before a Deputy Commissioner;
 - (2) once a case has been continued or removed from a Deputy Commissioner's calendar; or
 - (3) after the filing of an Opinion and Award when the time for taking appeal has run.
- (c) Motions and responses before the Full Commission:
- (1) in cases calendared for hearing before the Full Commission shall be addressed to the Chair of the Full Commission panel and filed in accordance with Rule .0108 of this Subchapter.
 - (2) filed after notice of appeal to the Full Commission has been given but prior to the calendaring of the case shall be addressed to the

Chair of the Commission and filed in accordance with Rule .0108 of this Subchapter.

(3) in cases continued from the Full Commission hearing docket, shall be addressed to the Chair of the panel of Commissioners who ordered the continuance and filed in accordance with Rule .0108 of this Subchapter.

(4) filed after the filing of an Opinion and Award by the Full Commission but prior to giving notice of appeal to the Court of Appeals or the expiration of the period allowed to give notice of appeal to the Court of Appeals shall be addressed to the Commissioner who authored the Opinion and Award and filed in accordance with Rule .0108 of this Subchapter.

(d) Motions requesting an award of attorney's fees from ongoing compensation pursuant to G.S. 97-90 that are not required to be filed with a Deputy Commissioner or the Full Commission pursuant to Paragraphs (a) and (c) of this Rule shall be filed with the Commission's Claims Administration Section in accordance with Rule .0108 of this Subchapter.

~~(d)(e)~~ All motions motions and responses ~~thereto thereto,~~ including requests for extensions of time and requests to withdraw motions, shall include a caption containing the Industrial Commission file number(s), party names, and a title identifying the nature of the motion or response. Motions and responses set forth in the body of electronic mail correspondence or contained in a brief will not be accepted for filing by the Commission. This Paragraph does not apply to parties without legal representation.

~~(e)(f)~~ A motion shall state with particularity the grounds on which it is based, the relief sought, and the opposing party's ~~position, if known.~~ position or that there has been a reasonable attempt to contact the opposing party and ascertain its position. Service shall be made on all opposing attorneys of record, or on all opposing parties if not represented.

~~(f)(g)~~ Motions to continue or remove a case from the hearing calendar on which the case is set shall be made as much in advance as possible of the scheduled hearing and may be made in written or oral form. In all cases, the moving party shall provide the basis for the motion and state that the other parties have been advised of the motion and relate the ~~position, if known,~~ position of the other parties regarding the ~~motion.~~ motion, or that there has been a reasonable attempt to contact the opposing party and ascertain its position regarding the motion. ~~Oral motions shall be followed with a written motion from the moving party.~~

(h) Oral motions shall be followed with a written motion from the moving party, if requested by a hearing officer.

~~(g)(i)~~ The responding party to a motion shall have 10 days after a motion is served during which to file and serve copies of a response in opposition to the motion. The Commission may shorten or extend the time for responding to any motion in the interests of justice or to promote judicial economy. Parties in agreement may submit a written stipulation to a single extension of time for responding to any motion, except for medical motions pursuant to Rule .0609A of this Section. The parties submitting a stipulation shall agree to an extension of a reasonable time, not to exceed 30 days.

~~(h)(j)~~ A party who has not received actual notice of a motion or who has not filed a response at the time action is taken and who

~~is adversely affected by the action may request that it be reconsidered, vacated, or modified.~~ Motions shall be determined without oral argument unless the Commission determines that oral argument is necessary for a complete understanding of the issues.

~~(i) Where correspondence relative to a case before the Commission is sent to the Commission, copies of such correspondence shall be contemporaneously sent by the same method of transmission to the opposing party or, if represented, to opposing counsel. Written communications, whether addressed directly to the Commission or copied to the Commission, may not be used as an opportunity to introduce new evidence or to argue the merits of the case, with the exception of the following:~~

- ~~(1) written communications, such as a proposed order or legal memorandum, prepared pursuant to the Commission's instructions;~~
- ~~(2) written communications relative to emergencies, changed circumstances, or scheduling matters that may affect the procedural status of a case such as a request for a continuance due to the health of a litigant or an attorney;~~
- ~~(3) written communications sent to the tribunal with the consent of the opposing lawyer or opposing party, if unrepresented; and~~
- ~~(4) any other communication permitted by law or the Rules of the Commission.~~

~~(j)(k)~~ All motions and responses thereto shall include a proposed Order in Microsoft Word format to be considered by the Commission. The proposed Order shall include:

- (1) the IC File Number;
- (2) the case caption;
- (3) the subject of the proposed Order;
- (4) the procedural posture; and
- (5) the party appearances or contact information. If a party is represented by counsel, then the appearance should include the attorney and firm name, email address, telephone number, and fax number. If a party is unrepresented, then the proposed Order should include the party's email address, telephone number, and fax number, if available.

Authority G.S. 97-79(b); 97-80(a); 97-84; 97-91.

11 NCAC 23A .0617 ATTORNEYS RETAINED FOR PROCEEDINGS

(a) Any attorney who is retained by a party in a proceeding before the Commission shall comply with the applicable rules of the North Carolina State Bar. A copy of a notice of representation shall be served upon all other counsel and all unrepresented parties, parties, and submitted to the Commission in accordance with Rule .0108 of this Subchapter. Thereafter, all notices required to be served on a party shall be served upon the attorney. No direct contact or communication concerning contested matters may be made with a represented party by the opposing party or any person on its his or her behalf, without the attorney's permission except as permitted by G.S. 97-32 or other applicable law.

(b) Any attorney who wishes to withdraw from representation in a proceeding before the Commission shall file with the Commission, in writing, a Motion to Withdraw that contains a statement of reasons for the request and that the request has been served on the client. The attorney shall make reasonable efforts to ascertain the last known address last known contact information as defined in Rule .0109 of this Subchapter of the client and shall include this information in the motion. A Motion to Withdraw before an award is made shall state whether the withdrawing attorney requests an attorney's fee from the represented party once an award of compensation is made or approved.

(c) An attorney may withdraw from representation only by written order of the Commission. The issuance of an award of the Commission does not release an attorney as the attorney of record.

(d) An attorney withdrawing from representation whose client wishes to appeal an Order, Decision, or Award to the Full Commission shall timely file a notice of appeal, as set out by this Subchapter, on behalf of his or her client either before or with his or her Motion to Withdraw.

(e) Motions to Withdraw shall be submitted in accordance with Rule .0108 of this Subchapter. The Motion to Withdraw shall include a proposed Order in Microsoft Word format that includes, in the appearances, the last known address of any pro se party or the contact information of new counsel if such counsel has been retained. The proposed Order shall include fax numbers for all parties, if known.

Authority G.S. 97-80(a); 97-90; 97-91.

11 NCAC 23A .0619 FOREIGN LANGUAGE AND SIGN LANGUAGE INTERPRETERS

(a) When a person who does not speak or understand the English language or who is speech or hearing impaired is either called to testify in a hearing, other than in an informal hearing conducted pursuant to G.S. 97-18.1, or appears unrepresented before the Full Commission for an oral argument, the person, whether a party or a witness, shall be assisted by a qualified ~~foreign language interpreter.~~ interpreter upon request.

(b) To qualify as a foreign language interpreter, a person shall possess sufficient experience and education, or a combination of experience and education, speaking and understanding English and the foreign language to be interpreted, to qualify as an expert witness pursuant to G.S. 8C-1, Rule 702. For Spanish language interpretation, the interpreter must be "Level A" certified by the North Carolina Administrative Office of the Courts. A person qualified as an interpreter under this Rule shall not be interested in the claim and shall make a declaration under oath or affirmation to interpret accurately, truthfully and without any additions or deletions, all questions propounded to the witness and all responses thereto.

(c) To qualify as a sign language interpreter, a person shall possess a license from the North Carolina Interpreter and Transliterator Licensing Board, under G.S. 90D. It is preferred that sign language interpreters obtain an SC:L legal certification.

~~(e)(d)~~ Any party who is unable to speak or understand English, or who is speech or hearing impaired, or who intends to call as a witness a person who is unable to speak or understand English, or who is speech or hearing impaired, shall so notify the Commission and the opposing party, in writing, not less than 21

days prior to the date of the hearing. The notice shall state the language(s) that shall be interpreted for the Commission.

~~(d)~~(e) Upon receiving or giving the notice required in Paragraph ~~(e)~~(d) of this Rule, the employer or insurer shall retain a disinterested interpreter who possesses the qualifications listed in Paragraph (b) or (c) of this Rule to appear at the hearing and interpret the testimony or oral argument of all persons for whom the notice in Paragraph ~~(e)~~(d) of this Rule has been given or received.

~~(e)~~(f) The interpreter's fee shall constitute a cost as contemplated by G.S. 97-80. A qualified interpreter who interprets testimony or oral argument for the Commission is entitled to payment of the fee agreed upon by the interpreter and employer or insurer that retained the interpreter. Except in cases where a claim for compensation has been prosecuted without reasonable ground, the fee agreed upon by the interpreter and employer or insurer shall be paid by the employer or insurer. Where the Commission ultimately determines that the request for an interpreter was unfounded, attendant costs shall be assessed against the movant.

~~(f)~~(g) Foreign language interpreters shall abide by the Code of Conduct and Ethics of Foreign Language Interpreters and Translators, contained in Part 4 of Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System and promulgated by the North Carolina Administrative Office of the Courts, and shall interpret, as word for word as is practicable, without editing, commenting, or summarizing, testimony or other communications. The Code of Conduct and Ethics of Foreign Language Interpreters and Translators is hereby incorporated by reference and includes subsequent amendments and editions. A copy may be obtained at no charge from the North Carolina Administrative Office of the Court's website, <http://www.nccourts.org/Citizens/CPrograms/Foreign/Document/s/guidelines.pdf>, or upon request, at the offices of the Commission, located in the Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, between the hours of 8:00 a.m. and 5:00 p.m.

(h) Sign language interpreters shall interpret, as word for word as is practicable, without editing, commenting, or summarizing, testimony or other communications. Sign language interpreters shall abide by the ethical standards communicated in the training required by G.S. 90D-8.

Authority G.S. 97-79(b); 97-80(a).

11 NCAC 23A .0620 WRITTEN COMMUNICATIONS WITH THE COMMISSION

(a) This Rule applies to written communications relative to a case before the Commission that are not governed by statute or another Rule in this Subchapter.

(b) Written communications sent to the Commission shall be contemporaneously sent by the same method of transmission, where possible, to the opposing party or, if represented, to opposing counsel.

(c) Written communications, whether addressed directly to the Commission or copied to the Commission, may not be used as an opportunity to introduce new evidence or to argue the merits of the case.

Authority G.S. 97-80(a).

SECTION .0700 - APPEALS

11 NCAC 23A .0701 REVIEW BY THE FULL COMMISSION

(a) Notice of Appeal. Application for review shall be made to the Commission within 15 days from the date when notice of the Deputy Commissioner's Opinion and Award shall have been given. A letter expressing a request for review is considered an application for review to the Full Commission within the meaning of G.S. 97-85, provided that the letter specifies the Order or Opinion and Award from which appeal is taken.

(b) Motions to Reconsider to the Deputy Commissioner. A motion to reconsider or to amend the decision of a Deputy Commissioner shall be filed with the Deputy Commissioner within 15 days of receipt of notice of the award. The time for filing a request for review from the decision of a Deputy Commissioner under the rules in this Subchapter shall be tolled until a motion to reconsider or to amend the decision has been ruled upon by the Deputy Commissioner. However, if either party files a letter requesting review of the decision as set forth in Paragraph (a) of this Rule after a motion to reconsider or to amend has been filed with the Deputy Commissioner, jurisdiction shall be transferred to the Full Commission. Any party who had a pending motion to reconsider or amend the decision of the Deputy Commissioner may file a motion with the Chair of the Commission requesting remand to the Deputy Commissioner with whom the motion was pending. Upon remand, jurisdiction will be transferred to the Deputy Commissioner. Following the Deputy Commissioner's ruling on the motion to reconsider or amend the decision, a party requesting review of the initial decision of the Deputy Commissioner or the ruling on the motion to reconsider or amend the decision shall file a letter requesting review as set forth in Paragraph (a) of this Rule to transfer jurisdiction of the matter back to the Full Commission.

(b)(c) Acknowledging Receipt; Form 44; Joint Certification. After receipt of a request for review, the Commission shall acknowledge the request for review by letter. The Commission shall prepare the official transcript and exhibits, if any, and provide them along with a Form 44 Application for Review to the parties involved in the appeal at no charge within 30 days of the acknowledgement letter. The official transcript and exhibits and a Form 44 Application for Review shall be provided to the parties electronically, where possible. In such cases, the Commission shall send an e-mail to the parties containing a link to the secure File Transfer Protocol (FTP) site where the official transcript and exhibits may be downloaded. The e-mail shall also provide instructions for the submission of the parties' acknowledgement of receipt of the Form 44 Application for Review and the official transcript and exhibits to the Commission. Parties represented by counsel shall sign a joint certification acknowledging receipt of the Form 44 Application for Review and the official transcript and exhibits and submit the certification within ten days of receipt of the Form 44 Application for Review and the official transcript and exhibits. The certification shall stipulate the date the Form 44 Application for Review and the official transcript and exhibits were received by the parties and shall note the date the appellant's brief is due. The Commission

shall save a copy of the parties' acknowledgements in the file for the claim to serve as record of the parties' electronic receipt of the Form 44 Application for Review and the official transcript and exhibits. In cases where it is not possible to provide a party with the official transcript and exhibits electronically, the Commission shall provide the official transcript and exhibits and a Form 44 Application for Review via certified U.S. Mail, with return receipt requested. The Commission shall save a copy of the return receipt to serve as record of the party's receipt of the official transcript and exhibits and Form 44 Application for Review.

- (1) The official transcript and exhibits and a Form 44 Application for Review shall be provided electronically to parties represented by counsel. In such cases, the Commission shall send an e-mail to the parties with directions on how to obtain an electronic copy of the official transcript and exhibits. The e-mail shall also provide instructions for the submission of the parties' acknowledgement of receipt of the Form 44 Application for Review and the official transcript and exhibits to the Commission. Parties represented by counsel shall sign a joint certification acknowledging receipt of the Form 44 Application for Review and the official transcript and exhibits and submit the certification within ten days of receipt of the Form 44 Application for Review and the official transcript and exhibits. The certification shall stipulate the date the Form 44 Application for Review and the official transcript and exhibits were received by the parties and shall note the date the appellant's brief is due. The Commission shall save a copy of the parties' acknowledgements in the file for the claim to serve as record of the parties' electronic receipt of the Form 44 Application for Review and the official transcript and exhibits.

- (2) In cases where it is not possible to provide a party with the official transcript and exhibits electronically, the Commission shall serve the official transcript and exhibits and a Form 44 Application for Review via any class of U.S. Mail that is fully prepaid.

~~(e) A motion to reconsider or to amend the decision of a Deputy Commissioner shall be filed with the Deputy Commissioner within 15 days of receipt of notice of the award with a copy to the Docket Director. The time for filing a request for review from the decision of a Deputy Commissioner under the rules in this Subchapter shall be tolled until a motion to reconsider or to amend the decision has been ruled upon by the Deputy Commissioner. However, if either party files a letter requesting review as set forth in Paragraph (a) of this Rule, jurisdiction shall be transferred to the Full Commission, and the Docket Director shall notify the Deputy Commissioner. Upon transfer of jurisdiction to the Full Commission, any party who had a pending motion to reconsider or amend the decision of the Deputy Commissioner may file a motion with the Chairman of the Commission requesting remand to the Deputy Commissioner with whom the motion was pending.~~

~~Within the Full Commission's discretion, the matter may be so remanded. Upon the Deputy Commissioner's ruling on the motion to reconsider or amend the decision, either party may thereafter file a letter requesting review of the Deputy Commissioner's decision as set forth in Paragraph (a) of this Rule.~~

~~(d) Appellant's Form 44. The appellant shall submit a Form 44 Application for Review upon which appellant shall state stating with particularity all assignments of error and grounds for review, the grounds for the review. The grounds shall be stated with particularity, including the errors allegedly committed by the Commissioner or Deputy Commissioner and, when applicable, including, where applicable, the pages in the transcript or the record on which the alleged errors are recorded. Grounds for review and assignments of error not set forth in the Form 44 Application for Review are deemed abandoned, and argument thereon shall not be heard before the Full Commission.~~

~~(e) Timing Requirements. The appellant shall file the Form 44 Application for Review and brief in support of the grounds for review with the Commission with a certificate of service on the appellee within 25 days after receipt of the transcript or receipt of notice that there will be no transcript. The appellee shall have 25 days from service of the Form 44 Application for Review and appellant's brief to file a responsive brief with the Commission. The appellee's brief shall include a certificate of service on the appellant. When an appellant fails to file a brief, an appellee shall file its brief within 25 days after the appellant's time for filing the Form 44 Application for Review and appellant's brief has expired. A party who fails to file a brief shall not participate in oral argument before the Full Commission. If multiple parties request review, each party shall file an appellant's brief and appellee's brief on the schedule set forth in this Paragraph. If the matter has not been calendared for hearing, ~~any~~ a party may file with the ~~Docket Director~~ obtain a single extension of time not to exceed 15 days by filing a written stipulation pursuant to Rule .0108 of this Subchapter. ~~to a single extension of time not to exceed 15 days. In no event shall the cumulative extensions of time exceed 30 days.~~~~

~~(f) Brief Requirements. Briefs to the Full Commission shall not exceed 35 pages, excluding attachments. In no event shall attachments be used to circumvent the 35-page limit. No page limit applies to the length of attachments. Briefs shall be prepared using a 12 point proportional font and serif typeface, shall be double spaced, and shall be prepared with non-justified right margins. Each page of the brief shall be numbered at the bottom of the page. When a party quotes or paraphrases testimony or other evidence from the appellate record in the party's brief, the party shall include, at the end of the sentence in the brief that quotes or paraphrases the testimony or other evidence, a parenthetical entry that designates the source of the quoted or paraphrased material and the page number within the applicable source. The party shall use "T" to refer to the transcript of hearing testimony and "Ex" for exhibit. For example, if a party quotes or paraphrases material located in the hearing transcript on page 11, the party shall use the following format "(T 11)," and if a party quotes or paraphrases material located in an exhibit on page 12, the party shall use the following format "(Ex 12)." When a party quotes or paraphrases testimony in the transcript of a deposition in the party's brief, the party shall include the last name of the deponent and the page on which such testimony is located. For~~

example, if a party quotes or paraphrases the testimony of John Smith, located on page 11 of such deposition, the party shall use the following format "(Smith 11)." Parties shall not discuss matters outside the record, assert personal opinions or relate personal experiences, or attribute wrongful acts or motives to opposing counsel or members of the Commission.

(g) Reply Briefs. Within 10 days of service of the appellee's brief, a party may request by motion to file a reply brief. The motion shall not contain a reply brief. A reply brief may only be filed if ordered by the Full Commission. Reply briefs shall not exceed 15 pages, excluding attachments. Reply briefs shall be prepared in accordance with the requirements of Paragraph (f) of this Rule. Any reply brief filed shall be limited to a concise rebuttal of arguments set out in the appellee's brief, and shall not reiterate arguments set forth in the appellant's principal brief.

(h) Citations. Case citations shall be to the North Carolina Reports, the North Carolina Court of Appeals Reports, or the North Carolina Reporter, and when possible, to the South Eastern Reporter. An unpublished appellate decision does not constitute controlling legal authority. If a party believes that an unpublished opinion has precedential or persuasive value to a material issue in the case and that there is no published opinion that would serve as well, the party may cite the unpublished opinion. When citing an unpublished opinion, a party shall indicate the opinion's unpublished status. If no reporter citation is available at the time a brief is filed, the party citing to the case shall attach a copy of the case to its brief.

(i) Motions. After a request for review has been submitted to the Full Commission, any motions related to the issues for review shall be filed with the Full Commission, with service on the other parties. Motions related to the issues for review including motions for new trial, to supplement the record, including documents from offers of proof, or to take additional evidence, filed during the pendency of a request for review to the Full Commission, shall be argued before considered by the Full Commission at the time of the hearing of the request for review, review of the appeal, except motions related to the official transcript and exhibits. The Full Commission, for good cause shown, may rule on such motions prior to oral argument.

(g) Case citations shall be to the North Carolina Reports, the North Carolina Court of Appeals Reports, or the North Carolina Reporter, and when possible, to the South Eastern Reporter. If no reporter citation is available at the time a brief is filed or if an unpublished decision is referenced in the brief, the party citing to the case shall attach a copy of the case to its brief. Counsel shall not discuss matters outside the record, assert personal opinions or relate personal experiences, or attribute wrongful acts or motives to opposing counsel or members of the Commission.

(h) Upon the request of a party or on its own motion, the Commission may waive oral argument in the interests of justice or to promote judicial economy. In the event of such waiver, the Full Commission shall file an award based on the record and briefs.

(j) Oral Argument.

(1) Each appellant shall have twenty minutes to present oral argument and may reserve any amount of the twenty-minute total allotment for rebuttal, unless otherwise specified by Order of the Commission. Each appellee shall also have

twenty minutes to present oral argument, unless otherwise specified by Order of the Commission; however, the appellee(s) may not reserve rebuttal time. In the case of cross-appeals, each appealing party may reserve rebuttal time.

(2) Any party may request additional time to present oral argument in excess of the standard twenty-minute allowance. Such requests shall be made in writing and submitted to the Full Commission no less than ten days prior to the scheduled hearing date. The written request for additional time shall state with specificity the reason(s) for the request of additional time and the amount of additional time requested.

(3) An employee appealing the amount of a disfigurement award shall personally appear before the Full Commission to permit the Full Commission to view the disfigurement.

(4) A party may waive oral argument at any time with approval of the Commission. Upon the request of a party or on its own initiative, the Commission may review the case and file an Order or Award without oral argument.

(5) If any party fails to appear before the Full Commission upon the call of the case, the Commission may disallow the party's right to present oral argument. If neither party appears upon the call of the case, the Full Commission may decide the case upon the record and briefs on appeal, unless otherwise ordered.

(6) Parties shall not discuss matters outside the record, assert personal opinions, relate personal experiences, or attribute wrongful acts or motives to opposing counsel or members of the Commission.

(i) Briefs to the Full Commission shall not exceed 35 pages, excluding attachments. No page limit applies to the length of attachments. Briefs shall be prepared using a 12-point type, shall be double spaced, and shall be prepared with non-justified right margins. Each page of the brief shall be numbered at the bottom of the page. When a party quotes or paraphrases testimony or other evidence from the appellate record in the party's brief, the party shall include, at the end of the sentence in the brief that quotes or paraphrases the testimony or other evidence, a parenthetical entry that designates the source of the quoted or paraphrased material and the page number within the applicable source. The party shall use "T" to refer to the transcript of hearing testimony, "Ex" for exhibit, and "p" for page number. For example, if a party quotes or paraphrases material located in the hearing transcript on page 11, the party shall use the following format "(T p 11)," and if a party quotes or paraphrases material located in an exhibit on page 12, the party shall use the following format "(Ex p 12)." When a party quotes or paraphrases testimony in the transcript of a deposition in the party's brief, the party shall include the last name of the deponent and the page on which such testimony is located. For example, if a party quotes or paraphrases the testimony of John Smith, located on page 11 of such

~~deposition, the party shall use the following format "(Smith p 11)."~~

~~(j) An employee appealing the amount of a disfigurement award shall personally appear before the Full Commission to permit the Full Commission to view the disfigurement.~~

Authority G.S. 97-80(a); 97-85; S.L. 2014-77.

11 NCAC 23A .0702 REVIEW OF ADMINISTRATIVE DECISIONS

(a) Administrative decisions include orders, decisions, and awards made in a summary manner, without findings of fact, including decisions on the following:

- (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 to change the interval of payments; and
- (4) applications for lump sum payments of compensation.

~~(b) Administrative decisions made in cases not set for hearing before a Commissioner or Deputy Commissioner or before the Full Commission for review shall be reviewed upon the filing of a Motion for Reconsideration. Reconsideration, upon a request for hearing on the administrative decision, or upon request for hearing on the ruling on a Motion for Reconsideration. A Motion for Reconsideration shall be filed within 15 days of receipt of the administrative decision and addressed to the Administrative Officer who made the decision. A request for hearing shall be filed within 15 days of the administrative decision or a ruling on a Motion for Reconsideration. with the Commission addressed to the Administrative Officer who made the decision or may be reviewed by requesting a hearing within 15 days of receipt of the decision or receipt of the ruling on a Motion to Reconsider. These issues may also Notwithstanding the provisions above, issues addressed by an administrative decision may be raised and determined at a subsequent hearing.~~

~~(b)(c) Motions for Reconsideration shall not stay the effect of the order, decision, or award; provided that Administrative Officer making the decision or a Commissioner may enter an order staying its effect pending the ruling on the Motion for Reconsideration or pending a decision by a Commissioner or Deputy Commissioner following a formal hearing. In determining whether or not to grant a stay, the Commissioner or Administrative Officer shall consider whether granting the stay will frustrate the purposes of the order, decision, or award. Motions to Stay shall not be filed with both the Administrative Officer and a Commissioner.~~

~~(e)(d) Any request for a hearing to review an administrative decision pursuant to Paragraph (b) of this Rule shall be made to the Commission and filed with the Commission's Doeket Director, Office of the Clerk. The Commission shall designate a Commissioner or Deputy Commissioner to hear the review. The Commissioner or Deputy Commissioner hearing the matter shall consider all issues de novo, and no issue shall be considered moot solely because the order has been fully executed during the pendency of the hearing.~~

(e) Any request for review by the Full Commission of an administrative decision by a Commissioner or Deputy Commissioner made during the pendency of a case assigned to them pursuant to G.S. 97-84 shall be filed with the Office of the Clerk. If the administrative decision made by the authoring Commissioner or Deputy Commissioner is a final judgment as to one or more issues or parties and the administrative decision contains a certification that there is no just reason for delay, the request for review shall be referred directly to a panel of the Full Commission. If the administrative decision contains no certification, requests for review will be referred to the Chair of the Commission for a determination regarding the right to immediate review, and the parties shall address the grounds upon which immediate review shall be allowed.

~~(d)(f) Orders filed by a single Commissioner, Commissioner in matters before the Full Commission for review pursuant to G.S. 97-85, including orders dismissing reviews to the Full Commission or denying the right of immediate request for review to the Full Commission, are administrative orders and are not final determinations of the Commission. As such, an order filed by a single Commissioner is not appealable to the North Carolina Court of Appeals. A one-signature order filed by a single Commissioner may be reviewed by:~~

- (1) filing a Motion for Reconsideration addressed to the Commissioner who filed the order; or
- (2) requesting a review to a Full Commission panel by requesting a hearing within 15 days of receipt of the order or receipt of the ruling on a Motion for Reconsideration.

~~(e)(g) This Rule shall not apply to medical motions filed pursuant to G.S. 97-25; provided, however, that a party may request reconsideration of an administrative ruling on a medical motion, or may request a stay, or may request an evidentiary hearing de novo, all as set forth in G.S. 97-25.~~

Authority G.S. 97-79(g); 97-80(a); 97-85; S.L. 2014-77.

SECTION .0800 – RULES OF THE COMMISSION

11 NCAC 23A .0801 WAIVER OF RULES

In the interests of justice or to promote judicial economy, the Commission may, except as otherwise provided by the rules in this Subchapter, waive or vary the requirements or provisions of any of the rules in this Subchapter in a case pending before the Commission upon ~~written application~~ request of a party or upon its own initiative only if the employee is not represented by counsel. Notwithstanding oral requests made during a hearing before the Commission, all requests shall be submitted in writing and served upon all opposing parties contemporaneously. By order of the Commission, oral requests shall be submitted in writing within five days of the request. Responses to requests considered pursuant to this Rule may be submitted in accordance with Rule .0609 of this Subchapter within five days of service of the original request. Citation to this Rule or use of the term "waiver" is not required for requests considered pursuant to this Rule. Factors the Commission shall use in determining whether to grant the waiver are:

- (1) the necessity of a waiver;

- (2) the party's responsibility for the conditions creating the need for a waiver;
- (3) the party's prior requests for a waiver;
- (4) the precedential value of such a waiver;
- (5) notice to and opposition by the opposing parties; and
- (6) the harm to the party if the waiver is not granted.

Authority G.S. 97-80(a).

SUBCHAPTER 23B – TORT CLAIMS RULES

SECTION .0200 - CLAIMS PROCEDURES

11 NCAC 23B .0206 HEARINGS

(a) The Commission may, on its own motion, order a hearing, rehearing, or pre-trial conference of any tort claim in dispute. The Commission shall set the date, time, and location of the hearing, and provide notice of the hearing to the parties. Within the Commission's discretion, any pre-trial conference, as well as hearings of claims in which the plaintiff is incarcerated at the time of the hearing, may be conducted via videoconference or telephone conference. The date and time of the hearing shall not be limited by the business hours of the Commission. Where a party has not notified the Commission of the attorney representing the party prior to the mailing of calendars for hearing, notice to that party constitutes notice to the party's attorney. Any scheduled hearings shall proceed to completion unless recessed, continued, or removed by Order of the Commission.

(b) When an attorney is notified to appear for a pre-trial conference, motion hearing, hearing, or any other appearance the attorney shall, consistent with ethical requirements, appear or have a partner, associate, or other attorney appear. Counsel for each party or any party without legal representation shall remain in the hearing room throughout the course of the hearing, unless released by the Commission.

(c) A motion for a continuance shall be allowed only by the Commissioner or Deputy Commissioner before whom the case is set in the interests of justice or to promote judicial economy.

(d) In cases involving property damage of less than five hundred dollars (\$500.00), the Commission may, upon its own motion or upon the motion of either party, order a videoconference or telephone conference hearing on the matter.

(e) Unless otherwise ordered by the Commission, in the event of inclement weather or natural disaster, hearings set by the Commission shall be cancelled or delayed when the proceedings before the General Courts of Justice in that county are cancelled or delayed.

(f) Unless otherwise ordered or waived by the Commission, applications for issuance of a writ of habeas corpus ad testificandum requesting the appearance of witnesses incarcerated by the North Carolina Division of Adult Corrections, shall be filed in accordance with Rule .0104 of this Subchapter, with a copy to the opposing party or counsel, for review by the Commission in accordance with G.S. 143-296.

(b) ~~The Commission shall set a contested case for hearing in a location deemed convenient to witnesses and the Commission, and conducive to an early and just resolution of disputed issues.~~

~~(e) The Commission may issue writs of habeas corpus ad testificandum in cases arising under the Tort Claims Act. Requests for issuance of a writ of habeas corpus ad testificandum shall be sent to the Docket Section of the Commission if the case has not been set on a calendar for hearing. If the case has been set on a hearing calendar, the request shall be sent to the Commissioner or Deputy Commissioner before whom the case is set.~~

~~(d) The Commission shall give notice of a hearing in every case. A motion for a continuance shall be allowed only by the Commissioner or Deputy Commissioner before whom the case is set in the interests of justice or to promote judicial economy. Where a party has not notified the Commission of the attorney representing the party prior to the mailing of calendars for hearing, notice to that party constitutes notice to the party's attorney.~~

~~(e) In cases involving property damage of less than five hundred dollars (\$500.00), the Commission shall, upon its own motion or upon the motion of either party, order a telephonic hearing on the matter.~~

~~(f) All subpoenas shall be issued in accordance with Rule 45 of the North Carolina Rules of Civil Procedure, with the exception that production of public records or hospital records as provided in Rule 45(e)(2), shall be served upon the Commissioner or Deputy Commissioner before whom the case is calendared, or upon the Docket Section of the Commission should the case not be calendared.~~

~~(g) In the event of inclement weather or natural disaster, hearings set by the Commission shall be cancelled or delayed when the proceedings before the General Court of Justice in that county are cancelled or delayed.~~

Authority G.S. 143-296; 143-300.

11 NCAC 23B .0207 HEARINGS OF CLAIMS BY PRISON INMATES

Authority G.S. 97-101.1; 143-296; 143-300.

SECTION .0500 – RULES OF THE COMMISSION

11 NCAC 23B .0503 SANCTIONS

The Commission may, on its own initiative or motion of a party, impose a sanction against a party, attorney, government entity, or any combination thereof, or attorney or both, when the Commission determines that such party, or attorney, government entity, or any combination thereof, or both failed to comply with the Rules in this Subchapter. Subchapter, an Order of the Commission, or other applicable rules, laws, or regulations. ~~The Commission may impose sanctions of the type and in the manner prescribed by Rule 37 of the North Carolina Rules of Civil Procedure.~~

Authority G.S. 1A-1, Rule 37; 143-291; 143-296; 143-300.

TITLE 12 – DEPARTMENT OF JUSTICE

Notice is hereby given in accordance with G.S. 150B-21.2 that the Criminal Justice Education and Training Standards Commission

**Regulatory Impact Analysis
Codification of Contact Information Requirements and Additional Rule
Amendments**

Basic Information

Agency: North Carolina Industrial Commission

Contact: Ashley Snyder
North Carolina Industrial Commission
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Rules Proposed for Adoption: Rule 11 NCAC 23A .0801
Waiver of Rules
(See proposed rule text in Appendix 1)

Rule 11 NCAC 23A .0109
Contact Information
(See proposed rule text in Appendix 1)

Statutory Authority: G.S. §§ 97-80; 97-80(a)

Impact Summary

State Government: Yes
Local Government: Yes
Private Sector: Yes
Substantial Economic Impact: No

RULE 11 NCAC 23A .0801

The amendments proposed to Rule 11 NCAC 23A .0801 allow oral waivers during hearings before the Commission. Currently, waivers may only be submitted in writing. The proposed amendments allow for more flexibility to request waivers during hearings, but the proposed amendments also allow the Commission to order written requests be submitted to the Commission following any oral waiver request.

The fiscal impact from the proposed amendments is expected to be *de minimis*. The proposed amendments will result in fewer waiver requests being submitted in writing, which will be a savings to the Commission due to decreased time reviewing written filings, as well as a savings to the State, local governments, and private sector due to decreased time needed to draft written waiver requests. However, oral requests may only be made during hearings. For reference, the Full Commission heard 393 appeals and the Deputy Commissioners section heard 1,728 cases in FY 2016-2017.¹ The Commission cannot determine how many oral requests may be made since all requests must currently be in writing. Since the Commission may require parties to submit written requests following any oral request, the number of purely oral waiver requests is expected to be minimal.

Due to the proposed change, it is also possible the Commission will receive an increased number of waiver requests if more parties decide to make oral waiver requests at hearings. Again, since this will be new, the Commission does not have data sufficient to determine the expected increase.

RULE 11 NCAC 23A .0109

Description of the Proposed Rule

Rule 11 NCAC 23A .0109 provides detailed instructions for participants in the workers' compensation system to provide the Industrial Commission with current contact information. The rule sets out different methods for filing updated contact information based on the identity of the person or entity. While there is variation between how different entities provide the information to the Commission, the information required is consistent system-wide. This rule places the burden on attorneys and unrepresented parties to keep the Commission apprised of any change in contact information, including telephone number, facsimile number, email address, and mailing address.

Necessity for the Proposed Rule

The North Carolina Industrial Commission is a quasi-judicial agency tasked with administering and adjudicating claims arising under the Workers' Compensation Act. In that capacity, the Commission functions as a court system, hearing cases and issuing orders and decisions. In its role as an adjudicatory body, there are situations and circumstances when the Commission needs to contact or communicate with parties in pending matters. In order to efficiently and effectively reach parties, the Commission needs to have on hand the most current addresses by which to reach that person, party, or entity. Adopting this rule will ensure that the

¹ Industrial Commission Annual Report, <http://www.ic.nc.gov/2017AnnualReport.pdf>

Commission is able to swiftly and effectively contact parties when necessary and appropriate.

Introduction and Background:

The North Carolina Industrial Commission is a statutory creation of the General Assembly tasked with administering the Workers' Compensation Act and adjudicating all cases arising thereunder. Pursuant to N.C. Gen. Stat. § 97-80, the Commission is required to adopt rules to carry out the provisions of the Act. These rules should establish processes and procedures as necessary. In complying with this statutory requirement, the Commission evaluates process improvements for the workers' compensation system.

The current rules of the Industrial Commission give no specific directions requiring persons or entities with active matters before the Commission to provide notice of any change to their contact information. It is important for the Commission to be kept apprised of current contact information for unrepresented employees, attorneys of record, and non-insured employers who are not represented by counsel in order to notify those persons or entities of hearings as well as filings of orders and opinions and awards. For purposes of this rule, contact information includes telephone number, facsimile number, email address and mailing address.

With no rule in place to govern updating contact information, the Commission also experiences inefficiencies internally. If contact information is outdated, Commission staff must spend additional time locating the updated contact information. If the person or entity does provide the Commission with their updated contact information, the lack of a specified contact via rule means staff must expend additional time ensuring the contact information is sent to and recorded by the appropriate staff member.

To improve efficiency, the Commission intends to require attorneys and unrepresented parties to keep the Commission informed of any changes to their contact information. Additionally, the proposed rule adoption sets forth specific instructions for how to notify the Commission of such an update. This ensures the updated contact information is directed to the appropriate staff member.

Impact of the Proposed New Rule:

Adoption of comprehensive contact information rule – Rule 11 NCAC 23A .0109

This rule mandates and describes the requirement for all attorneys or unrepresented parties to notify the Commission of all changes to their contact information. The term “contact information” includes telephone number,

facsimile number, email address, and mailing address. Please note this rule allows persons or entities without legal representation to provide their updated contact information via a variety of different methods to ensure they are able to comply with the rule.

a. Description of baseline situation:

The lack of clear and comprehensive directions regarding how to update contact information and the method for updating the information resulted in additional time and resources spent by the filers trying to determine how and where to update their contact information. Additionally, staff spent additional time and resources answering related phone calls, rerouting documents, tracking down documents, and tracking down updated contact information. Further, some hearings have been delayed or cancelled to due to the Commission's inability to contact individuals and provide notice of upcoming hearings.

1. Attorneys of record baseline:

Although not required by rule, attorneys of record generally know to keep the Commission apprised of any changes in their contact information. Currently, attorneys of record have been instructed to direct their contact via email to dockets@ic.nc.gov. However, some attorneys contact staff via phone or do not provide updated information. Once the updated contact information is provided or forwarded to dockets@ic.nc.gov, the Clerk's Office staff logs and updates the attorney's contact information on the master spreadsheet currently used to maintain this information.

2. Employees not represented by counsel baseline:

Employees not represented by counsel are not currently required by rule to notify the Commission of changes to their contact information. However, in practice, some employees do notify the Commission of changes to their contact information. Any such updates are logged and updated by Claims Administration Section staff. The Commission has promulgated a number of forms that are used for various purposes in a workers' compensation claim. Each form requests contact information from the parties. It is through these forms that the Commission currently collects contact information. This is not efficient as Commission staff must review all filings to determine which is the most recent. There is significant risk as well because there is no guarantee that the address provided on the last filing is accurate.

3. Non-insured employers not represented by counsel baseline:

Non-insured employers not represented by counsel are not currently required by rule to notify the Commission of changes to their contact information. If a non-insured employer does notify the Commission of a change, Clerk's Office staff logs and updates the contact information. The Commission has promulgated a number of forms that are used for various purposes in a workers' compensation claim. Each form requests contact information from the parties. It is through these forms that the Commission currently collects contact information. This is not efficient as Commission staff must review all filings to determine which is the most recent. There is significant risk as well because there is no guarantee that the address provided on the last filing is accurate.

b. Description of proposed changes:

The proposed Rule 11 NCAC 23A .0109 will require all attorneys or unrepresented parties to inform the Commission of any changes to their contact information. Contact information includes telephone number, facsimile number, email address, and mailing address. The proposed rule provides instructions for how to submit contact information updates. Attorneys, unrepresented employees, and unrepresented non-insured employers each have specific instructions for how to notify the Commission of their updated contact information to ensure the information is directed to the correct Commission staff and to ensure that compliance with the rule will be easily accomplished for all individuals who must submit contact information.

c. Economic impact:

(1) Costs to the State through the Commission:

- Opportunity Costs of Current Employees:
 - Opportunity cost of an Administrative Assistant I in the Clerk's Office logging and updating the contact information submissions from attorneys of record and non-insured employers. It takes the Administrative Assistant 5 minutes to log and update contact information in Rumba and Rightfax for an attorney of record. It is estimated it will take the same amount of time to update the contact information for a represented employee or non-insured employer. Based on Administrative Assistant salary of \$39,367, compensation including benefits equates to \$60,403.27, meaning an hourly rate of \$29.04. Thus, the cost of

logging and updating the contact information for one individual or entity is \$2.42. This estimate assumes employees work 2,080 hours per year.

- The Administrative Assistant in the Clerk's Office currently logs updated contact information for attorneys of record, though submission is not required by rule. The Commission receives between 240 and 300 such requests annually. Based on current submissions, the cost to log the information is between \$580.80 and \$726.00 per year. The Commission conservatively estimates 95% of attorneys of record currently update their contact information, meaning submissions could increase to between 253 and 316 per year, increasing opportunity costs to between \$611.37 and \$764.21 per year. Therefore, the proposed rule amendments are projected to increase opportunity costs by \$30.57 and \$38.21 per year.
- Opportunity cost of an Administrative Assistant I in the Commission's Claims Administration section to log and update the contact information submissions from employees not represented by counsel. The Commission occasionally receives such submissions now, and it takes 2 minutes to update an unrepresented employee's information in CCMS. Based on Administrative Assistant salary of \$39,373, compensation including benefits equates to \$60,411.60, meaning an hourly rate of \$29.04. Thus, the cost of logging and updating the contact information for one individual or entity is \$0.97. This estimate assumes employees work 2,080 hours per year. The Commission cannot estimate how many submissions it will receive.
- IT costs:
The email account dockets@ic.nc.gov costs \$6.25 per month. This account already exists and therefore no additional expenditure will be necessary.

(2) Costs to the State as an employer:

- State employees such as attorneys and paralegals representing the State will file updated contact information via email pursuant to this rule. Similarly, attorneys or paralegals representing local government units will file updated contact information via the same method. Local government is included in the public sector cost analysis in this section.
- Costs associated with email filing of updated contact information: Attorneys of record, including attorneys employed by the State or local government units must update their contact information by submitting

any updates via email. Currently, attorneys submit changes to their contact information to dockets@ic.nc.gov, though not required by rule. As explained above, the Commission expects to receive between 253 and 316 contact information updates per year from attorneys of record. Assuming the type of filer (public or private) follows the same breakdown as the type of employment in NC, about 11% of filings are from attorneys employed by State or local government units.² Based on a test of submitting contact information via email, it is estimated it will take attorneys 3 minutes to file a contact information update.³ It is assumed paralegals or legal assistants will compose and send these emails. Based on an hourly total compensation rate of \$35.71,⁴ the annual cost to filers will be between \$82.82 and \$103.44.

- Another potential cost to State or local governments would arise in situations where the party fails to comply with this rule and does not provide the Commission with updated contact information. The Commission would then send documents or transmit communications to the wrong address. This would have unintended costs to the public sector, such as not receiving notice of a hearing, missing a filing deadline, or missing the filing of an Order or Opinion and Award. These consequences could impose unquantifiable qualitative costs.

(3) Costs to private sector filers:

- A cost to the private sector would arise in situations where a party fails to comply with this rule and does not provide the Commission with updated contact information. The Commission would then send documents or transmit communications to the wrong address. This would have unintended costs to the private sector, such as not receiving notice of a hearing, missing a filing deadline, or missing the filing of an Order or Opinion and Award. This may result in added time and costs to resolve the hearing and an increased risk of cases being continued. These consequences could impose unquantifiable qualitative costs.
- There are potential costs to the private sector associated with the additional time required to update contact information. Attorneys or

² Governing website. Governing Data. States with Most Government Employees: Per Capita Rates by Job Type. <http://www.governing.com/gov-data/public-workforce-salaries/states-most-government-workers-public-employees-by-job-type.html>

³ For the test, an attorney at the Commission simulated looking up the correct email address for submitting updated contact information. The attorney then typed and submitted 3 test emails including their name, telephone number, facsimile number, email address, and mailing address. The tests averaged 2 minutes and 43 seconds. To account for individuals who may need more time, the number was rounded up to 3 minutes.

⁴ 2017 wage estimates for paralegals and legal assistants in North Carolina reported by NC Department of Commerce, Occupational Employment and Wages in North Carolina (OES).

paralegals employed by the private sector will spend time updating their own contact information. Additionally, employees not represented by counsel and non-insured employers not represented by counsel will be required to update their contact information.

- As explained above, the Commission expects to receive between 253 and 316 contact information updates per year from attorneys of record. 89% of those attorneys are employed by the private sector.⁵ As explained above, it is estimated it will take attorneys 3 minutes to file a contact information update via email. If it is assumed the legal or administrative assistants doing the filing are paid an hourly total compensation rate of \$34.50,⁶ the cost of filing updated contact information for attorneys of record will be between \$388.42 and \$485.14 per year.
- Unrepresented employees and non-insured employers will be required to file their updated contact information with the Commission via EDFP, email, facsimile, U.S. Mail, private courier service, or hand delivery. The Commission does not currently always receive this information and therefore cannot estimate how many filings will be received or which method of filing the unrepresented parties will use, though it is believed most will file using email or EDFP, making the cost minimal.

(4) Benefits to the State through the Commission:

- The proposed rule changes will greatly improve the efficiency of the Commission. Commission staff will spend less time searching for updated contact information when attempting to contact persons or entities with matters pending before the Commission in order to schedule hearings and file orders or Opinions and Awards. This includes reduced time on telephone calls and emails.
- Having all updated contact information on hand should result in a decreased number of continued hearings at the Full Commission Level. Some hearings are continued due to parties not receiving adequate notice of the hearing because their contact information changed and

⁵ Supra note 1.

⁶ 2017 wage estimates for paralegals and legal assistants in North Carolina reported by NC Department of Commerce, Occupational Employment and Wages in North Carolina (OES).

<https://d4.nccommerce.com/OESSelection.aspx>

Benefits as a percent of total compensation reported by Bureau of Labor Statistics. Employer Costs per Hour Worked for Employee Compensation and Costs as a Percentage of Total Compensation: Private industry workers. March 2018 (Release Date June 8 2018).

<https://www.bls.gov/news.release/ecec.t05.htm>

Adjusted for private sector wage growth estimate of 2.74% for North Carolina professional and business service sectors. Reported by IHS Connect. Regional Economics Database. North Carolina Annual Forecast Data. Accessed June 13, 2018.

the Commission was not notified. With updated contact information, notices of hearings will go to the correct person from the beginning. Per unit at the Full Commission level, the cost of continuing a hearing includes approximately 30 minutes for an Agency Legal Consultant with an average compensation of \$47.73 per hour⁷ to calendar the hearing, send notice to the parties, draft an order, and file the order. A Commissioner compensated at an average of \$88.50⁸ per hour spends approximately 5 minutes reviewing and signing the order. Combined, the total cost at the Full Commission level to continue a hearing amounts to \$31.25.

- Having all updated contact information on hand should result in a decreased number of continued hearings at the Deputy Commissioner level. Some hearings are continued due to parties not receiving adequate notice of the hearing because their contact information changed and the Commission was not notified. With updated contact information, notices of hearings will go to the correct person from the beginning. Per unit at the Deputy Commissioner level, the cost of continuing a hearing includes approximately 15 minutes for an Administrative Assistant with an average compensation of \$35.71⁹ per hour to review and file a continuance order. A Deputy Commissioner compensated at an average of \$70.52¹⁰ per hour spends approximately 30 minutes drafting the order. Combined, the total cost at the Deputy Commissioner level to continue a hearing amounts to \$44.19.
- Additionally, if a continuance order is filed at either the Full Commission or Deputy Commissioner level and a party is unrepresented by legal counsel, the party will be served via U.S. Mail. The cost of sending one letter not exceeding 1 oz. via U.S. Mail is \$0.47 plus 10% for Mail Service Center rates, totaling \$0.52 per continuance involving an unrepresented party.
- In the future, the Commission plans to use the updated contact information gathered according to this rule to increase efficiency by serving more orders and opinions via email, where possible, saving at least \$0.52 per mailing. The Commission currently serves represented

⁷ The Commission generally has 6 full-time permanent Agency Legal Consultants that serve as law clerks to the Commissioners. Currently, the Commission has 3 full-time permanent Agency Legal Consultants/law clerks. Their average annual compensation including benefits is \$99,278.40. Therefore, their average hourly compensation is \$47.73.

⁸ The Commission has 6 Commissioners whose salary is set by statute. The Chairman's annual compensation including benefits is \$185,824.36. The annual compensation for all other Commissioners is \$183,742.06. Therefore, the average annual compensation for a Commissioner is \$184,089.11, making a Commissioner's average hourly compensation \$88.50.

⁹ *Supra* note 4.

¹⁰ Deputy Commissioners' salaries are set by statute. See G.S. §§ 97-78(b2), (b3). The average annual compensation for a Deputy Commissioner, including benefits, is \$146,680.22. Therefore, the average Deputy Commissioner's hourly compensation is \$70.52.

parties via email when the Commission has record of the attorney of record's email address. However, the Commission does not have email addresses for all attorneys nor does it have email addresses for unrepresented parties.

(5) Benefits to the public and private sector:

- The proposed changes will result in improved information and clear direction regarding how to update contact information.
- Users' customer service experience will improve due to Commission staff's ability to serve documents and schedule hearings more efficiently.

Alternatives Analysis

Alternatives to the proposed rule changes include maintaining the status quo or adopting rules that require one-time filing of contact information with no requirement to provide updated information upon a change to the initial contact information.

If the Commission were to forgo adopting rules and instead requested the information be provided voluntarily, the Commission would not capture the cost savings estimated for reducing the time spent ascertaining the correct contact address. Without a mandate for this information to be provided to the Commission in the manner prescribed by the proposed rule, the Commission would achieve less savings in the future by not being able to serve as many orders and Opinions and Awards via email. If persons and entities are not required to submit this information, but are encouraged to do so voluntarily, the Commission would continue to have outdated contact information in some cases, leading to continuances and unnecessary use of Commission time and resources.

If the Commission were to adopt rules that required persons or entities with active matters pending before the Commission to submit contact information at a single point in the case, but did not add an additional requirement that he or she update that information upon any change, some benefits would be realized in terms of the Commission having some contact information on file which may still be correct. However, unless there is a continuing obligation for the party to notify the Commission with updated information, the Commission would not capture the benefit of certainty in transmission. Additionally, the Commission would capture some, but not all, of the benefits of reduced time spent trying to reach a party because there will be some returned or rejected mailings, emails, or other attempts to contact a party.

Any reductions in potential time and resource savings based on alternative, less stringent rules will result in less improvement in customer service, slower turnaround times for communications sent by the Commission, and increased risk in communications or materials being sent to an incorrect number or address. The baseline rule used for the fiscal impact analysis is continuing with no rule on point. Under the current situation, the Commission is not consistently collecting this information from all persons or entities.

Table 1. Summary of Costs and Benefits

	Impact
<hr/>	
COSTS	
<i>State</i>	
Logging Information – Attorney	\$30.57-\$38.21/year
Logging Information – Employee not represented by counsel	\$0.97/unit
Attorneys submitting information via email	\$82.82-\$103.44/year
<i>Private</i>	
Attorneys submitting information via email	\$388.42-\$485.14/year
<i>Unquantified</i>	
Time for unrepresented employees and non-insured employers to file information	
<hr/>	
Total Costs	
<hr/>	
<u>BENEFITS</u>	
<i>State</i>	
Continuing a hearing – Full Commission	\$31.25/unit
Continuing a hearing – Deputy Commissioner	\$44.19/unit
Decreased mail costs	\$0.52/unit
<i>Private</i>	
<i>Unquantified</i>	
Reduction in communications sent to wrong address	
Increased efficiency	
Improved customer service	

Appendix 1

11 NCAC 23A .0801 WAIVER OF RULES

In the interests of justice or to promote judicial economy, the Commission may, except as otherwise provided by the rules in this Subchapter, waive or vary the requirements or provisions of any of the rules in this Subchapter in a case pending before the Commission upon ~~written application request~~ of a party or upon its own initiative only if the employee is not represented by counsel. Notwithstanding oral requests made during a hearing before the Commission, all requests shall be submitted in writing and served upon all opposing parties contemporaneously. By order of the Commission, oral requests shall be submitted in writing within 5 days of the request. Responses to requests considered pursuant to this rule may be submitted in accordance with Rule .0609 of this Subchapter within 5 days of service of the original request. Citation to this Rule or use of the term “waiver” is not required for requests considered pursuant to this Rule. Factors the Commission shall use in determining whether to grant the waiver are:

- (1) the necessity of a waiver;
- (2) the party's responsibility for the conditions creating the need for a waiver;
- (3) the party's prior requests for a waiver;
- (4) the precedential value of such a waiver;
- (5) notice to and opposition by the opposing parties; and
- (6) the harm to the party if the waiver is not granted.

*History Note: Authority G.S. 97-80(a);
Eff. January 1, 1990;
Amended Eff. November 1, 2014.*

Rule 11 NCAC 23A .0109 is proposed for adoption as follows:

11 NCAC 23A .0109 CONTACT INFORMATION

(a) "Contact information" for purposes of this Rule shall include telephone number, facsimile number, email address, and mailing address.

(b) All attorneys of record with matters before the Commission shall inform the Commission in writing of any change in the attorney's contact information via email to doctors@ic.nc.gov.

(c) All unrepresented persons or entities with matters pending before the Commission shall advise the Commission upon any change to their contact information in the following manner:

(1) All employees who are not represented by counsel shall inform the Commission of any change in contact information by filing a written notice via the Commission's Electronic Document Filing Portal ("EDFP"), electronic mail, facsimile, U.S. Mail, private courier service, or hand delivery.

(2) All non-insured employers that are not represented by counsel shall inform the Commission of any change in contact information by filing a written notice via the Commission's Electronic Document Filing Portal ("EDFP"), electronic mail, facsimile, U.S. Mail, private courier service, or hand delivery.

History Note: Authority G.S. 97-80;

Eff. _____

**Regulatory Impact Analysis
Agreements for Prompt Payment of Compensation**

Agency: North Carolina Industrial Commission

Contact: Ashley Snyder – (919) 807-2524

Proposed New Rule Title: Agreements for Prompt Payment of Compensation

Rules proposed for amendment: Rule 11 NCAC 23A .0501
(See proposed rule text in Appendix 1)

State Impact: Yes

Local Impact: Yes

Private Impact: Yes

Substantial Economic Impact: No

Statutory Authority: G.S. §§ 97-18; 97-80(a); 97-82

Introduction/Background:

On January 1, 1990, the Industrial Commission implemented Rule 04 NCAC 10A .0501 to govern agreements for payment of compensation pursuant to G.S. § 97-18. The Commission later amended the rule on August 1, 2006 and November 1, 2014. Rule 04 NCAC 10A .0501 was recodified as Rule 11 NCAC 23A .0501 effective June 1, 2018.

The Commission proposes updates to the rule to increase efficiency by specifically requiring the inclusion of a job description in the employee’s medical and vocational records if the employee has permanent work restrictions and has returned to work for the employer of injury. Additionally, the rule adds Form 26A to a list of forms the employer, carrier, administrator, or attorney of record must provide to the employee. The proposed amendments also clarify filings of agreements for payment of compensation must be filed in accordance with Rule 11 NCAC 23A .0108.

Proposed Rule Changes and Their Estimated Impact:

The proposed rule additions and changes include the following:

1. *Amendment of subsection (b) to require inclusion of job description*

a. Description of baseline situation:

In its current form, Rule 11 NCAC 23A .0501 requires “relevant medical and vocational records” to be filed with the Commission. It also allows the Commission to request the parties file “any additional documentation” necessary for the Commission to determine whether the employee is receiving disability compensation for which the employee is entitled.

b. Description of proposed change:

The proposed amendment to this rule in subsection (b) is a clarifying change intended to improve compliance. Currently, the Commission expends time contacting adjusters and attorneys to request copies of job descriptions if they are not provided. The Commission intends to increase the number of job descriptions provided initially with the agreement for permanent disability. The proposed change only requires a job description be provided if it is “known to exist.”

c. Economic impact:

(1) Costs

There are expected to be no costs or minimal costs incurred by the addition of this language. Because the Commission already reaches out to parties and requests a job description if the employee has permanent work restrictions and has returned to work for the employer of injury and the rule currently requires parties to file additional documentation requested by the Commission, the impact of specifically requiring that documentation from the outset is minimal for State and local governments as well as the private sector.

(2) Benefits to the State through the Commission

Commission staff in the Claims Administration Section processes agreements for permanent disability. In the event a job description is necessary and a copy is not already contained in the employee’s relevant medical and vocational records, then a staff member must contact an adjuster or an attorney to obtain the job description.

Staff estimates it takes between 5 and 10 minutes to contact an attorney or adjuster via email or phone to ask them to provide the employee's job description. An Administrative Specialist I with an annual compensation (including benefits) of \$49,482.30 or a Business Manager I with an annual compensation (including benefits) of 106,387.39 would make the phone call or send the email. Assuming the employees work 2040 hours per year, it costs the Administrative Specialist I between \$2.00 and \$4.00 per follow-up and the Business Manager I between \$4.35 and \$8.70 per follow-up phone call or email. The Commission does not have specific data on the number of follow-ups required to obtain job descriptions. For reference, the Commission received 6,501 Form 26As in Fiscal Year 2016-17. Assuming half (3,251) of the Form 26As required a follow-up phone call or email, the opportunity cost would be between \$6,502 and \$28,283.70 per year.

(3) Benefits to State and Local Government and the Private Sector

As explained above, compliance with the proposed amendment will decrease additional Commission contact with employers, carriers, administrators, and attorneys to obtain necessary job descriptions. Instead, employers, carriers, administrators, and attorneys will file the job description initially with all other required documentation, saving them time from having to respond to additional calls and emails. The exact time and savings would be hard to quantify, but it is expected to be minimal.

2. *Amendment of subsection (d) to include the Form 26A*

a. Description of baseline situation:

Currently, the rule only requires employers, carriers, administrators, or attorneys of record to provide the employee's attorney or the employee, if unrepresented, a copy of a Form 21, Form 26, Form 26D, and a Form 30. In practice, employers, carriers, administrators, and attorneys of record are already providing copies of Form 26As to employees or their attorneys. The current rule requires the form be provided when it is signed.

b. Description of proposed change:

The proposed amendment adds the Form 26A to the list of forms which must be provided to the employee. The Form 26A was implemented via Rule 11 NCAC 23L .0103 on November 1, 2014, the same day this rule was last amended. The Forms listed in subsection (d) are agreements to facilitate the payment of compensation, and the proposed amendment adds Form 26A to the list because it is also an agreement to facilitate the payment of compensation. The rule clarifies the completed form must be provided to the employee or the employee's attorney upon submission to the Commission, when the form is finalized.

c. Economic impact:

(1) Costs to the State:

The Commission receives 6,501 Form 26A agreements annually.¹ The additional cost for the State to send this form is minimal. In most cases, a paralegal or administrative assistant would attach the form to an email to send to the employee or the employee's attorney. In some cases, the paralegal or administrative assistant may mail the form to the employee or employee's attorney. Assuming the type of filer (public or private) follows the same breakdown as the type of employment in NC, about 11%² of Form 26As filed with the Commission (715 Form 26As) are from attorneys employed by State or local government. Based on an hourly total compensation rate of \$35.71,³ assuming 95% of the Form 26As (679) are sent via email, and assuming an estimate of 3 minutes to send the Form via email, it would cost \$1,212.35 annually. Based on the price of a standard U.S. Mail stamp of \$0.49, the cost of mailing the remaining 36 Form 26As would be \$17.64 annually.

The Commission is not involved sending forms pursuant to subsection (d) of this rule and therefore there is no cost to the State through the Commission.

(2) Costs to the Private Sector

¹ Industrial Commission 2016-2017 Annual Report, <http://www.ic.nc.gov/2017AnnualReport.pdf>.

² Governing website. Governing Data. States with Most Government Employees: Per Capita Rates by Job Type. <http://www.governing.com/gov-data/public-workforce-salaries/states-most-government-workers-public-employees-by-job-type.html>

³ 2017 wage estimates for paralegals and legal assistants in North Carolina reported by NC Department of Commerce, Occupational Employment and Wages in North Carolina (OES).

The Commission receives 6,501 Form 26A agreements annually.⁴ The additional cost for the State to send this form is minimal. In most cases, a paralegal or administrative assistant would attach the form to an email to send to the employee or the employee's attorney. In some cases, the paralegal or administrative assistant may mail the form to the employee or employee's attorney. Assuming the type of filer (public or private) follows the same breakdown as the type of employment in NC, about 89%⁵ of Form 26As filed with the Commission (5,786 Form 26As) are from the private sector. Based on an hourly total compensation rate of \$34.50,⁶ assuming 95% of the Form 26As (5,497) are sent via email, and assuming an estimate of 3 minutes to send the Form via email, it would cost \$9,482.33 annually. Based on the price of a standard U.S. Mail stamp of \$0.49, the cost of mailing the remaining 289 Form 26As would be \$141.61 annually.

3. *Amendment of subsection (e) to require filing in accordance with Rule 11 NCAC 23A .0108*

The amendment to subsection (e) has no fiscal impact because agreements for payment of compensation are already required to be filed in accordance with Rule 11 NCAC 23A .0108. Rule 11 NCAC 23A .0108(b) requires all documents to be transmitted to the Commission via EDFP. Form 26As are not listed as an exemption to the EDFP filing requirement in Rule .0108. Therefore, the requirement to file Form 26As via EDFP is already accounted for in the fiscal note for Rule 11 NCAC 23A .0108.

Summary of Economic Impact:

⁴ Industrial Commission 2016-2017 Annual Report, <http://www.ic.nc.gov/2017AnnualReport.pdf>.

⁵ Governing website. Governing Data. States with Most Government Employees: Per Capita Rates by Job Type. <http://www.governing.com/gov-data/public-workforce-salaries/states-most-government-workers-public-employees-by-job-type.html>

⁶ 2017 wage estimates for paralegals and legal assistants in North Carolina reported by NC Department of Commerce, Occupational Employment and Wages in North Carolina (OES). <https://d4.nccommerce.com/OESSelection.aspx>

Benefits as a percent of total compensation reported by Bureau of Labor Statistics. Employer Costs per Hour Worked for Employee Compensation and Costs as a Percentage of Total Compensation: Private industry workers. March 2018 (Release Date June 8 2018).

<https://www.bls.gov/news.release/ecec.t05.htm>

Adjusted for private sector wage growth estimate of 2.74% for North Carolina professional and business service sectors. Reported by IHS Connect. Regional Economics Database. North Carolina Annual Forecast Data. Accessed June 13, 2018.

Overall, the proposed amendments to Rule 11 NCAC 23A .0501 will have an estimated aggregate impact of an estimated benefit of between \$6,502 and \$28,283.70 for the State through the Commission annually. The proposed amendments will also have an estimated total cost to the State as an employer of \$1,229.99 annually and an estimated cost to the private sector of \$9,623.94 annually, for an overall estimated cost of \$10,853.93. Therefore, the overall impact of the proposed amendments is estimated at between a cost of \$4,351.93 or a benefit of \$17,429.77 annually.

APPENDIX 1

Rule 11 NCAC 23A .0501 is proposed for amendment as follows:

SECTION .0500 – AGREEMENTS

11 NCAC 23A .0501 AGREEMENTS FOR PROMPT PAYMENT OF COMPENSATION

- (a) To facilitate the payment of compensation within the time prescribed in G.S. 97-18, the Commission shall accept memoranda of agreements on Commission forms.
- (b) No agreement for permanent disability shall be approved until the relevant medical and vocational ~~records~~ records, including a job description if the employee has permanent work restrictions and has returned to work for the employer of injury, known to exist in the case have been filed with the Commission. When requested by the Commission, the parties shall file any additional documentation necessary to determine whether the employee is receiving the disability compensation to which he or she is entitled and that an employee qualifying for disability compensation under G.S. 97-29 or G.S. 97-30, and G.S. 97-31 has the benefit of the more favorable remedy.
- (c) All memoranda of agreements shall be submitted to the Commission. Agreements conforming to the provisions of the Workers' Compensation Act shall be approved by the Commission and a copy returned to the employer, carrier, or administrator, and a copy sent to the employee, unless amended by an award, in which event the Commission shall return the award with the agreement.
- (d) The employer, carrier, administrator, or the attorney of record, if any, shall provide the employee, beneficiary, or attorney of record ~~employee's attorney of record or the employee,~~ if any, unrepresented, a copy of a Form 21 *Agreement for Compensation for Disability*, a Form 26 *Supplemental Agreement as to Payment of Compensation*, a Form 26A *Employer's Admission of Employee's Right to Permanent Partial Disability*, a Form 26D *Agreement for Payment of Unpaid Compensation in Unrelated Death Cases*, and a Form 30 *Agreement for Compensation for Death*, ~~when the employee or appropriate beneficiary signs the forms.~~ upon submission to the Commission of the executed form or agreement.
- (e) All memoranda of agreements for cases that are calendared for hearing before a Commissioner or Deputy Commissioner shall be ~~addressed sent directly~~ sent directly to that Commissioner or Deputy ~~Commissioner-Commissioner,~~ Commissioner, and filed in accordance with Rule .0108 of this Subchapter. Before a case is calendared, or once a case has been continued or removed, or after the filing of an Opinion and Award, all memoranda of agreements shall be ~~directed~~ addressed to the Claims Section of the ~~Commission.~~ Commission, and filed in accordance with Rule .0108 of this Subchapter.
- (f) After the employer, carrier, or administrator has received a memorandum of agreement that has been signed by the employee and the employee's attorney of record, if any, the employer, carrier, or administrator has 20 days within which to submit the memorandum of agreement to the Commission for review and approval or within which to show cause for not submitting the memorandum of agreement signed only by the employee.

History Note: Authority G.S. 97-18; 97-80(a); 97-82;
Eff. January 1, 1990;

*Amended Eff. **** **, ****. November 1, 2014; August 1, 2006;
Recodified from 04 NCAC 10A .0501 Eff. June 1, 2018.*

**Regulatory Impact Analysis
Codification of and/or changes to filing requirements**

Agency: North Carolina Industrial Commission
Contact: Ashley Snyder – (919) 807-2524
Proposed New Rule Title:
Rules proposed for amendment: Rule 11 NCAC 23A .0502
(See proposed rule text in Appendix 1)

State Impact: Yes
Local Impact: Yes
Private Impact: Yes
Substantial Economic Impact: No

Statutory Authority: G.S. § 97-17
G.S. § 97-80

Introduction/Background:

Rule 11 NCAC 23A .0502, along with G.S. 97-17, directs the parties as to what information and language must be included in compromise settlement agreements (CSAs) to be submitted to the Commission for approval. G.S. 97-17 (b)(1) provides that a settlement agreement must be deemed by the Commission to be fair and just and that the interests of the parties and any person, including a health benefit plan, that paid medical expenses of the employee have been considered prior to approval of the agreement. In order to complete an inquiry as to whether the agreement is fair, just, and in the interests of the parties, or to consider the interests of a health benefit plan, often additional information must be requested of the parties. Most of the proposed changes to the rule are designed to make the Rule easier to read and less confusing and are essentially a reorganization of information. The substantive changes to the rule are designed to make the inclusion of often-requested information mandatory and thus decrease the time it takes to review and approve settlement agreements.

Proposed Rule Changes and Their Estimated Impact:

The proposed rule amendments that make substantive changes to the rule include the following: a reference to the payment of costs by the parties related to Rule 11 NCAC 23E .0203 and 11 NCAC 23G .0107; the addition of language reducing the requirement to provide certain information if the employee is represented by counsel; additional details about required medical expense information; a reference to a party's duty to simultaneously serve the other party on additional information or changes to CSAs filed with the Commission following the initial submission, and the requirement that any current attorney seeking a fee in connection with a

CSA must advise the Commission if a pending claim for attorney's fees from a prior attorney exists, if known.

1. *11 NCAC 23A .0502(a)(2)*

This rulemaking updates the rule and requires the CSA submitted by the parties to provide an accounting of any costs the defendants intend to recoup from the settlement amount. These costs can be of three kinds: 50% of the CSA filing fee paid to the Commission, 50% of the mediator report filing fee paid to the Commission, and/or the employee's portion of any required compensation paid to a mediator. These costs are paid by the defendants upon filing or after mediation based on 11 NCAC 23E .0203(a) and (b) and 11 NCAC 23G .0107, respectively. Defendants are entitled to take a credit from the settlement amount for any of these costs paid on behalf of plaintiff. Quite often, the parties bargain over the payment of these costs as part of the settlement agreement.

Currently, the rule only requires that the CSA state that defendants will pay the CSA filing fee upon filing. That rule is no longer required because the CSA filing fee must now be paid upon submission. The current rule does not require any information about the application of credits or any agreement to waive the credits. Often, this information is included in the CSA, but there are a good number of cases in which it is not. The information is helpful because it affects the actual amount the employee will receive, which needs to be considered by the Commission. Most importantly, however, many settlements involve employees without legal counsel who may not be aware of these various costs or their obligations to pay portions of them. Therefore, they may settle their case for a certain amount and then receive \$200+ less than what they expected to receive without advance knowledge. This information should be in the settlement agreement that the employee reviews and signs so that the employee is aware of any credits to be applied to the settlement funds. Currently, this issue causes a delay in the approval process when the Commission has to request this information from the parties. The economic impact of this rule change is described below:

a. Costs to the State through the Commission:

The Commission does not anticipate any significant costs related to the proposed rule change. Most parties already memorialize in the CSA any agreement or credits related to the payment of costs in cases in which both sides are represented by counsel. There may be a brief period during which some parties fail to comply with the new rule and the Commission must correspond with them to inform them of the new rule and request the required information. However, this is likely to occur in a relatively small number of cases for only a few weeks and the corrective action by the Commission is equivalent to the action it already takes currently to obtain this information. Therefore, the Commission expects no to minimal cost impact from the rule change and only for a short duration.

b. Costs to the State as an employer:

It is unlikely that the State as an employer will have to expend additional funds to be able to comply with the proposed rule change, as the information being requested is available to the defendant. The defendant is responsible for drafting the agreement and this information is already frequently included. State employees such as attorneys and paralegals representing the State will have to add this information to any compromise settlement agreement submitted for filing. It is anticipated that this would take approximately 1-3 minutes per case. The Commission receives and reviews approximately 10,000 CSAs per year. There is no data regarding how many CSAs are currently submitted without this information.

c. Costs to private sector filers, including private employers, insurance carriers, and employees:

It is unlikely that those in the private sector would have to expend additional funds to be able to comply with the proposed rule change, as this information is available to the defendants and their attorneys who are responsible for drafting the agreement. Attorneys and paralegals will have to add this information to any compromise settlement agreement submitted for filing where an agreement exists. It is anticipated that this would take approximately 1-3 minutes per case. The Commission has no data regarding how many CSAs are submitted without this information where an agreement exists.

d. Benefits to the State through the Commission:

The proposed rule change will improve the efficiency of reviewing CSAs submitted to the Commission. This information is routinely requested when it is not initially provided, especially in cases where the plaintiff is not represented by an attorney and the settlement amount is low. This could save 10 to 15 minutes of the hearing officer's time in reviewing cases that do not currently include this information. The Commission has no data regarding how many cases this might be.

e. The benefits to the public and private sector:

If parties who did not previously provide the information comply with the new rule, they will save approximately 10-15 minutes of attorney or paralegal time handling an inquiry from the Commission seeking the information. All parties may see a small improvement in CSA turnaround times due to increased efficiency. Employees may benefit from having this information in the CSA so that they are aware in advance of the credits to be applied to the settlement amount.

2. *11 NCAC 23A .0502(a)(6)*

This rulemaking saves the CSA drafter from having to include certain employment information in cases where the employee has returned to work making less than his or her previous average weekly wage and is represented by counsel. Currently, the parties must state that the employee is not making a claim for partial wage loss or include information about the employee's job, including a description of the job, the name of the employer, and the average weekly wage earned. While this information is helpful for analyzing the employee's potential entitlement to temporary partial disability compensation, the Commission does not need the information in cases in which the employee is represented by counsel because it is assumed that counsel has advised the employee regarding entitlement to benefits during the settlement negotiations. Prior to November 1, 2014, the Commission did not require parties represented by counsel to state whether the employee was making a claim for partial wage loss or include information about the employee's current employment. The changes to this part of the rule in 2014 made Rule .0502(a)(6) inconsistent with (a)(7)(B) and thus confusing to parties. Currently, the Commission is in the position of having to enforce an unnecessary and inconsistent rule. The change to Rule 11 NCAC 23A .0502 (a)(6) would no longer require the drafters of the CSA to include partial wage loss claim information when the employee is represented by counsel, other than to include the employee's current work status.

The economic impact of the rule change is estimated as follows:

- a. Costs to the State through the Commission and to all parties before the Commission:

Because the rule removes a requirement, the Commission does not anticipate any costs related to the proposed rule change.

- b. Benefits to the State through the Commission:

The proposed rule change will improve the efficiency of reviewing CSAs submitted to the Commission. The Industrial Commission will no longer have to verify that this information is included in represented cases and spend 10-15 minutes contacting the parties to obtain the information. The Industrial Commission has no data on how many CSAs in represented cases do not include this information but it is believed to be a relatively low number.

- c. Benefits to the public and private sector:

For the small number of clinchers that do not include this information under the current rule, public and private sector parties will no longer be contacted to obtain it following submission of the CSA, saving approximately 10-15 minutes per applicable CSA. It is anticipated that this rule will improve turnaround times in CSA approvals incrementally by removing a requirement.

3. *11 NCAC 23A .0502(b)(2)*

This rulemaking has no economic impact. The changes to this part of the rule simply clarifies what is meant by “parties.”

4. *11 NCAC 23A .0502(b)(4)*

This rule provision addresses the list of medical expenses required by G.S. 97-17(b) and (c). The goal of the rule change is to clarify what information the Commission requires.

a. Description of baseline situation:

In settlement agreements where the defendants do not agree to pay all medical expenses related to the injury up to the date of injury, the parties must include with the agreement a list of all known medical expenses related to the injury, including disputed medical expenses. The parties must also include a list of all unpaid medical expenses that will be paid by the defendant, if the defendant has agreed to pay any, and a list of all unpaid medical expenses that will be paid by the employee, if the employee agrees to pay any. The current language of Rule .0502(b)(4) and (5) is somewhat confusing in its wording and the provisions overlap. Further, G.S. 97-17 requires the Commission to consider the interests of a health benefit plan that has paid medical expenses on behalf of the employee. However, the current rule does not require information regarding payment of medical expenses by a health benefit plan. Currently, medical expense information is one of the most common items delaying approval of a CSA. Often, even after the Commission requests the list of medical expenses, additional information must be requested because the list is not complete.

b. Description of proposed changes:

The changes to Rule 11 NCAC 23A .0502(b)(4), including the deletion of (b)(5), require that parties include on one list a breakdown of the medical expenses related to the claim including those that have been paid by defendants, are disputed by defendants, paid by the employee, paid by a health benefit plan, agreed to be paid by defendants as part of the settlement, and expenses that are to be paid by the employee. The rule change related to medical expenses is a re-configuration of the current rule to make it easier for the parties to understand what should be provided on a list of medical expenses and codifies the parties’ best practice, which is to provide the medical expense information in a list format. The only new addition to the rule is the requirement to list medical expenses paid by a health benefit plan, which G.S. 97-17 already requires indirectly. Many parties already include this information.

c. Economic Impact:

(1) Costs to the State through the Commission:

The Commission does not anticipate any significant costs related to the proposed rule change. The Commission already requests a list of medical expenses routinely when this information is not provided as required by the rule and statute.

(2) Costs to the State and some local government as an employer:

It is unlikely that the State as an employer will have to expend significant additional funds to comply with the proposed rule change, as most of the information being requested is available to the defendant who are responsible for drafting the agreement. Other than the list including expenses paid by a health benefit plan, this information already has to be provided per the existing rule. Even the list of medical expenses paid by a health benefit plan is contemplated by the statute and so is routinely included by most parties. In denied represented claims where the defendant has not paid any medical expenses, this list is often compiled by the plaintiff's counsel. In applicable cases, it could take the State or local government 15-30 minutes to obtain information from plaintiff regarding payment of medical expenses by a health benefit plan and include it in the CSA. This work may be done by legal assistants earning \$35.71 in total hourly compensation¹ or attorneys earning \$84.50 in total hourly compensation.² The Commission does not have data regarding how often it has to request additional information regarding payment of expenses by a health benefit plan from the State or local government.

(3) Costs to private sector, including private employers, insurance carriers, self-insured local government using private counsel, and employees:

It is unlikely that the private sector would have to expend significant additional funds to comply with the proposed rule change, as this information is generally available to the parties who are responsible for drafting the agreement. Other than the inclusion of expenses paid by a health benefit plan, this information already has to be provided to the Commission per the rule. If the information has not been provided by the employee, it may take 15-30 minutes to obtain information from the employee regarding payment of medical expenses by a health benefit plan and include it in the CSA. It is noted that many defense

¹ 2017 wage estimates for paralegals and legal assistants in North Carolina reported by NC Department of Commerce, Occupational Employment and Wages in North Carolina (OES). Benefits as a percent of total compensation reported by NC OSHR. 2016 Compensation and Benefits Report. https://files.nc.gov/ncoshr/documents/files/2016%20Comp%20and%20Benefits%20Report_FINAL.pdf
Total compensation adjusted for recent 2% legislative increase.

² 2017 median wage estimates for attorneys in North Carolina reported by NC Department of Commerce, Occupational Employment and Wages in North Carolina (OES). <https://d4.nccommerce.com/OESSelection.aspx>
Benefits as a percent of total compensation reported by NC OSHR. 2016 Compensation and Benefits Report. https://files.nc.gov/ncoshr/documents/files/2016%20Comp%20and%20Benefits%20Report_FINAL.pdf
Total compensation adjusted for recent 2% legislative increase.

firms charge an all-inclusive fee to carriers to draft and submit a CSA to the Commission. For those cases in which an hourly rate is charged to draft a CSA, it is estimated that a law firm charges \$90.00 per hour for a paralegal's time and \$150.00 for an attorney. It could take employees or their counsel 15-30 minutes to find and communicate the information, but it is not feasible to estimate the fiscal impact of this time because an unrepresented employee uses his or her own time and attorneys for employees generally work on a contingency fee. Therefore, the rule change may cause a temporary small increase in cost of \$30-60 in a small number of cases. The Commission does not have data regarding how often it has to request additional information regarding payment of expenses by a health benefit plan from the private sector.

(4) Benefits to the State through the Commission:

The proposed rule change reorganizes the information regarding medical expenses that should be submitted and is intended to make the information easier to digest. It is hoped that the Commission will see better compliance with this rule leading to improved efficiency in the Commission's review of CSAs. The Commission will save approximately 10-15 minutes of staff attorney time on applicable cases, which is estimated at \$7.77 - \$11.66³. It is not feasible to estimate the number of cases in which compliance with the amended rule will result in savings.

(5) Benefits to the public and private sector:

The parties may see an overall incremental improvement in CSA turnaround times due to better rule compliance and increased efficiency.

5. *11 NCAC 23A .0502(b)(5)*

Amendments to this rule provision expand the cases in which the CSA must indicate who will notify certain unpaid health care providers of the completion of the settlement agreement. Currently, the rule only requires this if (1) an employee's counsel has notified the health care provider in writing not to pursue a private claim against the employee or (2) a health care provider has notified an employee's counsel in writing of its claim for payment and requested notification of settlement. The amended rule would require this in cases where these conditions apply to an unrepresented employee as well. This could increase the number of cases where this provision is invoked. The rule change is intended to close the gap on cases in which health care providers have corresponded with the employee or counsel regarding payment. The amended rule will increase notice of settlement to health care providers. There is no data available on the number of cases

³ In FY 2016-2017, the Executive Secretary's Office issued 9,821 orders on CSAs, 83% of the 11,848 issued by the Commission as a whole. 2016-2017 Industrial Commission Annual Report, <http://www.ic.nc.gov/2017AnnualReport.pdf>. The average annual wage, including benefits, of a Special Deputy Commissioner in the Executive Secretary's section is \$95,139.92, or \$46.64 per hour.

in which employees are not represented by counsel and either of the two conditions in the amended rule exists with respect to a health care provider.

In those cases where the information must be included in a settlement agreement, it is not likely to take more than 1-3 additional minutes to insert the information in the settlement agreement. The Commission expect minimal cost or benefit to result from this rule change for the Commission, State, local government, or other parties. There may be some minor benefit to health care providers who receive notice of the completion of a settlement agreement and can consider that information with respect to any collection efforts. It is not feasible to estimate this benefit.

6. *11 NCAC 23A .0502(c)*

a. Description of baseline situation:

The current rule provides all CSAs will be directed to the Office of the Executive Secretary for review or distribution. The rule does not give any direction about addenda or changes to a CSA. Currently, there are times when it is not clear to the Commission that all parties have received a copy of a change to a CSA. The Commission cannot consider a change to a CSA unless all parties are aware of it and have agreed to the change.

b. Description of proposed changes:

The proposed amendments to the second sentence of the rule update the rule by deleting the reference to the Executive Secretary's Office. This allows the Commission flexibility for its internal procedures. The Commission does not expect this rule change to have any fiscal impact.

The proposed amendment adding a third sentence to the Paragraph (c) requires that any changes or addenda to the CSA be served upon the opposing party contemporaneously with submission to the Commission.

c. Economic impact:

(1) Costs to the State through the Commission:

There are no expected costs to the State through the Commission. Parties must already submit any changes or addenda to a CSA to the Commission in order to get them approved.

(2) Costs to the State and local governments as an employer:

Any changes to a CSA are already submitted to the Commission because they must be approved by the Commission. The only additional requirement on state and local governments is that they copy the opposing party contemporaneously

when any changes or addenda are submitted to the Commission. Because submissions to the Commission are electronic, the opposing party must be copied via email. This is expected to take one additional minute or less.

It is assumed paralegals or legal assistants will submit any changes and addenda. Based on an hourly compensation rate of \$35.71,⁴ it costs approximately \$0.60 to copy the opposing party on one change or addenda. Copying by mail to employees without reliable e-mail may take slightly longer, five minutes or less, or \$3.00, plus postage. Currently, most parties already follow this practice. There is no data on how many cases involve addenda. There is also no data on how often parties currently fail to copy the other parties on an addendum, but it is infrequent in the Commission's experience. Therefore, the additional cost on State and local governments is expected to be *de minimis*.

(3) Costs to the private sector:

Any changes to a CSA are already submitted to the Commission. The only additional requirement on state and local governments is that they copy the opposing party when any changes or addenda are submitted to the Commission. Because submissions to the Commission are electronic, the opposing party must be copied via email. This is expected to take one additional minute or less. It is assumed paralegals or legal assistants will submit any changes and addenda. Based on an hourly compensation rate of \$34.50,⁵ it costs approximately \$0.58 to copy the opposing party on one change or addenda. Copying by mail to employees without reliable e-mail may take slightly longer, five minutes or less, or \$2.90, plus postage. Currently, most parties already follow this practice. There is no data on how many cases involve addenda. There is also no data on how often parties currently fail to copy the other parties on an addendum, but it is infrequent in the Commission's experience. Therefore, the additional cost on State and local governments is expected to be *de minimis*.

(4) Benefits to the State through the Commission:

Ensuring the opposing party is copied on all changes and addenda to the CSA will decrease the time Commission staff spends communicating with the parties.

⁴ 2017 wage estimates for paralegals and legal assistants in North Carolina reported by NC Department of Commerce, Occupational Employment and Wages in North Carolina (OES).

⁵ 2017 wage estimates for paralegals and legal assistants in North Carolina reported by NC Department of Commerce, Occupational Employment and Wages in North Carolina (OES). <https://d4.nccommerce.com/OESSelection.aspx>

Benefits as a percent of total compensation reported by Bureau of Labor Statistics. Employer Costs per Hour Worked for Employee Compensation and Costs as a Percentage of Total Compensation: Private industry workers. March 2018 (Release Date June 8, 2018). <https://www.bls.gov/news.release/ecec.t05.htm>

Adjusted for private sector wage growth estimate of 2.74% for North Carolina professional and business service sectors. Reported by IHS Connect. Regional Economics Database. North Carolina Annual Forecast Data. Accessed June 13, 2018.

Although it is hard to estimate the time spent communicating with the parties regarding changes and addenda, Special Deputy Commissioners in the Executive Secretary's section handle most of the CSAs.⁶ The average hourly wage of a Special Deputy Commissioner in the Executive Secretary's section, including benefits, is \$46.64,⁷ meaning a benefit of \$7.77 for every 10 minutes saved.

(5) Benefits to the State, local governments, and the private sector, including employees:

The parties may see an overall incremental improvement in CSA turnaround times due to better rule compliance and increased efficiency.

7. *11 NCAC 23A .0502(d)*

a. Description of baseline situation:

The current rule requires the employer, carrier, or administrator to submit a CSA to the employee's attorney of record or the employee, if unrepresented, once the Commission approves the CSA. It should be noted that it is common practice for an employee to sign the CSA first and then send it back to defendants for signature, so the employee cannot receive a fully executed copy until after all signatures are complete. The current rule unnecessarily requires the employer or carrier to send a copy of the CSA to the employee after the CSA is approved by the Commission. Generally, the employee is copied on the submission of the CSA to the Commission. The rule as currently written could lead an employer or carrier to think they do not need to copy the employee on the submission to the Commission or it could create the impression that a second copy must be sent after the CSA is approved.

b. Description of proposed changes:

The proposed amendment simply requires the employer, carrier, or administrator to furnish an executed copy of the CSA to the employee's attorney of record or the employee, if unrepresented. There is no reason for the employer or carrier to wait until after approval of the CSA to provide the employee with a copy of the executed CSA. In fact, if the agreement is not approved, the rule would not require the carrier to provide a copy to the employee who may need a copy in order to appeal the disapproval.

c. Economic impact:

⁶ In FY 2016-2017, the Executive Secretary's Office issued 9,821 orders on CSAs, 83% of the 11,848 issued by the Commission as a whole. 2016-2017 Industrial Commission Annual Report, <http://www.ic.nc.gov/2017AnnualReport.pdf>.

⁷ The average annual wage, including benefits, of a Special Deputy Commissioner in the Executive Secretary's section is \$95, 139.92.

(1) Costs to the State through the Commission:

There are no expected costs to the State through the Commission because the proposed amendment to the rule deals with a requirement upon the parties.

(2) Costs to the State and local governments as an employer and private sector employers or carriers:

Any additional cost on State and local governments and private employers or carriers from this rule change is expected to be *de minimis*.

(4) Benefits to the State through the Commission:

Ensuring all parties have a copy of the final, executed agreement as submitted to the Commission in subsection (c) will decrease the time Commission staff spends communicating with the parties. Special Deputy Commissioners in the Executive Secretary's section handle the majority of the CSAs.⁸ The average hourly wage of a Special Deputy Commissioner in the Executive Secretary's section, including benefits, is \$46.64,⁹ meaning a benefit of \$7.77 for every 10 minutes saved.

(5) Benefits to the State, local governments, and the private sector:

The parties may see an overall incremental improvement in CSA turnaround times due to better rule compliance and increased efficiency. Most employers or carriers already copy the employee or counsel with a copy of the executed CSA when it is submitted to the Commission. The rule as currently written would seem to require them to send another copy to the employee after approval of the CSA. There could be a small savings if the amended rule prevents duplication.

8. *11 NCAC 23A .0502(e)*

This rulemaking deals with the situation in which the employee is currently represented by counsel but was previously represented by another attorney who has requested that a fee be considered at the time of any award by the Commission.

a. Description of baseline situation:

The current rule provides that an attorney seeking fees in connection with a CSA shall submit a copy of the fee agreement with the client. If there is a pending fee request from a prior attorney in the file, the hearing officer reviewing the CSA will contact the current counsel of record and opposing counsel of record and ask

⁸ In FY 2016-2017, the Executive Secretary's Office issued 9,821 orders on CSAs, 83% of the 11,848 issued by the Commission as a whole. 2016-2017 Industrial Commission Annual Report, <http://www.ic.nc.gov/2017AnnualReport.pdf>.

⁹ The average annual wage, including benefits, of a Special Deputy Commissioner in the Executive Secretary's section is \$95,139.92.

them whether there is an agreement as to the fee split and, if not, to communicate with each other to determine whether an agreement as to the fee split can be reached between the attorneys. If no agreement can be reached, the hearing officer will approve the CSA and the current counsel of record will be advised to hold the fee in trust pending a determination of the fee split.

b. Description of proposed changes:

The change to Rule 11 NCAC 23A .0502 (e) requires that plaintiff's counsel inform the Commission of a prior attorney's fee request if one is known to exist at the time of submission of the clincher and shall advise if an agreement regarding a division of fees has been reached. This rule codifies the best practice of plaintiffs' attorneys when it comes to requesting consideration of a fee where a prior attorney's fee claim exists.

c. Economic Impact:

(5) Costs to the State through the Commission:

The Commission does not anticipate any significant costs related to the proposed rule change. There may be an initial increase in calls or emails from attorneys to confirm the rule change.

(6) Costs to the State as an employer:

The state should have no additional costs as an employer. This rule does not affect employers or their attorneys.

(7) Costs to private sector filers, including private employers, insurance carriers, and employees:

This rule will only effect current plaintiff's attorneys. It is anticipated that providing the information sought would take approximately 1-3 minutes per case to add this information to an existing fee request.

(8) Benefits to the State through the Commission:

The proposed rule changes may improve the efficiency of reviewing CSAs submitted to the Commission. Although the rule only requires attorneys to provide information if known and only requires them to advise the Commission on an agreement regarding the division of fees if one has been reached, it may prompt current attorneys to contact prior attorneys and negotiate an agreement prior to submitting a fee request. Since the rule only applies to situations in which the pending fee request is known, the hearing officer reviewing the CSA will still have to review the file to ascertain whether an attorney fee request is pending, or if more than one is pending.

The hearing officer will still need to send a memo to the attorney and former attorney(s) in cases where the former attorney's request wasn't noted by the current attorney or, if it was noted, no agreement on a fee split was reached. It might save the Commission 15-30 minutes of time where the parties have noted all fee petitions and have come to an agreement on those fees.

(5) The benefits to the public and private sector:

The proposed rule change won't significantly benefit the public or private sector, except that the parties may see an improvement in CSA turnaround times.

Summary of impact:

Benefits and costs related to the changes to 11 NCAC 23A .0502 are not quantified in this analysis due to lack of data.

It is anticipated that the rule will go into effect on January 1, 2019, and that the same level of cost and benefit will recur each year.

APPENDIX 1

Proposed Rule Text

Rule 11 NCAC 23A .0502 is proposed for amendment as follows:

11 NCAC 23A .0502 COMPROMISE SETTLEMENT AGREEMENTS

(a) The Commission shall not approve a compromise settlement agreement unless it contains the following information:

- (1) The employee knowingly and intentionally waives the right to further benefits under the Workers' Compensation Act for the injury that is the subject of this agreement.
- (2) ~~The employer, carrier, or administrator will pay all costs incurred. The parties' agreement, if any, as to the payment of the costs due to the Commission pursuant to 11 NCAC 23E .0203, and any mediation costs pursuant to 11 NCAC 23G .0107. If there is no agreement as to the payment of some or all of these costs, the compromise settlement agreement shall include the credits, including the amounts, to be applied by the employer or carrier against the settlement proceeds.~~
- (3) No rights other than those arising under the provisions of the Workers' Compensation Act are compromised or released by this agreement.
- (4) ~~The Whether the employee has, or has not, returned to work. a job or position at the same or a greater average weekly wage as was being earned prior to the injury or occupational disease.~~
- (5) If the employee has returned to work, whether the employee is earning the same or greater average weekly wage.
- ~~(5)(6) Where~~ If the employee has not returned to work a job or position at the same or a greater wage at a lower average weekly wage, as was being earned prior to the injury or occupational disease, the employee has, or has not, returned to some other job or position and, if so, the a description of the particular job or position, the name of the employer, and the average weekly wage earned. This Subparagraph does not apply where the employee or counsel certifies that partial wage loss due to an injury or occupational disease is not being claimed. if the employee is represented by counsel or if the employee certifies that partial wage loss due to an injury or occupational disease is not being claimed.
- ~~(6)(7) Where~~ If the employee has not returned to work, a job or position at the same or a greater average weekly wage as was being earned prior to the injury or occupational disease, a summary of the employee's age, educational level, past vocational training, past work experience, and any emotional, mental, or physical impairment that predates the current injury or occupational disease. This Subparagraph does not apply upon a showing of: if:
 - (A) it places an unreasonable burden upon the parties;
 - (B) the employee is represented by counsel; or

(C) ~~even if the employee is not represented by counsel, where~~ the employee or counsel certifies that total wage loss due to an injury or occupational disease is not being claimed.

(b) No compromise settlement agreement shall be considered by the Commission unless the following requirements are met:

- (1) The relevant medical, vocational, and rehabilitation reports known to exist, including those pertinent to the employee's future earning capacity, are submitted with the agreement to the Commission by the employer, carrier, administrator, or the attorney for the employer.
- (2) The parties and all attorneys of record, employee, the employee's attorney of record, if any, and an attorney of record or other representative who has been given the authority to sign for the employer, carrier and administrator, have signed the agreement.
- (3) In a claim where liability is admitted or otherwise has been established, the employer, carrier, or administrator has undertaken to pay all medical expenses for the compensable injury to the date of the settlement agreement.
- (4) In a claim in which the employer, carrier, or administrator has not agreed to pay all medical expenses of the employee related to the injury up to the date of the settlement agreement, the settlement agreement contains a list of all known medical expenses of the employee related to the injury to the date of the settlement agreement, including medical expenses that the employer, carrier, or administrator disputes, when the employer or insurer has not agreed to pay all medical expenses of the employee related to the injury up to the date of the settlement agreement. This list shall include:
 - (A) All known medical expenses that have been paid by the employer, carrier, or administrator;
 - (B) All known medical expenses that the employer, carrier, or administrator disputes;
 - (C) All known medical expenses that have been paid by the employee;
 - (D) All known medical expenses that have been paid by a health benefit plan;
 - (E) All known unpaid medical expenses that will be paid by the employer, carrier, or administrator;
 - (F) All known unpaid medical expenses that will be paid by the employee.
- ~~(5) The settlement agreement contains a list of the unpaid medical expenses, if known, that will be paid by the employer, carrier, or administrator, if there are unpaid medical expenses that the employer or carrier has agreed to pay. The settlement agreement also contains a list of unpaid medical expenses, if known, that will be paid by the employee, if there are unpaid medical expenses that the employee has agreed to pay.~~
- ~~(6)~~(5) The settlement agreement provides that a party who has agreed to pay a disputed unpaid medical expense will notify ~~in writing~~ the unpaid health care provider in writing of the party's responsibility to pay the unpaid medical expense. Other unpaid health care providers will be notified in writing of the completion of the settlement by the party specified in the settlement agreement:

- (A) when the employee or the employee's attorney has notified the unpaid health care provider in writing under G.S. 97-90(e) not to pursue a private claim against the employee for the costs of medical treatment, or
- (B) when the unpaid health care provider has notified ~~in writing~~ the employee or the employee's attorney in writing of its claim for payment for the costs of medical treatment and has requested notice of a settlement.
- ~~(7)(6)~~ Any obligation of any party to pay an unpaid disputed medical expense pursuant to a settlement agreement does not require payment of any medical expense in excess of the maximum allowed under G.S. 97-26.
- ~~(8)(7)~~ The settlement agreement contains a finding that the positions of the parties to the agreement are reasonable as to the payment of medical expenses.
- (c) When a settlement has been reached, the written agreement shall be submitted to the Commission upon execution in accordance with Rule .0108 of this Subchapter. All compromise settlement agreements shall be ~~directed to the Office of the Executive Secretary for review or distribution~~ distributed for review in accordance with Paragraphs (a) through (c) of Rule .0609 of this Subchapter. Any changes or addenda to the agreement submitted to the Commission shall be served upon the opposing party contemporaneously with submission to the Commission.
- (d) ~~Once a compromise settlement agreement has been approved by the Commission, the~~ The employer, carrier, or administrator shall furnish an executed copy of the agreement to the employee's attorney of record or the employee, if unrepresented.
- (e) An employee's attorney ~~seeking~~ that seeks fees in connection with a ~~Compromise Settlement Agreement~~ compromise settlement agreement shall submit ~~to the Commission~~ a copy of the attorney's fee agreement between the employee and the employee's previous attorney, then with the client. at the time of submission of a compromise settlement agreement, the employee's current attorney shall advise the Commission of the employee's fee agreement with the previous attorney and note whether an agreement has been reached between counsel as to the division of attorney's fees.

History Note: Authority G.S. 97-17; 97-80(a); 97-82;
Eff. January 1, 1990;
Amended Eff. February 1, 2016; November 1, 2014; August 1, 2006; June 1, 2000; March 15, 1995;
Recodified from 04 NCAC 10A .0502 Eff. June 1, 2018.

**Regulatory Impact Analysis
Codification of and/or changes to filing requirements**

Agency: North Carolina Industrial Commission
Contact: Ashley Snyder – (919) 807-2524
Proposed New Rule Title:
Rules proposed for amendment: Rule 11 NCAC 23A .0609
Rule 11 NCAC 23A .0620
(See proposed rule text in Appendix 1)

State Impact: Yes
Local Impact: Yes
Private Impact: Yes
Substantial Economic Impact: No

Statutory Authority: G.S. §§ 97-79(g), 97-80(a).

Introduction/Background:

Rule 11 NCAC 23A .0609 governs general motions practice before the Industrial Commission. The proposed rule amendments for Rule 11 NCAC 23A .0609 are intended to update the rule, provide clarifications, and add certain requirements to improve the efficiency of the motions process. In addition, the adoption of a new rule, Rule 11 NCAC 23A .0620, allows the movement of part of Paragraph (i) out of Rule 11 NCAC 23A .0609, along with a clarification applying the provision to non-motion correspondence.

Proposed Rule Changes and Their Estimated Impact:

The proposed rule additions and changes include the following:

1. *Amendment of Motions Practice rule – Rule 11 NCAC 23A .0609*
 - a. The proposed amendment to 11 NCAC 23A .0609(c)(4) provides clarification to external filers that motions submitted after the filing of a Full Commission Opinion and Award shall be addressed to the authoring Commissioner until notice of appeal is filed or the time for taking appeal expires. The added language ties Subparagraph (c)(4) with Subparagraph (b)(3) which indicates that motions shall be filed with the Executive Secretary’s Office after the time for taking appeal from an Opinion and Award has run. The rule amendment does not impact the Commission’s internal processes. The rule amendment is intended to benefit external users who might only read Subparagraph (c)(4) when filing a motion with the Full Commission. If the external user desires a ruling from the Full Commission panel that recently heard the case, the user will know the window of

opportunity to file the motion with the Full Commission. This benefit is not a one that can be monetized.

- b. The proposed new Subparagraph (d) in 11 NCAC 23A .0609 indicates to external users that motions for an award of attorney fees from an employee's ongoing disability compensation shall be directed to the Commission's Claims Administration Section. This new provision creates an exception to Paragraph (b). This type of motion has been internally routed to the Claims Administration Section for many years, instead of being handled by the Executive Secretary's Office. The rule amendment updates the rule to reflect this long-standing practice. Therefore, there is no anticipated impact on the Commission. There is also no or minimal expected cost or benefit to external filers in that the rule amendment only changes to whom such motions are to be addressed. There may be a small adjustment period for those not already addressing such motions to the Claims Administration Section, but the motions will be routed to the proper place within the Commission regardless of the addressee.
- c. The proposed amendment to Subparagraph (e) (formerly Paragraph (d)) in 11 NCAC 23A .0609 clarifies that the requirements of the provision apply to motions requesting extensions of time and motions to withdraw motions. This was the intent of the provision as it reads without the proposed amendment. However, many external filers continue to try to obtain extensions of time or to notify the Commission of the withdrawal of a motion by email correspondence. These requests are currently rejected and the parties are required to file the motions in compliance with the rule. The rule amendment is intended to improve compliance with the rule and does not create a new cost or benefit.
- d. The proposed amendment to Paragraphs (f) and (g) (formerly Paragraphs (e) and (f)) of 11 NCAC 23A .0609 is intended to encourage parties to communicate and resolve disputes prior to the filing of a motion.
 - i. Description of baseline situation:

Currently, the rule only requires that the moving party include a statement of the opposing party's position on the motion, if known. The Commission receives thousands of motions of different kinds each year. The Commission receives approximately 13,500 motions per year via electronic filing.¹ Approximately 2,000 of these motions are discovery motions. A requirement similar to the proposed requirement is already in place for motions to compel discovery under Rule 11 NCACC 23A .0605(9). Therefore, the rule changes will apply to an estimated 11,500 motions per year. Many of these motions already contain an indication of the opposing party's position or that an attempt was made to contact the opposing party about the issue before filing the motion. However, an estimated 30% of motions, or 3,450 motions, do not include this information and would not comply with the rule as amended.
 - ii. Description of proposed changes:

The proposed amendments remove the phrase "if known" and requires a party filing a motion to provide the opposing party's position or to indicate

¹ This figure does not include medical motions which are addressed in Rule 11 NCAC 23A .0609A.

in the motion that a reasonable attempt was made to ascertain the position of the opposing party to the motion. If the moving party does not do so, the motion may be denied on that basis alone, though it could be re-filed with proper documentation.

The costs and benefits of the proposed rule change are described and estimated below.

iii. Economic impact:

As stated above, this rule change will affect an estimated 30% of motions filed, or 3,450 motions. It is likely that in some percentage of these cases the moving parties know the opposing party's position or have contacted them about the issue, but have not included the information in the motion. It is not possible to estimate this proportion with any accuracy. It will be assumed for purposes of this analysis that in half of the 3,450 motions, the information is known or the contact has been attempted, but the information is not included in the motion.

o Costs to the State through the Commission:

- It is likely that the Commission will experience a slight increase in the number of motions filed initially because there will be motion filers who do not comply with the rule for a brief period of time after the rule goes into effect. Their initial motions may be denied depending on the circumstances of the case for failure to comply and they will have to file a new motion.² Some portion of the denied motions will not be re-filed because circumstances will change in the case, such as the dispute being resolved between the parties. The only potential temporary cost to the Commission from an increase is the opportunity cost of current employees who handle the increased motions.
- Processing a motion requires an estimated average of 15 minutes of processing assistant time, starting with intake and finishing with filing an order. The processing assistants who work with motions at the Commission earn between \$30,000 and \$36,000 per year, with an average of \$33,000, or \$51,155 in total compensation.³
- The time required to review and rule on a motion can range from 5 minutes to over an hour, depending on the

² Some noncompliant motions may not be denied on this basis if, for example, the motion involves an emergency situation or the opposing party responds to the motion with their position.

³ Total compensation calculated with salary as 65.8% and benefits as 34.2%.

Benefits as a percent of total compensation reported by NC OSHR. 2016 Compensation and Benefits Report. https://files.nc.gov/ncoshr/documents/files/2016%20Comp%20and%20Benefits%20Report_FINAL.pdf

Total compensation adjusted for recent 2% legislative increase.

complexity of the motion. However, a majority of motions require 30 minutes or less. Therefore, an estimated average of 20 minutes is required for the review of a motion and any response, as well as the drafting of an order. The employees who review and rule on motions at the Commission have salaries ranging from \$62,000 to \$128,000, with an average of \$95,000, or about \$147,264 in total compensation.⁴

- Assuming 2,080 work hours a year, the average opportunity cost of a re-filed motion would be \$6.15 in processing time and \$23.60 in attorney review time, for a total of \$29.75 per motion.
 - The number of motions that may have to be re-filed due to non-compliance with the rule is difficult to determine with any accuracy. Based on the Commission's experience, the rate of non-compliance in the first few months after the rule changes is expected to be relatively low. As demonstrated above, the cost to the Commission to process each motion is also low. Therefore, the Commission expects this change to create only a minor impact.
- Costs to the State as an employer
 - While it is unlikely that the State as an employer will have to expend additional funds to be able to comply with the proposed rule change, state employees such as attorneys and paralegals representing the State will have to spend additional time and effort to make a reasonable attempt to contact the opposing party regarding its position on the motion before filing a certain number of motions. Similarly, local government units who represent themselves before the Commission may experience a similar loss in opportunity cost. Local government may also be required to expend additional funds if represented by private law firms who charge them for additional time spent complying with the rule as amended. Local government is included in the public-sector cost analysis in this section.
 - Approximately half of the 3,450 motions likely to be affected by this rule amendment will be filed by employers or carriers. Assuming that the type of filing employer (public or private) follows the same breakdown as the type of employment in NC, about 11% of these motions could be attributed to state and local government filings and 89% to private sector.⁵ Eleven percent of 1,725 motions is 190 motions.

⁴ Id.

⁵ Governing website. Governing Data. States with Most Government Employees: Per Capita Rates by Job Type. <http://www.governing.com/gov-data/public-workforce-salaries/states-most-government-workers-public-employees-by-job-type.html>

- As stated above, it is likely that in half of the estimated 190 motions, the filing State or local government entity knows the opposing party's position or has made a reasonable attempt to ascertain it, but merely did not include the information in the motion. In such cases, the only cost imposed by the proposed rule change is the time and effort to type the information into the motion. If it is assumed that typing the required information in a motion could take 2-3 minutes and the average state legal or administrative assistant who would be drafting the motion is paid on average \$35.71 in total hourly compensation,⁶ the total cost of added time to state and local governments as filers would be \$1.50 per motion⁷, or \$120.00.
- For the other 80 motions in which the filer does not know the opposing party's position, the cost will be the time to make reasonable contact with the opposing party to ascertain its position, plus \$120.00 to include the information in the motions.
- Because each case will be different, it is difficult to estimate the amount of time it would take to make a reasonable attempt to contact the opposing party about a motion. What is reasonable may differ between cases. An attorney may choose to spend an hour drafting a letter to the opposing party or may have a paralegal make a quick telephone call or send a two-sentence e-mail. For purposes of this analysis, it is assumed that an average of 10 minutes will be spent making a reasonable attempt to ascertain the opposing party's position. This work may be done by legal assistants earning \$35.71 in total hourly compensation or attorneys earning \$84.50 in total hourly compensation.⁸ Therefore, the average cost to make the required attempt to contact the opposing party would cost between \$6.00 and \$14.10 per

⁶ 2017 average wage estimates for paralegals and legal assistants in North Carolina reported by NC Department of Commerce, Occupational Employment and Wages in North Carolina (OES).

<https://d4.nccommerce.com/OESSelection.aspx>

Benefits as a percent of total compensation reported by NC OSHR. 2016 Compensation and Benefits Report.

https://files.nc.gov/ncoshr/documents/files/2016%20Comp%20and%20Benefits%20Report_FINAL.pdf

Total compensation adjusted for recent 2% legislative increase.

⁷ This amount may be an actual cost in funds and may be higher for local government entities if they hire private legal counsel for workers' compensation claims as the local government entity will likely pay at a contracted rate per hour for attorney and paralegal time. Because there is no reliable way of determining how many motions are filed on behalf of local government, a separate analysis will not be conducted here.

⁸ 2017 median wage estimates for attorneys in North Carolina reported by NC Department of Commerce, Occupational Employment and Wages in North Carolina (OES). <https://d4.nccommerce.com/OESSelection.aspx>

Benefits as a percent of total compensation reported by NC OSHR. 2016 Compensation and Benefits Report.

https://files.nc.gov/ncoshr/documents/files/2016%20Comp%20and%20Benefits%20Report_FINAL.pdf

Total compensation adjusted for recent 2% legislative increase.

- motion. For 80 motions, this would amount to between \$480 and \$1,128, or an average of \$804.
- Based on the above, the total cost to state and local government of the proposed change to Paragraphs (f) and (g) (formerly Paragraphs (e) and (f)) of 11 NCAC 23A .0609 is approximately \$1,044 a year.
 - Costs to private sector filers (including private employers/carriers and employees):
 - Because private employers and carriers will hire private legal counsel to represent them, any additional time required to comply with the proposed rule changes will result in additional costs for them in the form of legal fees.
 - Employees who hire legal counsel generally pay a legal fee on a contingency basis. Therefore, the proposed changes will have no or minimal impact on the legal fees paid by employees. However, there is a potential opportunity cost for the law firms representing employees to comply with the rule.
 - Employees without legal counsel may have to expend additional time and effort in certain cases to comply with the proposed rule, but there are too many uncontrolled variables to estimate this potential cost with any accuracy.
 - As stated above, approximately half of the 3,450 motions likely to be affected by this rule amendment will be filed by employers or carriers. Assuming that the type of employer/carrier filer (public or private) follows the same breakdown as the type of employment in NC, about 11% of these motions could be attributed to state and local government filings and 89% to private sector.⁹ Eighty-nine percent of 1,725 motions is 1,535 motions.
 - As stated above, it is likely that in half of the estimated 1,535 motions, the filing private sector employer or carrier knows the opposing party's position or has made a reasonable attempt to ascertain it, but merely did not include the information in the motion. In such cases, the only cost imposed by the proposed rule change is the time and effort to type the information into the motion. If it is assumed that typing the required information in a motion could take an average of 2-3 minutes to draft and review and a law firm charges between \$90 (paralegal estimate) and \$150 (attorney estimate), or an average of \$120, per hour,¹⁰ the total annual cost of added time to private-sector motion filers would be \$5 per motion, or \$3,840.

⁹ See note 5.

¹⁰ These hourly rates are estimates based on an informal survey of law firms. They reflect hourly costs billed to clients, not employee compensation costs.

- For the other 768 motions in which the filer does not know the opposing party's position, the cost will be the time to make reasonable contact with the opposing party to ascertain its position, plus \$3,840 to include the information in the motions.
 - Because each case will be different, it is difficult to estimate the amount of time it would take to make a reasonable attempt to contact the opposing party about a motion. What is reasonable may differ between cases. An attorney may spend an hour drafting a letter to the opposing party or may have a paralegal make a quick telephone call or send a two-sentence e-mail. For purposes of this analysis, it is assumed that an average of 10 minutes will be spent making a reasonable attempt to ascertain the opposing party's position. Using the estimated legal fee rates above, the average cost to make the required attempt to contact the opposing party would cost an estimated \$20 per motion. For 768 motions, this would amount to \$15,360.
 - Based on the above, the total cost to the private sector from the proposed change to Paragraphs (f) and (g) (formerly Paragraphs (e) and (f)) of 11 NCAC 23A .0609 is \$23,040 a year.
 - Benefits to the State through the Commission:
 - The proposed rule change is expected to benefit the Commission by reducing the number of unnecessary motions and by providing additional information in motions that will assist the deciding officer in ruling on the motion.
 - As estimated above, in about 15% of motions filed with the Commission, or 1,725 motions, the moving party knows the opposing party's position or has made a reasonable attempt to ascertain it, but has not included the information in the motion. In these cases, the benefit to the Commission will be additional information to consider in ruling on the motion. This additional information may result in a decision that is more appropriate for the circumstances of the case and may result in fewer appeals or other motions. It is not feasible to estimate a fiscal impact for this benefit.
 - Further, in another estimated 1,725 motions filed, the moving party has not made contact with the opposing party and does not know its position on the motion. In these cases, the benefit to the Commission may be fewer motions filed if contact between the parties resolves the issue in the motion or, alternatively, additional information in the motion to consider when ruling.
 - For any motion not filed due to the amended rule, the Commission would save an estimated opportunity cost in

- staff time of \$29.75 per motion. It is unknown how many motions might be resolved due to the rule change.
- Benefits to the State as an employer
 - The proposed rule change is expected to benefit the State and local government as employers by reducing the number of unnecessary motions and by providing additional information in motions that will assist the deciding officer in ruling on the motion.
 - As discussed above, the additional information may result in a decision that is more appropriate for the circumstances of the case and may result in fewer appeals or other motions. It is difficult to estimate the fiscal impact of this benefit, but it will apply to approximately 380 motions per year for public-sector employers, using the 11% figure to estimate the proportion of 3,450 motions attributable to cases involving public-sector employers.¹¹
 - In terms of savings related to unnecessary motions avoided by the rule amendments, it is estimated that 11% of 173 motions, or 19 motions, might not be filed in cases with public-sector employers in 2019. These may be motions not filed by the employer or motions not filed by the employee to which the employer does not need to respond.
 - The amount of time required to draft and file a motion or a response to a motion varies widely on a case-by-case basis. It is estimated that an average of 1.25 hours of attorney and paralegal time is required to file a motion or a response. For 19 motions, this would amount to 23.75 hours. This work is likely a combination of attorney and paralegal time, with State employee legal assistants earning \$35.71 in total hourly compensation and State attorneys earning \$84.50 in total hourly compensation, for an average of \$60.11 per hour.
 - The total estimated savings in opportunity cost to the State based on filing or responding to fewer motions is \$1,428 in 2019.
 - Benefits to private sector (including private employers/carriers and employees)
 - The proposed rule change is expected to benefit private sector parties by reducing the number of unnecessary motions and by providing additional information in motions that will assist the deciding officer in ruling on the motion.
 - It is not possible to separate out the motions involving the different private sector groups potentially affected by the rule, but the potential savings effect for each is described as follows:

¹¹ See note 5.

- Because private employers and carriers will hire private legal counsel to represent them, any decrease in motions due to the proposed rule changes will result in savings for them in the form of lower legal fees.
 - Employees who hire legal counsel generally pay a legal fee on a contingency basis. Therefore, the proposed changes will have no or minimal impact on the legal fees paid by employees. However, there is a potential opportunity cost savings for the law firms representing employees if the rule changes result in fewer motions filed.
 - Employees without legal counsel may experience a savings in actual and opportunity cost if the rule changes result in fewer motions needing to be filed, but there are too many uncontrolled variables to estimate this potential savings with any accuracy.
- As discussed above, the additional information may result in a decision that is more appropriate for the circumstances of the case and may result in fewer appeals or other motions. It is difficult to estimate the fiscal impact of this benefit, but it will apply to approximately 3,071 motions per year for private sector litigants, using the 89% figure to estimate the proportion of motions attributable to cases involving private sector parties.¹²
 - In terms of savings related to unnecessary motions avoided by the rule amendments, it is estimated that 89% of 173 motions, or 154 motions, might not be filed in cases with private sector parties in 2019. The savings may come from not having to file a motion or not having to respond to a motion.
 - The amount of time required to draft and file a motion or a response to a motion varies widely on a case-by-case basis. It is estimated that an average of 1.25 hours of attorney and paralegal time is required to file a motion or a response. For 154 motions, this would amount to 192.5 hours. This work is likely a combination of attorney and paralegal time. Using an average cost of \$120 per hour for combined private-sector attorney and paralegal time, the total estimated savings in actual or opportunity cost to the private

¹² See note 5.

sector based on filing or responding to fewer motions is \$23,100 in 2019.

- e. The proposed amendment to Paragraph (g) (formerly Paragraph (f)) regarding the requirement to follow an oral motion with a written motion moves the provision to a new Paragraph (h) and adds a condition that a written motion is only required if requested by a hearing officer. Oral motions are not tracked by the Commission. They occur in informal telephone hearings or in-person hearings on an infrequent basis. It is anticipated that the rule change would result in a minimal savings because it may slightly reduce the number of cases in which a written motion must be filed following an oral motion.
- f. The proposed amendment to Paragraph (i) (former Paragraph (g)) is intended to allow the parties to agree on and file a stipulation for an extension of time to respond to a motion other than a medical motion instead of filing a motion which requires an order of the Commission to grant or deny the extension.
 - i. Baseline description: There are at least 1,560 motions for extension of time to respond to a motion filed per year. Approximately 1,279 of them would be potentially affected by this rule change, as the remaining 281 are estimated to apply to medical motions. Motions for extension of time to respond to a motion are estimated to take 20-25 minutes to draft and file. Responses to motions for extension of time to respond to a motion are infrequent. In many cases, the motions indicate that the opposing party has consented to the extension of time. Reviewing such motions and issuing orders on the motions takes an average of 10-15 minutes of processing assistant time and 5-10 minutes of staff attorney time at the Commission.
 - ii. Description of proposed changes: Allowing parties in agreement to file a stipulation for an extension of time for up to 30 days will affect a significant portion of the 1,279 motions for extension of time. As stated above, in many cases, the opposing party has already consented to the extension. There are likely many other cases in which the opposing party would agree, if asked. However, there will be some cases in which the rule change will not apply because the opposing party would not agree to an extension of time or the moving party will be seeking more than 30 days' extension.
 - iii. Economic impact:
 - o It is estimated that a large percentage of 1,279 motions will be affected by the rule change, assuming that as many parties take advantage of the rule as possible. Based on the Commission's experience, a range of 65 to 85 percent, or 831 to 1,087 motions, is reasonable to use for this analysis.
 - o Cost to the State through the Commission: No costs are anticipated because the rule change is expected to reduce the amount of work for the Commission where a stipulation is filed. In cases where the parties do not agree or a longer extension is requested, the cost will remain at the baseline level.

- Costs to State and local government:
 - Approximately half of the motions for extension of time to respond to a motion are filed by employers and carriers. The public sector portion of 416-544 motions is 11%, or 46-60 motions.¹³ The difference in time and effort to file a motion versus a stipulation is negligible, with a stipulation likely taking slightly less time, and represents no additional cost. In approximately half of these motions, as stated above, the moving party has already obtained consent for an extension. Therefore, there would be no additional cost related to 23-30 of the motions. For the other half, contacting the other side to obtain agreement to an extension may take an estimated 10 minutes on average.
 - At an average cost of State paralegal and attorney time of \$60.11 per hour, 10 minutes per motion for 23-30 motions equates to \$230-300 in opportunity cost.
- Cost to private sector filers (including private employers/carriers and employees):
 - The private sector share of the 831 to 1,087 motions potentially affected is the 416-544 motions attributable to employees and 89% of the 416-544 motions attributable to employers and carriers¹⁴, totaling 786-1,028 motions. Similar to the public-sector analysis above, the only anticipated cost of availing oneself of the amended rule is the cost of contacting the opposing party regarding an extension in cases where a contact would not have been made under the old rule. It is anticipated that such contacts will be required in half of the cases.
 - Using an average cost of \$120 per hour for combined private-sector attorney and paralegal time and assuming an estimated 10 minutes is required on average to contact the opposing party, the estimated cost to the private sector is \$20 per motion, for an estimated range of \$15,720-20,560 total.
 - Based on the division above, the cost for employers and carriers who pay legal fees based on hourly rates will amount to \$7,400-9,680. The savings in opportunity cost for legal counsel to employees will be \$8,320-10,880.
 - The Commission receives very few motions for extension of time from unrepresented employees and does not track them. The fiscal impact of the rule change for unrepresented employees, who may not be aware of or utilize the amended rule is estimated to be *de minimis*.
- Benefit to the State through the Commission:

¹³ See note 5.

¹⁴ See note 5.

from this change. The movement of the first and second sentence and the creation of a new Rule 11 NCAC 23A .0620 will be analyzed in 2. below.

- i. The proposed amendment to Paragraph (k) (former Paragraph (j)) provides clarifying details regarding the content of the proposed order the rule requires to be submitted with all motions and responses. The intended benefit of the Rule is that less Commission time will be spent editing basic information on proposed orders and sending completed orders to the parties, which will allow the Commission to issue Orders to the parties more quickly.
 - i. Baseline description:

The Commission receives about 16,000 motions a year, including medical motions. Responses are received in approximately two-thirds of cases with motions. Therefore, the Commission receives about 26,667 proposed orders per year subject to this rule. Currently, the rule requires that proposed orders be submitted with all motions and responses filed with the Commission. However, the rule does not prescribe the content of the required proposed order. The majority of proposed orders are submitted by attorneys who are familiar with the customary contents of proposed orders expected at the Commission and in other judicial forums. Most proposed orders received by the Commission already contain the information that will be required by the new rule. However, about 20% of the proposed orders, or 5,333 orders, do not. In particular, there are orders that do not describe the subject of the proposed order, the procedural posture, and/or complete party appearances or contact information, which would be required under the amended rule.
 - ii. Description of the proposed changes:

Under the proposed changes, parties will be required to submit proposed orders that contain all of the information listed in the rule. If the proposed order does not comply with the rule, the Commission may contact the party and require a revised proposed order or may reject the motion or response and require that it be re-filed. The proposed rule change will require that a small additional effort be made in drafting the proposed order in those cases where the order does not comply with the rule.
 - iii. Economic Impact
 - Cost to the State through the Commission: The Commission does not anticipate a cost of any significance to result from this rule change.
 - Cost to State and local government as employers:
 - About half of the proposed orders submitted are filed by employers or carriers. The public-sector portion of 2,667 orders is 11%, or 293 orders.¹⁶
 - It is estimated that the proposed rule change will require an average of 2 additional minutes to be spent on preparing proposed orders in those cases where incomplete orders are being currently being submitted. It is most likely that this information would be entered by a paralegal. Therefore,

¹⁶ See note 5.

- using the estimated opportunity cost of \$35.71 per hour for a State employee paralegal time mentioned above, it is estimated that the rule change will cost approximately \$1.20 per motion. For 293 motions, this will amount to \$351.60.
- Cost to private sector filers (including private employers/carriers and employees):
 - About half of the proposed orders submitted are filed by employers or carriers. The private sector portion of 2,667 orders is 89%¹⁷, or 2374 orders. In addition, the other half of the proposed orders, those filed by employees, also fall under private sector. Therefore, the total number of proposed orders prepared by private sector filers is 5,040.
 - It is estimated that the proposed rule change will require an average of 2 additional minutes to be spent on preparing proposed orders in those cases where incomplete orders are being currently being submitted. It is most likely that this information would be entered by a paralegal. Therefore, using the estimated cost of \$90 per hour for paralegal time mentioned above, it is estimated that the rule change will cost approximately \$3.00 per motion. For 5,040 motions, this will amount to \$15,120.
 - Benefit to the State through the Commission:
 - It is estimated that the proposed rule change will save the Commission an average of 2 additional minutes spent on revising proposed orders in those cases where incomplete orders are being currently being submitted. Depending on the nature of the missing information, it could be entered by a processing assistant or an attorney. Therefore, using the estimated average cost of \$47.70 per hour for Commission assistant (\$24.59) and attorney (\$70.80) time mentioned above, it is estimated that the rule change will save approximately \$1.60 per motion. For 5,333 motions, this will amount to \$8,533.
 - Benefit to external filers:
 - The benefit of the rule for external stakeholders is that they will receive Commission orders more quickly because the Commission will not have to spend as much time revising proposed orders and looking for correct contact information to send the orders to the parties. External stakeholders will not experience a distinct financial benefit from the rule change that can be quantified.

¹⁷ See note 5.

2. *Adoption of Written Correspondence rule – Rule 11 NCAC 23A .0620*

- a. As discussed in 1.h. above, it is proposed that the first sentence and part of the second sentence of former Paragraph (i) of Rule 11 NCAC 23A .0609 be moved to a new Rule 11 NCAC 23A .0620. The new rule contains a new sentence indicating that the rule applies only to written communications that are not covered by any other rule. The second sentence is one moved from Rule 11 NCAC 23A .0609. This provision requires that written communications sent to the Commission be copied to the opposing party or counsel contemporaneously and by the same method of transmission where possible. The conditional phrase “where possible” was added because if a written communication is uploaded via the Commission’s electronic filing portal, it cannot be transmitted to the opposing party in the same manner. Therefore, some flexibility has been added to the rule. The third sentence was also moved from Rule 11 NCAC 23A .0609. This sentence disallows the use of written communications covered by the rule from being used to introduce new evidence or to make additional arguments. It is not expected that the new Rule 11 NCAC 23A .0620 will impose a fiscal impact of any significance on the Commission or its external stakeholders.

Summary of aggregate impact:

The monetized costs and benefits cited above, in the aggregate, range from \$95,854.00-103,009.00 each year. Costs and benefits will continue indefinitely. Most of the costs related to the proposed rule changes come from relatively small actual and opportunity costs to external stakeholders for additional time required to comply with the amended rule. The bulk of the estimated savings related to the proposed rules comes from time saved by the Commission which will allow it to provide better customer service to external stakeholders.

Benefits related to the rule changes that are not quantified in this analysis due to lack of data or uncertainty include: improved customer service due to time savings for the Commission, more informed decisions by the Commission based on additional information included in motions, more certainty in scheduling for external stakeholders based on extension of time stipulations, and faster receipt of Orders.

It is anticipated that the rule will go into effect on January 1, 2019, and that the same level of cost and benefit will recur each year. A summary of the fiscal impacts is presented in the table below.

Table 1. Summary of Impacts

	Annual Impact
COSTS	
<i>State</i>	
Added Drafting and Filing Time Costs	591.00
Added Communication Costs	1,034.00-1,104.00
<i>Private</i>	
Added Drafting and Filing Time Costs	22,800.00
Added Communication Costs	31,080.00-35,920.00
Total Costs	55,505.00-60,415.00
BENEFITS	
<i>State</i>	
Time Saved – Filing or responding to fewer motions	1,428.00
Time Saved – Processing and ruling on fewer motions for extension of time (Commission)	7,288.00-9,533.00
Time Saved – Editing Proposed Orders (Commission)	8,533.00
<i>Private</i>	
Time Saved - Filing or responding to fewer motions	23,100.00
<i>Unquantified Benefits</i>	
More informed decisions	Unquantified
Faster turnaround time	Unquantified
Total Benefits	40,349.00-42,594.00
TOTAL IMPACT	95,854.00-103,009.00
NET COSTS	(15,156.00-17,821.00)

APPENDIX 1

Proposed Rule Text

11 NCAC 23A .0609 ~~MOTIONS PRACTICE IN CONTESTED CASES~~

(a) Motions and responses before a Deputy Commissioner:

- (1) in cases that are currently calendared for hearing before a Deputy Commissioner shall be filed in accordance with Rule .0108 of this Subchapter.
- (2) to reconsider or amend an Opinion and Award, made prior to giving notice of appeal to the Full Commission, shall be addressed to the Deputy Commissioner who authored the Opinion and Award and filed in accordance with Rule .0108 of this Subchapter.

(b) Motions and responses shall be filed with the Office of the Executive Secretary in accordance with Rule .0108 of this Subchapter:

- (1) when a case is not calendared before a Deputy Commissioner;
- (2) once a case has been continued or removed from a Deputy Commissioner's calendar; or
- (3) after the filing of an Opinion and Award when the time for taking appeal has run.

(c) Motions and responses before the Full Commission:

- (1) in cases calendared for hearing before the Full Commission shall be addressed to the Chair of the Full Commission panel and filed in accordance with Rule .0108 of this Subchapter.
- (2) filed after notice of appeal to the Full Commission has been given but prior to the calendaring of the case shall be addressed to the Chair of the Commission and filed in accordance with Rule .0108 of this Subchapter.
- (3) in cases continued from the Full Commission hearing docket, shall be addressed to the Chair of the panel of Commissioners who ordered the continuance and filed in accordance with Rule .0108 of this Subchapter.
- (4) filed after the filing of an Opinion and Award by the Full Commission but prior to giving notice of appeal to the Court of Appeals or the expiration of the period allowed to give notice of appeal to the Court of Appeals shall be addressed to the Commissioner who authored the Opinion and Award and filed in accordance with Rule .0108 of this Subchapter.

(d) Motions requesting an award of attorney's fees from ongoing compensation pursuant to G.S. 97-90 that are not required to be filed with a Deputy Commissioner or the Full Commission pursuant to Paragraphs (a) and (c) of this Rule shall be filed with the Commission's Claims Administration Section in accordance with Rule .0108 of this Subchapter.

~~(d)~~ (e) All motions motions and responses ~~thereto~~ thereto, including requests for extensions of time and requests to withdraw motions, shall include a caption containing the Industrial Commission file number(s), party names, and a title identifying the nature of the motion or response. Motions and responses set forth in the body of electronic mail correspondence or contained in a brief will not be accepted for filing by the Commission. This Paragraph does not apply to parties without legal representation.

~~(e)~~ (f) A motion shall state with particularity the grounds on which it is based, the relief sought, and the opposing party's ~~position, if known,~~ position or that there has been a reasonable attempt to contact the opposing party and ascertain its position. Service shall be made on all opposing attorneys of record, or on all opposing parties if not represented.

~~(f)~~ (g) Motions to continue or remove a case from the hearing calendar on which the case is set shall be made as much in advance as possible of the scheduled hearing and may be made in written or oral form. In all cases, the moving party shall provide the basis for the motion and state that the other parties have been advised of the motion and relate the ~~position, if known,~~ position of the other parties regarding the ~~motion,~~ motion, or that there has been a reasonable attempt to contact the opposing party and ascertain its position regarding the motion. ~~Oral motions shall be followed with a written motion from the moving party.~~

(h) Oral motions shall be followed with a written motion from the moving party, if requested by a hearing officer.

~~(g)~~ (i) The responding party to a motion shall have 10 days after a motion is served during which to file and serve copies of a response in opposition to the motion. The Commission may shorten or extend the time for responding to any motion in the interests of justice or to promote judicial economy. Parties in agreement may submit a written stipulation to a single extension of time for responding to any motion, except for medical motions pursuant to Rule .0609A of this Section. The parties submitting a stipulation shall agree to an extension of a reasonable time, not to exceed 30 days.

~~(h)~~ (j) ~~A party who has not received actual notice of a motion or who has not filed a response at the time action is taken and who is adversely affected by the action may request that it be reconsidered, vacated, or modified. Motions shall be determined without oral argument unless the Commission determines that oral argument is necessary for a complete understanding of the issues.~~

~~(i) Where correspondence relative to a case before the Commission is sent to the Commission, copies of such correspondence shall be contemporaneously sent by the same method of transmission to the opposing party or, if represented, to opposing counsel. Written communications, whether addressed directly to the Commission or copied to the Commission, may not be used as an opportunity to introduce new evidence or to argue the merits of the case, with the exception of the following:~~

- ~~(1) written communications, such as a proposed order or legal memorandum, prepared pursuant to the Commission's instructions;~~
- ~~(2) written communications relative to emergencies, changed circumstances, or scheduling matters that may affect the procedural status of a case such as a request for a continuance due to the health of a litigant or an attorney;~~
- ~~(3) written communications sent to the tribunal with the consent of the opposing lawyer or opposing party, if unrepresented; and~~
- ~~(4) any other communication permitted by law or the Rules of the Commission.~~

~~(j)~~ (k) All motions and responses thereto shall include a proposed Order in Microsoft Word format to be considered by the Commission. The proposed Order shall include:

- (1) the IC File Number;

- (2) the case caption;
(3) the subject of the proposed Order;
(4) the procedural posture; and
(5) the party appearances or contact information. If a party is represented by counsel, then the appearance should include the attorney and firm name, email address, telephone number, and fax number. If a party is unrepresented, then the proposed Order should include the party's email address, telephone number, and fax number, if available.

History Note: Authority G.S. 97-79(b); 97-80(a); 97-84; 97-91;
Eff. January 1, 1990;
Amended Eff. *****, **, *****; February 1, 2016; November 1, 2014; June 1, 2000; March 15, 1995;
Recodified from 04 NCAC 10A .0609 Eff. June 1, 2018.

11 NCAC 23A .0620 WRITTEN COMMUNICATIONS WITH THE COMMISSION

- (a) This Rule applies to written communications relative to a case before the Commission that are not governed by statute or another Rule in this Subchapter.
(b) Written communications sent to the Commission shall be contemporaneously sent by the same method of transmission, where possible, to the opposing party or, if represented, to opposing counsel.
(c) Written communications, whether addressed directly to the Commission or copied to the Commission, may not be used as an opportunity to introduce new evidence or to argue the merits of the case.

History Note: Authority G.S. 97-80(a);
Eff. *****, **, *****

**Regulatory Impact Analysis
Foreign Language and Sign Language Interpreters**

Agency:	North Carolina Industrial Commission
Contact:	Ashley Snyder – (919) 807-2524
Proposed New Rule Title:	Contact Information
Rules proposed for amendment:	Rule 11 NCAC 23A .0619 (See proposed rule text in Appendix 1)
State Impact:	Yes
Local Impact:	Yes
Private Impact:	Yes
Substantial Economic Impact:	No
Statutory Authority:	G.S. § 97-79(b); 97-80(a)

Introduction/Background:

On November 1, 2014, the Commission implemented Rule 04 NCAC 10A .0619 to allow and regulate the use of foreign language interpreters in Commission hearings. Interpreters ensure full and fair participation of all parties and witnesses as well as equal access to justice. Rule 04 NCAC 10A .0619 was recodified as Rule 11 NCAC 10A .0619 effective June 1, 2018.

On July 1, 2017, the North Carolina Administrative Office of the Courts issued updated Standards for Language Access Services. The Commission proposes to amend Rule 11 NCAC 23A .0619 to incorporate the standards for Spanish language interpretation as required by the Administrative Office of the Courts for the Judicial Branch. Adopting the same standards as the Judicial Branch will promote uniformity, making navigating the requirements easier for attorneys who practice before different courts.

In addition, the North Carolina Administrative Office of the Courts revised their Guidelines for Accommodating Persons who are Deaf or Hard of Hearing in the Courts in March 2017. The Commission proposes to amend Rule 11 NCAC 23A .0619 to adopt the standards set forth in that document for sign language interpreters. Again, adopting the same standards as the Judicial Branch will promote uniformity.

Proposed Rule Changes and Their Estimated Impact:

The proposed rule additions and changes include the following:

1. *Amendment of foreign language interpreters rule – Rule 11 NCAC 23A .0619*
 - a. Description of baseline situation:

In its current form, Rule 11 NCAC 23A .0619 requires persons who do not speak or understand the English language to be assisted by a foreign language interpreter when testifying at a hearing. To qualify as an interpreter, an individual must qualify as an expert witness pursuant to G.S. 8C-1, Rule 702. Requirements for qualification as a Spanish language interpreter or a sign language interpreter were not further specified.

Additionally, the Rule currently requires parties and witnesses who do not speak or understand the English language to be assisted at hearings other than informal hearings other than informal hearings conducted pursuant to G.S. 97-18.1.

b. Description of proposed changes:

The proposed amendments to this rule require Spanish language interpreters to obtain a “Level A” certification according to the standards set forth by the North Carolina Administrative Office of the Courts. Additionally, the amendments allow those who are speech or hearing impaired to request a sign language interpreter. Sign language interpreters must be licensed by the North Carolina Interpreter and Transliterator Licensing Board. The Board’s SC:L legal certification is preferred, but not required. Amendments to the rule also clarify interpreters may be used for oral argument before the Full Commission as well as for testimony at hearings.

c. Economic impact:

(1) Costs to the State through the Commission:

- The costs to the State through the Commission are *de minimus*. The Commission does not coordinate or arrange interpretation services. The Commission only receives notification an interpreter will be used at hearing or oral argument. Additionally, the notification requirement is not being amended in the rule.
- Occasionally, the Commission receives a request for a translator. A Commission employee, usually an Executive Assistant, simply forwards the request to the employer or insurer who would be responsible for retaining the translator’s services.

(2) Costs to the State as an employer:

- The employer or insurer that retained the interpreter must pay the interpreter’s fee. In instances where the State is the employer, the State will be responsible for payment of the cost of the interpreter’s services. The proposed amendments to the Rule require heightened certification requirements for Spanish language interpreters. The average hourly wage of interpreters and translators is \$24.90 per

hour.¹ The average hourly wage of interpreters providing professional, scientific, or technical services is \$26.69 per hour,² equating to an estimated increase of \$1.79 per hour for a translator providing professional, scientific, or technical services.

- The requirements for other spoken languages remain unchanged, meaning there is no fiscal impact to the State for obtaining the assistance of an interpreter of any foreign language other than Spanish.
- The Deputy Commissioner section hears 1,728 cases per year.³ Out of 9,027,673 speakers in North Carolina, 331,650 individuals (3.67%) speak Spanish and speak English less than “very well.”⁴ Applied to the number of Deputy Commissioner hearings, an estimated 63.4 cases per year involve an individual who speaks Spanish and speaks English less than “very well,” meaning they likely need the assistance of a translator. Assuming Spanish translating services are needed for one hour of those Deputy Commission Section hearings, the additional cost caused by the proposed amendments to the rule is \$113.19 per year, total. Assuming the type of filer (public or private) follows the same breakdown as the type of employment in NC, about 11% of employers should be attributed to the public sector,⁵ meaning \$12.48 per year in increased costs to the State as an employer.
- The Full Commission section hears 424 cases on appeal annually.⁶ Out of 9,027,673 speakers in North Carolina, 331,650 individuals (3.67%) speak Spanish and speak English less than “very well.”⁷ Applied to the number of Full Commission hearings, an estimated 15.56 cases per year involve an individual who speaks Spanish and speaks English less than “very well,” meaning they likely need the assistance of a translator. (For reference, it is believed no Spanish language translators were requested at a Full Commission oral argument within the past year.) Assuming Spanish translating services are needed for the total time of a Full Commission oral argument, 40 minutes, the additional cost caused by the proposed

¹ “Occupational Employment and Wages, May 2017,” Occupational Employment Statistics, Bureau of Labor Statistics, <https://www.bls.gov/oes/current/oes273091.htm#st>

² Supra note 1.

³ Industrial Commission Annual Report, Fiscal Year 2017, <http://www.ic.nc.gov/2017AnnualReport.pdf>.

⁴ Detailed Languages Spoken at Home and Ability to Speak English for the Population 5 Years and Over: 2009-2013, <https://www.census.gov/data/tables/2013/demo/2009-2013-lang-tables.html>.

⁵ Governing website. Governing Data. States with Most Government Employees: Per Capita Rates by Job Type. <http://www.governing.com/gov-data/public-workforce-salaries/states-most-government-workers-public-employees-by-job-type.html>

⁶ Annual Report.

⁷ Table: Detailed Languages Spoken at Home and Ability to Speak English for the Population 5 Years and Over for States: 2009-2013, <https://www.census.gov/data/tables/2013/demo/2009-2013-lang-tables.html>.

amendments to the rule is \$18.57 per year, total. Assuming the type of filer (public or private) follows the same breakdown as the type of employment in NC, about 11% of employers should be attributed to the public sector,⁸ meaning \$2.04 per year in increased costs to the State as an employer.

- Currently, the Rule does not contemplate the assistance of a sign language interpreter. As a result, the full cost of a sign language interpreter should be included in the fiscal impact of the proposed amendments to this Rule.
- The Full Commission section hears 424 cases on appeal annually.⁹ 5.9%¹⁰ of the population are individuals who are deaf or hard of hearing. Assuming all persons who are deaf or hard of hearing use sign language, approximately 25 Full Commission oral arguments per year would require a sign language interpreter. (For reference, it is believed no sign language interpreters were requested at a Full Commission oral argument within the past year.) The proposed rule amendments establish a preference for SC:L legal certifications for sign language interpreters. The average wage for professional, scientific, and technical interpreters is \$26.69 per hour.¹¹ Assuming sign language interpretation is needed for the total time of a Full Commission oral argument, 40 minutes, the additional cost caused by the proposed amendments to the rule is \$444.83 per year, total. Assuming the type of filer (public or private) follows the same breakdown as the type of employment in NC, about 11% of employers should be attributed to the public sector,¹² meaning \$48.93 per year in increased costs to the State.
- The Deputy Commissioner section hears 1,728 cases per year.¹³ 5.9% of the population are individuals who are deaf or hard of hearing. Applied to the number of Deputy Commissioner hearings, an estimated 102 cases per year would require a sign language interpreter. Assuming sign language translating services are needed for one hour of those Deputy Commission Section hearings, the additional cost caused by the proposed amendments to the rule is \$2,722.38 per year, total. Assuming the type of filer (public or

⁸ Governing website. Governing Data. States with Most Government Employees: Per Capita Rates by Job Type. <http://www.governing.com/gov-data/public-workforce-salaries/states-most-government-workers-public-employees-by-job-type.html>

⁹ Annual Report.

¹⁰ 2016 Behavioral Risk Factor Surveillance System Survey Results: NC Disability, <https://schs.dph.ncdhhs.gov/data/brfss/2016/nc/all/DEAF.html>.

¹¹ <https://www.bls.gov/oes/current/oes273091.htm#st>

¹² Governing website. Governing Data. States with Most Government Employees: Per Capita Rates by Job Type. <http://www.governing.com/gov-data/public-workforce-salaries/states-most-government-workers-public-employees-by-job-type.html>

¹³ Industrial Commission Annual Report, Fiscal Year 2017, <http://www.ic.nc.gov/2017AnnualReport.pdf>.

private) follows the same breakdown as the type of employment in NC, about 11% of employers should be attributed to the public sector,¹⁴ meaning \$299.46 per year in increased costs to the State as an employer.

(3) Costs to private sector:

- The employer or insurer that retained the interpreter must pay the interpreter's fee. The proposed amendments to the Rule require heightened certification requirements for Spanish language interpreters. The average hourly wage of interpreters and translators is \$24.90 per hour.¹⁵ The average hourly wage of interpreters providing professional, scientific, or technical services is \$26.69 per hour,¹⁶ equating to an estimated increase of \$1.79 per hour for a translator providing professional, scientific, or technical services.
- The requirements for other spoken languages remain unchanged, meaning there is no fiscal impact to the State for obtaining the assistance of an interpreter of any foreign language other than Spanish.
- The Deputy Commissioner section hears 1,728 cases per year.¹⁷ Out of 9,027,673 speakers in North Carolina, 331,650 individuals (3.67%) speak Spanish and speak English less than "very well."¹⁸ Applied to the number of Deputy Commissioner hearings, an estimated 63.4 cases per year involve an individual who speaks Spanish and speaks English less than "very well," meaning they likely need the assistance of a translator. Assuming Spanish translating services are needed for one hour of those Deputy Commission Section hearings, the additional cost caused by the proposed amendments to the rule is \$113.19 per year, total. Assuming the type of filer (public or private) follows the same breakdown as the type of employment in NC, about 89% of employers should be attributed to the private sector,¹⁹ meaning \$100.74 per year in increased costs to the State as an employer.

¹⁴ Governing website. Governing Data. States with Most Government Employees: Per Capita Rates by Job Type. <http://www.governing.com/gov-data/public-workforce-salaries/states-most-government-workers-public-employees-by-job-type.html>

¹⁵ "Occupational Employment and Wages, May 2017," Occupational Employment Statistics, Bureau of Labor Statistics, <https://www.bls.gov/oes/current/oes273091.htm#st>

¹⁶ Supra note 1.

¹⁷ Industrial Commission Annual Report, Fiscal Year 2017, <http://www.ic.nc.gov/2017AnnualReport.pdf>.

¹⁸ Detailed Languages Spoken at Home and Ability to Speak English for the Population 5 Years and Over: 2009-2013, <https://www.census.gov/data/tables/2013/demo/2009-2013-lang-tables.html>.

¹⁹ Governing website. Governing Data. States with Most Government Employees: Per Capita Rates by Job Type. <http://www.governing.com/gov-data/public-workforce-salaries/states-most-government-workers-public-employees-by-job-type.html>

- The Full Commission section hears 424 cases on appeal annually.²⁰ Out of 9,027,673 speakers in North Carolina, 331,650 individuals (3.67%) speak Spanish and speak English less than “very well.”²¹ Applied to the number of Full Commission hearings, an estimated 15.56 cases per year involve an individual who speaks Spanish and speaks English less than “very well,” meaning they likely need the assistance of a translator. (For reference, it is believed no Spanish language translators were requested at a Full Commission oral argument within the past year.) Assuming Spanish translating services are needed for the total time of a Full Commission oral argument, 40 minutes, the additional cost caused by the proposed amendments to the rule is \$18.57 per year, total. Assuming the type of filer (public or private) follows the same breakdown as the type of employment in NC, about 89% of employers should be attributed to the public sector,²² meaning \$16.53 per year in increased costs to the State as an employer.
- Currently, the Rule does not contemplate the assistance of a sign language interpreter. As a result, the full cost of a sign language interpreter should be included in the fiscal impact of the proposed amendments to this Rule.
- amendments to this Rule.
- The Full Commission section hears 424 cases on appeal annually.²³ 5.9%²⁴ of the population are individuals who are deaf or hard of hearing. Assuming all persons who are deaf or hard of hearing use sign language, approximately 25 Full Commission oral arguments per year would require a sign language interpreter. (For reference, it is believed no sign language interpreters were requested at a Full Commission oral argument within the past year.) The proposed rule amendments establish a preference for SC:L legal certifications for sign language interpreters. The average wage for professional, scientific, and technical interpreters is \$26.69 per hour.²⁵ Assuming sign language interpretation is needed for the total time of a Full Commission oral argument, 40 minutes, the additional cost caused by the proposed amendments to the rule is \$444.83 per year, total. Assuming the type of filer (public or private) follows the same

²⁰ Annual Report.

²¹ Table: Detailed Languages Spoken at Home and Ability to Speak English for the Population 5 Years and Over for States: 2009-2013, <https://www.census.gov/data/tables/2013/demo/2009-2013-lang-tables.html>.

²² Governing website. Governing Data. States with Most Government Employees: Per Capita Rates by Job Type. <http://www.governing.com/gov-data/public-workforce-salaries/states-most-government-workers-public-employees-by-job-type.html>

²³ Annual Report.

²⁴ 2016 Behavioral Risk Factor Surveillance System Survey Results: NC Disability, <https://schs.dph.ncdhhs.gov/data/brfss/2016/nc/all/DEAF.html>.

²⁵ <https://www.bls.gov/oes/current/oes273091.htm#st>

breakdown as the type of employment in NC, about 89% of employers should be attributed to the private sector,²⁶ meaning \$395.90 per year in increased costs to the private sector.

- The Deputy Commissioner section hears 1,728 cases per year.²⁷ 5.9% of the population are individuals who are deaf or hard of hearing. Applied to the number of Deputy Commissioner hearings, an estimated 102 cases per year would require a sign language interpreter. Assuming sign language translating services are needed for one hour of those Deputy Commission Section hearings, the additional cost caused by the proposed amendments to the rule is \$2,722.38 per year, total. Assuming the type of filer (public or private) follows the same breakdown as the type of employment in NC, about 89% of employers should be attributed to the private sector,²⁸ meaning \$2,422.92 per year in increased costs to the private sector.

(4) Benefits to the State through the Commission:

- The Commission will benefit by being able to communicate with those that need sign language interpreters and by being able to communicate at a higher and more professional level with individuals requesting Spanish interpreters.

(5) Benefits to the public and private sector:

- Because the Commission proposing amendments based upon standards adopted by the Administrative Office of the Courts, the Commission proposes the same standards for Spanish language and sign language interpreters as required by North Carolina's district courts, superior courts, the Court of Appeals of North Carolina, and the North Carolina Supreme Court. Adopting the same standards will ensure uniformity and will make it easier for attorneys to navigate the proposed requirements.
- Members of both the public and private sector who are parties in a case before the Commission or who are witnesses in a case before the Commission will benefit from being able to fully and actively participate in hearings and oral arguments. Individuals who speak Spanish will benefit from more highly trained interpreters. Individuals who communicate using sign language will now be

²⁶ Governing website. Governing Data. States with Most Government Employees: Per Capita Rates by Job Type. <http://www.governing.com/gov-data/public-workforce-salaries/states-most-government-workers-public-employees-by-job-type.html>

²⁷ Industrial Commission Annual Report, Fiscal Year 2017, <http://www.ic.nc.gov/2017AnnualReport.pdf>.

²⁸ Governing website. Governing Data. States with Most Government Employees: Per Capita Rates by Job Type. <http://www.governing.com/gov-data/public-workforce-salaries/states-most-government-workers-public-employees-by-job-type.html>

guaranteed access to a sign language interpreter during hearings and oral arguments.

Summary of aggregate impact:

Based on the monetized costs and benefits cited above, it is estimated the proposed rule amendments will amount to an aggregate impact of \$131.79 per year for the amendments related to Spanish language interpreters plus \$3,167.21 per year for sign language interpreters. In total, the proposed amendments amount to an impact of \$3299.00. Additionally, the proposed changes will result in unquantifiable benefits to the public, including equal access to justice and uniformity with North Carolina's Judicial Branch. It is anticipated the rule will go into effect January 1, 2019, and that the same level of cost and benefit will recur each year.

APPENDIX I

Rule 11 NCAC 23A .0619 is proposed for amendment as follows:

11 NCAC 23A .0619 FOREIGN LANGUAGE AND SIGN LANGUAGE INTERPRETERS

(a) When a person who does not speak or understand the English language or who is speech or hearing impaired is either called to testify in a hearing, other than in an informal hearing conducted pursuant to G.S. 97-18.1, or appears unrepresented before the Full Commission for an oral argument, the person, whether a party or a witness, shall be assisted by a qualified ~~foreign language interpreter~~. interpreter upon request.

(b) To qualify as a foreign language interpreter, a person shall possess sufficient experience and education, or a combination of experience and education, speaking and understanding English and the foreign language to be interpreted, to qualify as an expert witness pursuant to G.S. 8C-1, Rule 702. For Spanish language interpretation, the interpreter must be "Level A" certified by the North Carolina Administrative Office of the Courts. A person qualified as an interpreter under this Rule shall not be interested in the claim and shall make a declaration under oath or affirmation to interpret accurately, truthfully and without any additions or deletions, all questions propounded to the witness and all responses thereto.

(c) To qualify as a sign language interpreter, a person shall possess a license from the North Carolina Interpreter and Transliterator Licensing Board, under Chapter 90D of the North Carolina General Statutes. It is preferred that sign language interpreters obtain an SC:L legal certification.

~~(d)~~ (d) Any party who is unable to speak or understand ~~English~~, English or who is speech or hearing impaired, or who intends to call as a witness a person who is unable to speak or understand ~~English~~, English or who is speech or hearing impaired, shall so notify the Commission and the opposing party, in writing, not less than 21 days prior to the date of the hearing. The notice shall state the language(s) that shall be interpreted for the Commission.

~~(e)~~ (e) Upon receiving or giving the notice required in Paragraph ~~(d)~~ (d) of this Rule, the employer or insurer shall retain a disinterested interpreter who possesses the qualifications listed in Paragraph (b) or (c) of this Rule to appear at the hearing and interpret the testimony or oral argument of all persons for whom the notice in Paragraph ~~(d)~~ (d) of this Rule has been given or received.

~~(f)~~ (f) The interpreter's fee shall constitute a cost as contemplated by G.S. 97-80. A qualified interpreter who interprets testimony or oral argument for the Commission is entitled to payment of the fee agreed upon by the interpreter and employer or insurer that retained the interpreter. Except in cases where a claim for compensation has been prosecuted without reasonable ground, the fee agreed upon by the interpreter and employer or insurer shall be paid by the employer or insurer. Where the Commission ultimately determines that the request for an interpreter was unfounded, attendant costs shall be assessed against the movant.

~~(g)~~ (g) Foreign language interpreters shall abide by the Code of Conduct and Ethics of Foreign Language Interpreters and Translators, contained in Part 4 of Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System and promulgated by the North Carolina Administrative Office of the Courts, and shall interpret, as word for word as is practicable, without editing, commenting, or

summarizing, testimony or other communications. The Code of Conduct and Ethics of Foreign Language Interpreters and Translators is hereby incorporated by reference and includes subsequent amendments and editions. A copy may be obtained at no charge from the North Carolina Administrative Office of the Court's website, <http://www.nccourts.org/Citizens/CPrograms/Foreign/Documents/guidelines.pdf>, or upon request, at the offices of the Commission, located in the Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, between the hours of 8:00 a.m. and 5:00 p.m.

(h) Sign language interpreters shall interpret, as word for word as is practicable, without editing, commenting, or summarizing, testimony or other communications. Sign language interpreters shall abide by the ethical standards communicated in the training required by G.S. 90D-8.

History Note: Authority G.S. 97-79(b); 97-80(a);

Eff. November 1, 2014.

*Amended Eff. **** **, ****.*

**Regulatory Impact Analysis
Codification of and/or changes to filing requirements**

Agency: North Carolina Industrial Commission
Contact: Ashley Snyder – (919) 807-2524
Proposed New Rule Title:
Rules proposed for amendment: Rule 11 NCAC 23A .0701
Rule 11 NCAC 23A .0702
(See proposed rule text in Appendix 1)

State Impact: Yes
Local Impact: Yes
Private Impact: Yes
Substantial Economic Impact: No

Statutory Authority: G.S. §§ 97-79(g), 97-80(a), 97-85.

Introduction/Background:

Rule 11 NCAC 23A .0701 governs review of trial-level decisions appealed to the Full Commission of the Industrial Commission. The proposed rule amendments for Rule 11 NCAC 23A .0701 are intended to reorganize and update the rule, to provide some clarifications, and to add some new provisions codifying common practices related to appeals.

Rule 11 NCAC 23A .0702 governs review of administrative decisions, or decisions made based on a motion and/or without an evidentiary hearing. The proposed amendments for Rule 11 NCAC 23A .0702 are intended to update the rule with respect to filing procedures, to provide certain clarifications, and to add a new paragraph addressing review of administrative decisions by a Deputy Commissioner or Commissioner.

Proposed Rule Changes and Their Estimated Impact:

The proposed rule additions and changes include the following:

1. *Amendment of Rule 11 NCAC 23A .0701*
 - a. The rule is amended to give each paragraph a heading indicating its topic. These amendments do not have any fiscal impact.
 - b. The proposed Rule 11 NCAC 23A .0701(b) is taken from the former .0701(c) with modifications to update the rule to be consistent with the Commission’s electronic filing rule, 11 NCAC 23A .0108, and to provide clarifications regarding the remand of cases on appeal when a motion to reconsider has been filed.

- i. The deletions making the rule consistent with Rule 11 NCAC 23A .0108 will not have any fiscal impact.
- ii. One of the amendments to the rule clarifies that the Chair, not the Full Commission, will decide whether to remand a case to the Deputy Commissioner if a motion to reconsider the Deputy Commissioner's decision is filed. The amendment removes a sentence indicating that this decision is within the Full Commission's discretion. To provide background, applications for review of an Opinion and Award by a Deputy Commissioner must be filed within 15 days of notice of the decision. Similarly, a party has 15 days from notice of a decision to file a motion to reconsider or amend an Opinion and Award with the Deputy Commissioner. When a party files an application for review of a Deputy Commissioner decision, the appeal puts the case in the jurisdiction of the Full Commission. In some cases, the appealing party or another party files a motion to reconsider the decision with the Deputy Commissioner, as well. In order for the Deputy Commissioner to have adequate time to rule on the motion to reconsider or amend the decision, the Full Commission must stop its appeal processes and return the case to the Deputy Commissioner's jurisdiction. At this point in time, the case is many weeks away from being set for hearing before a Full Commission panel of three Commissioners. Therefore, a Full Commission panel would not be in a position to make the decision regarding remand. The issue of whether to remand a case to the Deputy Commissioner goes to the Chair's Office for review or delegation to another Commissioner. The rule amendment makes this process clear, codifies current practice, and avoids any challenges, however unlikely, to a decision by the Chair. The Commission does not expect any fiscal impact from this rule change.
- iii. The remaining changes to Rule .0701(b) are intended to clarify the change in jurisdiction when a remand occurs. Under the current language in effect, a party might not understand that after the ruling on the motion to reconsider or amend is issued, something additional must be done to return the matter to the Full Commission. In order to make this clear, the revised language specifies that a remand to the Deputy Commissioner transfers jurisdiction to the Deputy Commissioner and that a letter requesting review of the initial decision of the Deputy Commissioner and/or the ruling on the motion to reconsider or amend must be filed to bring the case back to the jurisdiction of the Full Commission.

There is no data on the number of times a party has failed to appeal in a timely manner due to misunderstanding the current rule. The Full Commission received 434 appeals in FY 2016-17. Thus, the pool of cases in which such an error might occur is relatively small. The Commission has received questions from attorneys for explanation of the current rule, indicating a level of uncertainty with the current rule.

While a failure to timely appeal may not occur often due to the current rule, that failure can be disaster for a party if they lose their right to appeal. In the case of injured employees, they could lose their chance for medical treatment and indemnity benefits. Employers and carriers could be required to pay for benefits and treatment that they do not believe they owe. Because each case is different, there is no way to monetize the potential effect on a case.

- c. The proposed new Subparagraph (c) in 11 NCAC 23A .0701 is taken from former Paragraph (b). The proposed changes to the rule language include minor language changes and revision of Commission procedures for sending the official transcripts, exhibits, and Form 44 *Application for Review* to the parties.
 - i. The language changes deleting the unnecessary first clause of the first sentence, inserting “if any” after “exhibits” in the second sentence, and changing “provide” to “serve” in the last sentence are minor and are not expected to result in any fiscal impact.
 - ii. The remaining changes to the .0701(c) separate the provisions for providing the transcript, exhibits, and Form 44 into two new subparagraphs.
 - o The first subparagraph addresses providing the documents electronically. The current rule indicates that the documents are provided electronically “where possible” and that the Commission will send an email to the parties providing a link to an FTP site from which the transcript and exhibits can be downloaded. The amendments to the rule specify that the documents will be provided electronically to parties represented by counsel and that the Commission will email the parties directions on how to obtain the documents electronically.
 - Currently, the Commission generally only provides the documents electronically to parties with counsel because those are the parties for which the Commission has a reliable email address. Therefore, the rule essentially codifies current practice. However, there could be occasions when the Commission has sent a link to an unrepresented party so that they could download the documents. For such cases, the impact of the rule change would be that they would receive the documents in paper form by mail. This could be a benefit to parties who do not have the capability to deal with electronic files, or it could be a cost to parties who want to have an electronic file and now will receive paper and have to scan it.

There is no data regarding the number of litigants potentially affected by this rule change, though it is expected to be small. There were 434 appeals to the Full Commission in FY2016-17 and such litigants would be a very small portion of those, if any. In addition, it is

difficult to estimate the impact per case because each case is different. Some cases have transcripts and exhibits less than 100 pages in length and some can have thousands of pages. Therefore, there is the potential for a fiscal impact, but it is not possible to monetize with any accuracy.

Notably, there is a simultaneous potential effect on the State through the Commission in that transcripts and exhibits not provided electronically must be mailed which involves the cost of postage. Because the potential number of cases involved is very small and the size of the packages unknown, the fiscal impact cannot be estimated with any accuracy.

- With respect to changing the rule to indicate that the Commission will email parties with counsel instructions on how to retrieve the documents electronically rather than a link to an FTP site, the Commission does not expect this amendment to have a fiscal impact. The amendment is intended to allow the Commission flexibility to move away from using an FTP site if desired. It is not expected that any new methods of providing the documents electronically will be markedly different such as to have a fiscal impact on the Commission or external stakeholders.
- The second subparagraph indicates that in cases where it is not possible to provide a party with the official transcript and exhibits electronically (usually when a party is without counsel), the documents will be served using “any class of U.S. Mail that is fully prepaid.” The current rule requires the Commission to use certified U.S. Mail, return receipt requested. The rule change proposed follows the trend of the 2017 legislative change to N.C. Gen. Stat. § 97-86 changing the requirement to send Opinion and Awards to the parties via certified mail with return receipt to email or any class of U.S. Mail that is fully prepaid.

The cost of certified mail is \$3.45 and the cost for a return receipt via email, which is what the Commission uses, is \$1.50. In a recent six-month period, the Commission sent transcripts and exhibits by certified return receipt email pursuant to the current rule in 17 cases. The Commission does not charge any party for this cost. Therefore, if the Commission chooses under the amended rule not to use certified mail with return receipt in the future, the State through the Commission could save up to \$84.15 per year. There may also be a minimal benefit to the Commission in terms of time saved by not filling out the e-certify request.

There are other benefits and costs to the proposed rule change that are not easily quantified. Currently, when the Commission sends a transcript package to a party by certified mail with return receipt, the Commission has access to documentation of whether the party received the package. This documentation comes into play only in those cases where the party does not timely file its Form 44 and brief and claims that it did not receive the transcript package. In these situations, currently, the Commission can check the e-certify information online to verify whether the package was received. If the Commission chooses under the amended rule not to use certified mail with return receipt, this potential documentation will not be available and the party claiming it did not receive the package will have to provide support for its claim, especially if the Commission does not receive a returned package sent by non-return receipt mail. There could be a high cost to such parties of having their appeal dismissed. However, the Commission has experienced problems using certified mail with return receipt because the package cannot be delivered if no one is home who will sign for it. The USPS will make a certain number of attempts, but will then return the package. This can cost the Commission extra time and postage to send the package again and cause delays in the appeal process which can affect both parties. As these problems happen in a limited number of cases and the potential effect could vary widely in terms of fiscal impact, it is not feasible to estimate the fiscal impact of the proposed rule change further.

- d. The proposed amendments to Paragraph (d) in 11 NCAC 23A .0701 are intended to provide clarification by rewording the provision regarding the Form 44 *Application for Review*, but do not add any additional requirements. Therefore, no fiscal impact is anticipated to result from these changes.
- e. The proposed amendments to Paragraph (e) are intended to update the rule to be consistent with Rule 11 NCAC 23A .0108 regarding electronic filing. The amendments also remove potentially confusing language about extensions of time to file the Form 44 and briefs. The changes do not alter the 15-day extension of time that each party may obtain. Therefore, no fiscal impact is expected to result from these changes.
- f. The new Paragraph (f) of Rule .0701, which addresses brief requirements, is largely former Paragraph (i). The only changes to the former language are the new requirement that briefs be prepared using a proportional font and serif typeface and a change to the form of citations to the record or depositions. None of these changes are anticipated to have any fiscal impact. The last sentence of new Paragraph (f) is taken from former Paragraph (g) with only one word change of no fiscal significance. One new sentence has been added to make clear that attachments to a brief may not be used to circumvent the 35-page limit. Occasionally, parties or attorneys will attach fact summaries or additional

argument to a brief to avoid the page limit. This occurs in only a very small number of cases. There may be a minimal savings to the Commission and a small, relatively intangible cost to the filing party as a result of the rule, but it is not feasible to monetize these effects.

- g. The proposed Paragraph (g) of 11 NCAC 23A .0701 creates a new provision governing reply briefs. A reply brief is a brief filed by an appellant in response to issues raised in the appellee's brief. While reply briefs are currently allowed in some cases at the Commission, there is no rule setting out a procedure for reply briefs. Therefore, the rule will reduce uncertainty about the procedure.

- i. Description of baseline situation:

- There is currently no rule governing reply briefs. The Commission receives them in only a few cases per year. Parties wishing to file reply briefs with the Commission do not usually file a motion requesting permission to file one. The reply briefs generally follow the formatting requirements of the Commission's rule on briefs. It is also common practice in many courts to limit the reply brief to rebuttal of arguments raised in the appellee brief, and that is expected by the Commission.

- ii. Description of proposed changes:

- The new Paragraph (g) of Rule .0701 addresses several aspects, including the number of days within which to file a motion to file a reply brief, the page limit, format, and what the reply brief may address. In addition, the rule disallows the inclusion of a reply brief with the motion.

- iii. Economic impact:

- The costs and benefits of the proposed rule change are described below.

- o Costs to the State through the Commission:

- The only potential anticipated costs to the Commission from this provision are the possibility of a small increase in the number of reply briefs due to the existence of a rule. In addition, there could be a small increase in the number of motions filed because the rule requires a motion requesting permission to file a reply brief.
 - The costs would include the additional staff and attorney time to process and review the motions and reply briefs. This cost is expected to be minimal due to the small number of reply briefs filed. It is not anticipated that this number will increase significantly.

- o Costs to external stakeholders, including the State as an employer, local government, and private employers/carriers, and employees:

- Litigating parties may incur minor costs due to the new rule requiring the filing of a motion. They may incur minor costs due to the time limit or page limit, if they would have preferred more time or more pages. They may also incur costs from filing more reply briefs than before the rule. Lastly, they may incur a cost if they request to file a reply brief and the request is denied. These potential costs are intangible or difficult to estimate with any accuracy.

- Benefits to the State through the Commission:
 - The expected benefits for the Commission from this rule include more efficient and certain procedures due to having a rule on reply briefs, the ability to decline to allow a reply brief pursuant to rule, and limits on the length, format, and topics of the briefs. The Commission will be better able to consistently address reply briefs and may have reduced time spent reading lengthy reply briefs and reduced delay in considering and deciding cases. These potential costs are intangible or difficult to estimate with any accuracy.
 - Benefits to external stakeholders, including the State as an employer, local government, and private employers/carriers, and employees:
 - Litigating parties will benefit from the rule because it will provide clear guidelines on how to request and file reply briefs. There may also be more parties who choose to file a reply brief because there is a rule, which may result in better outcomes in their cases. These potential costs are intangible or difficult to estimate with any accuracy.
- h. The proposed Paragraph (h) was previously Paragraph (g) of the rule. Additional changes have been made to the language and new language has been added. The changes and new language relate to the use of unpublished appellate decisions to support arguments in briefs to the Commission. Unpublished appellate decisions are those filed by the North Carolina Court of Appeals under Rule 30(e) of the N.C. Rules of Appellate Procedure, because “the panel that hears the case determines that the appeal involves no new legal principles and that an opinion, if published, would have no value as a precedent.” Currently, the former Paragraph (g) only indicates that if an unpublished opinion is cited in a brief, a copy must be attached to the brief. The new rule deletes that requirement and adds information about how and when to cite an unpublished opinion. The additional information is taken from Rule 30(e) of the N.C. Rules of Appellate Procedure and is commonly known and followed by attorneys and is not expected to have an impact.
- i. Costs – There may be a small cost to the Commission in that those staff attorneys reviewing the brief will need to find the unpublished opinion on Westlaw because it will not be attached to the briefs. Given that finding the opinions takes only a few minutes and that unpublished opinions are not commonly cited, the impact will be minimal.
 - ii. Benefits – There may be a small benefit to brief filers in not having to print and scan and attach unpublished opinions to briefs. Again, this situation is not common and the benefit is minimal.
- i. The proposed amendments to Paragraph (i) of Rule 11 NCAC 23A .0701 are minor wording changes that do not change the meaning of the rule and are not expected to have a fiscal impact.

- j. The new Paragraph (j) of Rule 11 NCAC 23A .0701 addresses oral argument before the Full Commission. Subparagraph (3) is the former Paragraph (j) and contains no changes. Subparagraph (4) is taken from former Paragraph (h) and is re-worded, but its effect is not changed. Subparagraphs (1), (2), (5), and (6) are new provisions though they largely codify current practice.
 - i. Subparagraph (1) places allows 20 minutes for each party for oral argument and describes when time may be reserved for rebuttal. It is very common in most courts for oral argument to have time limits. The rule codifies the time limits and rebuttal procedure the Commission has used for many years. The Commission does not expect to incur any costs or benefits on behalf of the State based on the rule. Litigating parties could experience a cost in that their time is now limited through regulation. They may also experience a benefit from the certainty provided by having a rule.
 - ii. Subparagraph (2) provides a procedure for requesting additional time for oral argument beyond that allowed in Subparagraph (1). There is no data on the number of requests for additional time. Based on the Commission's experience, they are known to be rare.
 - o The Commission expects to experience a small cost from receiving written requests that must be processed and reviewed. However, the Commission also expects a small benefit from no longer receiving such requests in various forms or at the last minute prior to hearing.
 - o Litigating parties may experience a cost from the regulation because it imposes limits on how and when they can request additional time. There is likely to be a small cost in staff and attorney time to prepare and file written requests, as opposed to oral requests. Parties may receive a benefit from the existence of a rule allowing them to request additional time if they believe they need it. Parties may also benefit from not being surprised close to the hearing with a request from the other party for more time.
 - o As stated above, additional time for oral argument is not a common request, usually reserved only for cases involving multiple parties, very complicated facts or arguments, or cases involving more than one injury claim. Therefore, the impact of this rule provision is expected to be minimal.
 - iii. Subparagraph (5) of Rule .0701 addresses what happens if a party or parties do not appear for scheduled oral argument. If one party fails to appear at the call of the case, the Full Commission may disallow their right to present oral argument. If both parties fail to appear, the matter may be decided on the records and briefs alone. There is nothing unusual about this rule provision in terms of how most courts operate. The Commission will benefit from having this rule in the Code so that a decision to disallow oral argument for failure to appear at the call of the case cannot be challenged. Litigating parties may incur a corresponding cost if they lose the right to argue because they are late or fail to appear

and want to appeal the decision to disallow their arguments. It is very rare that attorneys do not appear on time for oral argument without reasonable excuse, such that their arguments would be disallowed. This may occur slightly more frequently with unrepresented parties, but is still rare. The fiscal impact of this rule is expected to be minimal.

- iv. Subparagraph (6) is copied from former Paragraph (g) with one minor word change. Former Paragraph (g) applied only to briefs. Subparagraph (6) indicates that parties may not discuss matters outside the record, use personal opinions or experiences, or make negative statements about opposing counsel or members of the Commission during oral argument. This rule reflects and allows enforcement of a best practice. It is rare that litigants try to go outside the record, mention personal opinions, or make disparaging comments during oral argument, so the impact will be minimal. However, the Commission and other parties will benefit from being able to point to the rule if a party does behave in such a manner. A party restrained by the rule may experience a cost due to limitations placed on its oral argument. These costs and benefits are relatively intangible and cannot be monetized with any accuracy.

2. *Amendment of Rule 11 NCAC 23A .0702*

- a. There are several proposed amendments to 11 NCAC 23A .0702 that are not anticipated to have any fiscal impact.
 - i. The amendments to new Paragraph (b) add some phrases and re-word the provision for clarification, but do not change the meaning of the rule.
 - ii. The first amendment to new Paragraph (d) clarifies that the Paragraph applies to requests for hearing to review an administrative decision referenced in Paragraph (b). The second amendment updates the rule because the Docket Director is now within the Office of the Clerk.
 - iii. The amendment to Paragraph (f) clarifies the orders subject to this provision.
- b. As stated at the beginning of this fiscal note, the proposed rule changes add a new paragraph to the rule that addresses review of administrative decisions by a Deputy Commissioner or Commissioner. This paragraph will affect very few cases per year and is not expected to result in significant impact.

New Paragraph (e) first states that administrative decisions made by a Commissioner or Deputy Commissioner during the pendency of a case pursuant to G.S. § 97-84 may be reviewed by the Full Commission. The concept of interlocutory decisions or orders is established and familiar to attorneys and is utilized by a variety of tribunals. Next, the provision states that requests for review of such administrative decisions by the Full Commission will be reviewed by the Chair of the Commission to determine whether there is a right of immediate review. The parties are to address the grounds for immediate review in the request for review for the Chair's consideration. The practice of reviewing and analyzing appeals of interlocutory decisions to determine whether they should proceed or wait until the entire matter is decided is common to many tribunals,

with a primary goal of judicial efficiency. The grounds presented are analyzed according to the existing body of case law addressing interlocutory orders. The first and last sentences of the rule reflect the current practice of the Commission. They are included in the new provision to codify the current practice, but also to provide context for the second sentence of the paragraph, which involves a procedural change.

Currently, all requests for review of administrative decisions go to the Chair for review to determine if they should go immediately to a Full Commission panel. Paragraph (e) changes the current practice slightly by allowing administrative decisions that constitute a final judgment as to one or more issues or parties and contain a certification by the Commissioner or Deputy Commissioner that there is no just reason for delay to proceed directly to a Full Commission panel for review. This provision is modeled after a similar provision in Rule 54 of the North Carolina Rules of Civil Procedure.

In terms of impact, the average number of appeals of interlocutory administrative decisions over the past two fiscal years is 16. The potential benefits and costs of the new provision, which are likely to be minimal in sum, are described below:

- For those requests for review where there is no certification by the Deputy Commissioner, the rule does not contemplate a change in procedure. There may be a small benefit to the Commission and litigants from having a rule on the subject that outlines the procedure. There may also be a small cost to the litigants in that the rule prevents arguments for a different procedure.
- For those cases in which the second sentence of the rule applies, which are projected to occur between zero and five times a year, the Commission will have a small cost savings of approximately three hours of law clerk time and 30 minutes of the Chair's time that would have been spent reviewing the request for review and related grounds. There is unlikely to be a corresponding savings to the litigants in not having to draft arguments for the Chair's review because they will most likely include them in their briefs and arguments before the Full Commission panel. It is anticipated that the Full Commission panel will review the issue of whether the decision should be immediately reviewed as well as the merits of the request for review.
- When an administrative decision is reviewed pursuant to this procedure, the case before the Deputy Commissioner is placed on hold. If the administrative decision is not a final judgment and the request for review is reviewed by the Chair, there can be a delay of up to 45 days before it is known whether the appeal will be referred to a Full Commission panel. If review is not allowed, the matter then proceeds before the Deputy Commissioner. If it is referred to the Full Commission, it may take four to six months before a decision is issued and the proceedings before the Deputy Commissioner may resume. Therefore, in cases where there is a

certification by the Deputy Commissioner (potentially 0-5 times a year), the parties will have the benefit of saving up to 45 days of delay by proceeding directly to a Full Commission panel. There is a chance in such cases that a Full Commission panel may find that the request for review is not proper and should not be allowed, in which case the matter will have been delayed an extra 4-6 months, but this situation is equivalent to situations that already occur if the Chair allows a request for review to go forward and the Full Commission later disagrees or the Chair disallows a request for review and it is reviewed by the Full Commission.

Summary of impact:

Most benefits and costs related to the changes to 11 NCAC 23A .0701 and .0702 are not quantified in this analysis due to lack of data. Most are expected to be minimal because of the small numbers of cases affected. These include the benefits of procedural clarifications, the costs and benefits of a new reply brief rule, the costs and benefits of a new interlocutory review rule, and the costs and benefits of changes to the service of transcripts. The Commission is able to estimate that it could save up to \$85.00 a year in certified and return receipt mail costs depending on how it chooses to mail transcripts under the proposed 11 NCAC 23A .0701.

It is anticipated that the rule will go into effect on January 1, 2019, and that the same level of cost and benefit will recur each year.

APPENDIX 1

Proposed Rule Text

11 NCAC 23A .0701 REVIEW BY THE FULL COMMISSION

(a) Notice of Appeal. Application for review shall be made to the Commission within 15 days from the date when notice of the Deputy Commissioner's Opinion and Award shall have been given. A letter expressing a request for review is considered an application for review to the Full Commission within the meaning of G.S. 97-85, provided that the letter specifies the Order or Opinion and Award from which appeal is taken.

(b) Motions to Reconsider to the Deputy Commissioner. A motion to reconsider or to amend the decision of a Deputy Commissioner shall be filed with the Deputy Commissioner within 15 days of receipt of notice of the award. The time for filing a request for review from the decision of a Deputy Commissioner under the rules in this Subchapter shall be tolled until a motion to reconsider or to amend the decision has been ruled upon by the Deputy Commissioner. However, if either party files a letter requesting review of the decision as set forth in Paragraph (a) of this Rule after a motion to reconsider or to amend has been filed with the Deputy Commissioner, jurisdiction shall be transferred to the Full Commission. Any party who had a pending motion to reconsider or amend the decision of the Deputy Commissioner may file a motion with the Chair of the Commission requesting remand to the Deputy Commissioner with whom the motion was pending. Upon remand, jurisdiction will be transferred to the Deputy Commissioner. Following the Deputy Commissioner's ruling on the motion to reconsider or amend the decision, a party requesting review of the initial decision of the Deputy Commissioner or the ruling on the motion to reconsider or amend the decision shall file a letter requesting review as set forth in Paragraph (a) of this Rule to transfer jurisdiction of the matter back to the Full Commission.

~~(b)(c) Acknowledging Receipt; Form 44; Joint Certification. After receipt of a request for review, the~~ The Commission shall acknowledge the request for review by letter. The Commission shall prepare the official transcript and ~~exhibits~~ exhibits, if any, and provide them along with a Form 44 *Application for Review* to the parties involved in the appeal at no charge within 30 days of the acknowledgement letter. ~~The official transcript and exhibits and a Form 44 *Application for Review* shall be provided to the parties electronically, where possible. In such cases, the Commission shall send an e-mail to the parties containing a link to the secure File Transfer Protocol (FTP) site where the official transcript and exhibits may be downloaded. The e-mail shall also provide instructions for the submission of the parties' acknowledgement of receipt of the Form 44 *Application for Review* and the official transcript and exhibits to the Commission. Parties represented by counsel shall sign a joint certification acknowledging receipt of the Form 44 *Application for Review* and the official transcript and exhibits and submit the certification within ten days of receipt of the Form 44 *Application for Review* and the official transcript and exhibits. The certification shall stipulate the date the Form 44 *Application for Review* and the official transcript and exhibits were received by the parties and shall note the date the appellant's brief is due. The Commission shall save a copy of the parties' acknowledgements in the file for the claim to serve as record of the parties' electronic receipt of the Form 44 *Application for Review* and the official transcript and exhibits. In cases where it is not possible to provide a party with the official transcript and exhibits electronically, the Commission shall provide the official transcript and exhibits and a Form 44 *Application*~~

~~for Review via certified U.S. Mail, with return receipt requested. The Commission shall save a copy of the return receipt to serve as record of the party's receipt of the official transcript and exhibits and Form 44 Application for Review.~~

(1) The official transcript and exhibits and a Form 44 Application for Review shall be provided electronically to parties represented by counsel. In such cases, the Commission shall send an e-mail to the parties with directions on how to obtain an electronic copy of the official transcript and exhibits. The e-mail shall also provide instructions for the submission of the parties' acknowledgement of receipt of the Form 44 Application for Review and the official transcript and exhibits to the Commission. Parties represented by counsel shall sign a joint certification acknowledging receipt of the Form 44 Application for Review and the official transcript and exhibits and submit the certification within ten days of receipt of the Form 44 Application for Review and the official transcript and exhibits. The certification shall stipulate the date the Form 44 Application for Review and the official transcript and exhibits were received by the parties and shall note the date the appellant's brief is due. The Commission shall save a copy of the parties' acknowledgements in the file for the claim to serve as record of the parties' electronic receipt of the Form 44 Application for Review and the official transcript and exhibits.

(2) In cases where it is not possible to provide a party with the official transcript and exhibits electronically, the Commission shall serve the official transcript and exhibits and a Form 44 Application for Review via any class of U.S. Mail that is fully prepaid.

~~(e) A motion to reconsider or to amend the decision of a Deputy Commissioner shall be filed with the Deputy Commissioner within 15 days of receipt of notice of the award with a copy to the Docket Director. The time for filing a request for review from the decision of a Deputy Commissioner under the rules in this Subchapter shall be tolled until a motion to reconsider or to amend the decision has been ruled upon by the Deputy Commissioner. However, if either party files a letter requesting review as set forth in Paragraph (a) of this Rule, jurisdiction shall be transferred to the Full Commission, and the Docket Director shall notify the Deputy Commissioner. Upon transfer of jurisdiction to the Full Commission, any party who had a pending motion to reconsider or amend the decision of the Deputy Commissioner may file a motion with the Chairman of the Commission requesting remand to the Deputy Commissioner with whom the motion was pending. Within the Full Commission's discretion, the matter may be so remanded. Upon the Deputy Commissioner's ruling on the motion to reconsider or amend the decision, either party may thereafter file a letter requesting review of the Deputy Commissioner's decision as set forth in Paragraph (a) of this Rule.~~

(d) Appellant's Form 44. The appellant shall submit a Form 44 Application for Review upon which appellant shall state stating with particularity all assignments of error and grounds for review, the grounds for the review. The grounds shall be stated with particularity, including the errors allegedly committed by the Commissioner or Deputy Commissioner and, when applicable, including, where applicable, the pages in the transcript or the record on which the alleged errors are recorded. Grounds for review and assignments of error not set forth in the Form 44 Application for Review are deemed abandoned, and argument thereon shall not be heard before the Full Commission.

(e) Timing Requirements. The appellant shall file the Form 44 *Application for Review* and brief in support of the grounds for review with the Commission with a certificate of service on the appellee within 25 days after receipt of the transcript or receipt of notice that there will be no transcript. The appellee shall have 25 days from service of the Form 44 *Application for Review* and appellant's brief to file a responsive brief with the Commission. The appellee's brief shall include a certificate of service on the appellant. When an appellant fails to file a brief, an appellee shall file its brief within 25 days after the appellant's time for filing the Form 44 *Application for Review* and appellant's brief has expired. A party who fails to file a brief shall not participate in oral argument before the Full Commission. If multiple parties request review, each party shall file an appellant's brief and appellee's brief on the schedule set forth in this Paragraph. ~~If the matter has not been calendared for hearing, any a party may file with the Docket Director obtain a single extension of time not to exceed 15 days by filing a written stipulation pursuant to Rule .0108 of this Subchapter. to a single extension of time not to exceed 15 days. In no event shall the cumulative extensions of time exceed 30 days.~~

(f) Brief Requirements. Briefs to the Full Commission shall not exceed 35 pages, excluding attachments. In no event shall attachments be used to circumvent the 35-page limit. No page limit applies to the length of attachments. Briefs shall be prepared using a 12 point proportional font and serif typeface, shall be double spaced, and shall be prepared with non-justified right margins. Each page of the brief shall be numbered at the bottom of the page. When a party quotes or paraphrases testimony or other evidence from the appellate record in the party's brief, the party shall include, at the end of the sentence in the brief that quotes or paraphrases the testimony or other evidence, a parenthetical entry that designates the source of the quoted or paraphrased material and the page number within the applicable source. The party shall use "T" to refer to the transcript of hearing testimony and "Ex" for exhibit. For example, if a party quotes or paraphrases material located in the hearing transcript on page 11, the party shall use the following format "(T 11)," and if a party quotes or paraphrases material located in an exhibit on page 12, the party shall use the following format "(Ex 12)." When a party quotes or paraphrases testimony in the transcript of a deposition in the party's brief, the party shall include the last name of the deponent and the page on which such testimony is located. For example, if a party quotes or paraphrases the testimony of John Smith, located on page 11 of such deposition, the party shall use the following format "(Smith 11)." Parties shall not discuss matters outside the record, assert personal opinions or relate personal experiences, or attribute wrongful acts or motives to opposing counsel or members of the Commission.

(g) Reply Briefs. Within 10 days of service of the appellee's brief, a party may request by motion to file a reply brief. The motion shall not contain a reply brief. A reply brief may only be filed if ordered by the Full Commission. Reply briefs shall not exceed 15 pages, excluding attachments. Reply briefs shall be prepared in accordance with the requirements of Paragraph (f) of this Rule. Any reply brief filed shall be limited to a concise rebuttal of arguments set out in the appellee's brief, and shall not reiterate arguments set forth in the appellant's principal brief.

(h) Citations. Case citations shall be to the North Carolina Reports, the North Carolina Court of Appeals Reports, or the North Carolina Reporter, and when possible, to the South Eastern Reporter. An unpublished appellate decision does not constitute controlling legal authority. If a party believes that an unpublished opinion has precedential or persuasive value to a material issue in the case and that there is no published opinion that would serve as well, the party may cite the unpublished opinion. When citing an unpublished opinion, a party shall indicate the opinion's

unpublished status. If no reporter citation is available at the time a brief is filed, the party citing to the case shall attach a copy of the case to its brief.

~~(f)(i) Motions. After a request for review has been submitted to the Full Commission, any motions related to the issues for review shall be filed with the Full Commission, with service on the other parties. Motions related to the issues for review including motions for new trial, to supplement the record, including documents from offers of proof, or to take additional evidence, filed during the pendency of a request for review to the Full Commission, shall be argued before considered by the Full Commission at the time of the hearing of the request for review, review of the appeal, except motions related to the official transcript and exhibits. The Full Commission, for good cause shown, may rule on such motions prior to oral argument.~~

~~(g) Case citations shall be to the North Carolina Reports, the North Carolina Court of Appeals Reports, or the North Carolina Reporter, and when possible, to the South Eastern Reporter. If no reporter citation is available at the time a brief is filed or if an unpublished decision is referenced in the brief, the party citing to the case shall attach a copy of the case to its brief. Counsel shall not discuss matters outside the record, assert personal opinions or relate personal experiences, or attribute wrongful acts or motives to opposing counsel or members of the Commission.~~

~~(h) Upon the request of a party or on its own motion, the Commission may waive oral argument in the interests of justice or to promote judicial economy. In the event of such waiver, the Full Commission shall file an award based on the record and briefs.~~

(j) Oral Argument.

- (1) Each appellant shall have twenty minutes to present oral argument and may reserve any amount of the twenty-minute total allotment for rebuttal, unless otherwise specified by Order of the Commission. Each appellee shall also have twenty minutes to present oral argument, unless otherwise specified by Order of the Commission; however, the appellee(s) may not reserve rebuttal time. In the case of cross-appeals, each appealing party may reserve rebuttal time.
- (2) Any party may request additional time to present oral argument in excess of the standard twenty-minute allowance. Such requests shall be made in writing and submitted to the Full Commission no less than ten days prior to the scheduled hearing date. The written request for additional time shall state with specificity the reason(s) for the request of additional time and the amount of additional time requested.
- (3) An employee appealing the amount of a disfigurement award shall personally appear before the Full Commission to permit the Full Commission to view the disfigurement.
- (4) A party may waive oral argument at any time with approval of the Commission. Upon the request of a party or on its own initiative, the Commission may review the case and file an Order or Award without oral argument.
- (5) If any party fails to appear before the Full Commission upon the call of the case, the Commission may disallow the party's right to present oral argument. If neither party appears upon the call of the case, the Full Commission may decide the case upon the record and briefs on appeal, unless otherwise ordered.

(6) Parties shall not discuss matters outside the record, assert personal opinions, relate personal experiences, or attribute wrongful acts or motives to opposing counsel or members of the Commission.

~~(i) Briefs to the Full Commission shall not exceed 35 pages, excluding attachments. No page limit applies to the length of attachments. Briefs shall be prepared using a 12 point type, shall be double spaced, and shall be prepared with non justified right margins. Each page of the brief shall be numbered at the bottom of the page. When a party quotes or paraphrases testimony or other evidence from the appellate record in the party's brief, the party shall include, at the end of the sentence in the brief that quotes or paraphrases the testimony or other evidence, a parenthetic entry that designates the source of the quoted or paraphrased material and the page number within the applicable source. The party shall use "T" to refer to the transcript of hearing testimony, "Ex" for exhibit, and "p" for page number. For example, if a party quotes or paraphrases material located in the hearing transcript on page 11, the party shall use the following format "(T p 11)," and if a party quotes or paraphrases material located in an exhibit on page 12, the party shall use the following format "(Ex p 12)." When a party quotes or paraphrases testimony in the transcript of a deposition in the party's brief, the party shall include the last name of the deponent and the page on which such testimony is located. For example, if a party quotes or paraphrases the testimony of John Smith, located on page 11 of such deposition, the party shall use the following format "(Smith p 11)."~~

~~(j) An employee appealing the amount of a disfigurement award shall personally appear before the Full Commission to permit the Full Commission to view the disfigurement.~~

History Note: Authority G.S. 97-80(a); 97-85; S.L. 2014-77;

Eff. January 1, 1990;

*Amended Eff. ***** **, *****, November 1, 2014; January 1, 2011; August 1, 2006; June 1, 2000;*

Recodified from 04 NCAC 10A .0701 Eff. June 1, 2018.

11 NCAC 23A .0702 REVIEW OF ADMINISTRATIVE DECISIONS

(a) Administrative decisions include orders, decisions, and awards made in a summary manner, without findings of fact, including decisions on the following:

- (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 to change the interval of payments; and
- (4) applications for lump sum payments of compensation.

~~(b) Administrative decisions made in cases not set for hearing before a Commissioner or Deputy Commissioner or before the Full Commission for review shall be reviewed upon the filing of a Motion for Reconsideration upon a request for hearing on the administrative decision, or upon request for hearing on the ruling on a Motion for Reconsideration. A Motion for Reconsideration shall be filed within 15 days of receipt of the administrative decision and addressed to the Administrative Officer who made the decision. A request for hearing shall be filed within 15 days of the administrative decision or a ruling on a Motion for Reconsideration. with the Commission addressed to the Administrative Officer who made the decision or may be reviewed by requesting a hearing within 15 days of receipt of the decision or receipt of the ruling on a Motion to Reconsider. These issues may also be~~ Notwithstanding the provisions above, issues addressed by an administrative decision may be raised and determined at a subsequent hearing.

~~(b)~~ (c) Motions for Reconsideration shall not stay the effect of the order, decision, or award; provided that Administrative Officer making the decision or a Commissioner may enter an order staying its effect pending the ruling on the Motion for Reconsideration or pending a decision by a Commissioner or Deputy Commissioner following a formal hearing. In determining whether or not to grant a stay, the Commissioner or Administrative Officer shall consider whether granting the stay will frustrate the purposes of the order, decision, or award. Motions to Stay shall not be filed with both the Administrative Officer and a Commissioner.

~~(c)~~ (d) Any request for a hearing to review an administrative decision pursuant to Paragraph (b) shall be ~~made to the Commission and~~ filed with the ~~Commission's Docket Director,~~ Office of the Clerk. The Commission shall designate a Commissioner or Deputy Commissioner to hear the review. The Commissioner or Deputy Commissioner hearing the matter shall consider all issues de novo, and no issue shall be considered moot solely because the order has been fully executed during the pendency of the hearing.

(e) Any request for review by the Full Commission of an administrative decision by a Commissioner or Deputy Commissioner made during the pendency of a case assigned to them pursuant to G.S. 97-84 shall be filed with the Office of the Clerk. If the administrative decision made by the authoring Commissioner or Deputy Commissioner is a final judgment as to one or more issues or parties and the administrative decision contains a certification that there is no just reason for delay, the request for review shall be referred directly to a panel of the Full Commission. If the administrative decision contains no certification, requests for review will be referred to the Chair of the Commission for a determination regarding the right to immediate review, and the parties shall address the grounds upon which immediate review shall be allowed.

~~(d)~~(f) Orders filed by a single Commissioner in matters before the Full Commission for review pursuant to G.S. 97-85, including orders dismissing reviews to the Full Commission or denying the right of immediate request for review to the Full Commission, are administrative orders and are not final determinations of the Commission. As such, an order filed by a single Commissioner is not appealable to the North Carolina Court of Appeals. A one-signature order filed by a single Commissioner may be reviewed by:

- (1) filing a Motion for Reconsideration addressed to the Commissioner who filed the order; or
- (2) requesting a review to a Full Commission panel by requesting a hearing within 15 days of receipt of the order or receipt of the ruling on a Motion for Reconsideration.

~~(e)~~(g) This Rule shall not apply to medical motions filed pursuant to G.S. 97-25; provided, however, that a party may request reconsideration of an administrative ruling on a medical motion, or may request a stay, or may request an evidentiary hearing de novo, all as set forth in G.S. 97-25.

*History Note: Authority G.S. 97-79(g); 97-80(a); 97-85; S.L. 2014-77;
Eff. January 1, 1990;
Amended Eff. **** **, ****; November 1, 2014; January 1, 2011; June 1, 2000;
Recodified from 04 NCAC 10A .0701 Eff. June 1, 2018.*

Regulatory Impact Analysis Hearings

Agency:	North Carolina Industrial Commission
Contact:	Ashley Snyder – (919) 807-2524
Proposed New Rule Title:	Hearings
Rule(s) Proposed for Amendment:	Rule 11 NCAC 23B .0206 (see proposed rule text in Appendix 1)
State Impact:	Yes
Local Impact:	No
Private Impact:	No
Substantial Economic Impact:	No
Statutory Authority:	N.C. Gen. Stat. § 143-296; 143-300

Introduction/Background:

On January 1, 1989, the Commission implemented Rule 04 NCAC 10B .0202 to regulate the course of Commission hearings and the issuance of notice and various writs and subpoenas. Such guidelines ensure timely proceedings, fair participation of all parties and witnesses, and equal access to justice. Rule 04 NCAC 10B .0202 was recodified as Rule 04 NCAC 10B .0206 effective April 17, 2000 and recodified again as Rule 11 NCAC 23B .0206 effective July 1, 2018.

The Commission proposes to amend Rule 11 NCAC 23B .0206, increasing the Commission's flexibility to schedule hearings in a timely fashion.

Proposed Rule Changes and Their Estimated Impact:

The proposed rule additions and changes include the following:

1. Amendment of hearing rules to allow telephone- or video-conferences – 11 NCAC 23B .0206(a)

- a. Description of baseline situation:

In its current form, Rule 11 NCAC 23B .0206(a) simply describes the Commission's power, on its own motion, to order a hearing, rehearing, or pre-trial conference of any tort claim in dispute.

- b. Description of proposed changes:

The proposed amendments to this rule grant the Commission discretion to conduct pre-trial conferences, or any hearing in which the plaintiff is currently incarcerated at the time of the hearing, by telephone- or video-conference. This

new additional language largely mirrors current Rule 11 NCAC 23B .0207(a)(1)–(3) which is presently proposed for repeal.

c. Economic impact:

(1) Costs to the State through the Commission

- The costs to the State through the Commission are *de minimus*. The Commission presently conducts telephone- or video-conferences under Rule 11 NCAC 23B .0207(a)(1)–(3).

(2) Costs to the State as an employer:

- The costs to the State as an employer are *de minimus*. State employees from the North Carolina Department of Justice (NCDOJ) and the Department of Public Safety (DPS) presently facilitate and participate in telephone- or video-conferences under Rule 11 NCAC 23B .0207(a)(1)–(3).

(3) Costs to private sector:

- The costs to the private sector are *de minimus*. While the proposed 11 NCAC 23B .0206(a) is intended to cover all Commission hearings, the majority of telephone- and video-conferences involve inmate torts,¹ as demonstrated by the language in current Rule 11 NCAC 23B .0207(a)(1)–(3). Inmate tort hearings typically involve only a hearing officer, a self-represented inmate, State employees from NCDOJ and the DPS, and a court-reporter under contract with the Commission.

(4) Benefits to the State through the Commission:

- The State will benefit from the unification of all rules governing Commission hearings under one rule, providing clarity to all parties. Additionally, through utilizing telephone- and video-conferences, the State will continue to save the cost of transporting inmates and Commission and NCDOJ personnel to and from various correctional facilities and hearing locations.

(5) Benefits to the public and private sector:

- Through the Commission’s use of telephone- and video-conferences, the public and private sectors will continue to benefit from the timely administration of justice and the ability to forego costly in-person hearings

¹ In FY 2017-2018, the Commission received 678 tort claims: 481 were by inmates (71%) and 197 by non-inmates (29%).

on certain issues. In inmate tort cases, the public and private sectors will benefit from the decreased risk of violence, formerly created by placing multiple state employees in close proximity to sometimes-violent inmates during in-person hearings.²

2. Amendment of hearing rules to allow the Commission to conduct hearings beyond the businesses hours of the Commission – 11 NCAC 23B .0206(a)

a. Description of baseline situation:

In its current form, Rule 11 NCAC 23B .0206 only requires the Commission to hold hearings in a “location deemed convenient to witnesses and the Commission,” without reference to the time of such hearings. By implication, hearings may be understood to occur within Commission businesses hours, 8:00 am to 5:00 pm as set by Rule 11 NCAC 23B .0101.

Despite this implication, Industrial Commission hearings are not bound by regular business hours. The Commission is a special or limited tribunal possessing the powers and incidents of a court,³ and the role of Deputy Commissioners is “indisputably judicial in nature.”⁴ Judges have broad inherent authority to see that courts are run efficiently and properly and that litigants are treated fairly.⁵ Such power is “not derived from any statute but aris[es] from necessity; implied, because it is necessary to the exercise of all other powers. It is indispensable to the proper transaction of business.”⁶ The ability to regulate courtroom hours is among these implied powers.

b. Description of proposed changes:

The proposed amendment to this rule recognizes the Commission’s inherent authority to set the time of its hearings to promote the timely administration of justice and to hear any scheduled hearings to completion unless recessed, continued, or removed by the Commission. The Commission wishes to codify this inherent power, placing all parties before the Commission on notice.

The Commission presently requires extended hours because, in addition to its usual docket of cases, in Fiscal Year 2018-2019, the Commission is currently processing approximately 525 pending inmate tort cases. This requires the

² For an recent account of occasional inmate violence, see, e.g., Ames Alexander, Colin Warren-Hicks & Ron Gallagher, *A day after brutal attack on prison manager, 2 more officers assaulted at NC prison*, THE NEWS & OBSERVER (updated June 20, 2018, 07:01 PM) <https://www.newsobserver.com/news/local/article213451649.html>.

³ Hanks v. Southern Pub. Util. Co., 210 N.C. 312, 186 S.E. 252 (1936).

⁴ Sherwin v. Piner, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 26855 (E.D.N.C. July 21, 2003).

⁵ See generally, Michael Crowell, *Inherent Authority*, NORTH CAROLINA SUPERIOR COURT JUDGES’ BENCHBOOK (UNC School of Government 2015), <https://benchbook.sog.unc.edu/general/inherent-authority>.

⁶ Ex parte McCown, 139 N.C. 95, 103 (1905) (quoting Cooper’s Case, 32 Vt. 257 (1859)).

Commission to hear an above-average number of inmate tort cases each month.⁷ The Commission builds its dockets from the parties' own estimate of required hearing time, scheduling several cases to be heard consecutively on a given day. However, the eccentricities of any given case may necessitate additional time, requiring hearing officers to maintain hearings past business hours, within reasonable limits, so that all scheduled parties may receive a full and fair hearing.

c. Economic impact:

(1) Costs to the State through the Commission:

- Some hearings may run past regular business hours, necessitating overtime compensation for Commission staff. Commission hearings are presided over by Commission officers, none of whom are subject to usual State overtime compensation policies. In lieu of pay, Commission officers working more than 40 hours per week receive "overtime compensation time" at a 1:1 ratio for each additional hour worked. Commission officers may subsequently use these accrued hours in lieu of paid vacation time.

Commissioners receive an annual salary is \$128,215.⁸ Assuming an annual average of 2,000 work hours, the State incurs an average hourly cost of \$64.11 per Commissioner. The Commission Chairman receives an additional \$1,500 annually,⁹ yielding a salary of \$129,715 and an adjusted average hourly cost of \$64.86.

Deputy Commissioners receive an average annual salary of \$100,232.05.¹⁰ Assuming an annual average of 2,000 work hours, the State incurs an average hourly cost of \$50.12 per Deputy Commissioner. The Chief Deputy Commissioner receives an annual salary is \$115,494,¹¹ for an average hourly cost of \$57.75.

Special Deputy Commissioners receive an annual salary of \$62, 915.¹² Assuming an annual average of 2,000 work hours, the State incurs an average hourly cost of \$31.46 per Special Deputy Commissioner.

⁷ In order to reduce the number of pending inmate tort cases, the Commission must not only hear all newly-filed cases, but also hear a number of cases which have been previously continued. The Commission estimates that, at its current pace, it will have significantly reduced its number of pending cases by late 2018 and that, consequently, requiring extended hearing hours will not be a common occurrence by the time an amended Rule .0206 takes effect.

⁸ *Look Up Salaries of State Government Workers*, NEWS & OBSERVER (2018), <https://www.newsobserver.com/news/databases/state-pay/> (hereinafter State Pay Database).

⁹ N.C. Gen. Stat. § 97-78(a) (2017); State Pay Database, *supra* note 8.

¹⁰ Because Deputy Commissioners receive varying salaries based on years of experience, the current Deputy Commissioners' publicly listed salaries have been averaged. N.C. Gen. Stat. § 97-78(b)(b3)(1)–(5) (2017); State Pay Database, *supra* note 8.

¹¹ The Chief Deputy Commissioner's salary is set at 90% of a Commissioner's salary. N.C. Gen. Stat. § 97-78(b)(b2) (2017); State Pay Database, *supra* note 8.

¹² State Pay Database, *supra* note 8.

- Additionally, the Commission annually contracts with private court-reporting companies to provide court-reporters at hearings and to generate hearing transcripts. However, the current terms of these contracts require that court-reporters attend *all* hearings on their assigned days, regardless of the number. Therefore, the Commission does not foresee any cost increases during the current Fiscal Year. And, as the present number of pending inmate tort cases is projected to be substantially reduced by late 2018, the Commission does not anticipate cost increases in future years as a direct result of the proposed amendment.

(2) Costs to the State as an employer:

- Some hearings may run past regular business hours, necessitating overtime compensation for State employees. In matters before the Commission, the State is represented by NCDOJ attorneys. Any overtime costs will vary depending on the salary of the NCDOJ attorney in each case. However, as an example of estimated costs, inmate tort cases are handled by Assistant Attorneys General from the NCDOJ's Tort Claims Section. The current annual salary for these particular Assistant Attorneys General is \$67,545.¹³ Assuming an annual average of 2,000 work hours, the State incurs an average hourly cost of \$33.77 for each Assistant Attorney General. The State's standard overtime rate is either (1) 1½ times the employee's regular hourly rate or (2) a relative compensatory time off on the basis of 1½ times time amount of time worked.¹⁴ Using either overtime compensation method, a Commission hearing which runs overtime would therefore cost the State \$50.66 per hour per Assistant Attorney General, respectively.
- Commission hearings involving inmates require the assistance of the Department of Public Safety (DPS) at various North Carolina correctional facilities. DPS staff members escort inmates to-and-from the designated hearing room at each facility and also operate the necessary telecommunications equipment to connect with off-site hearing officers and State-employed defendants. Although DPS staff are State employees, correctional centers are 24-hour facilities and some staff should be on-hand at all times to facilitate hearings. Additionally, these DPS staff are already required to facilitate hearings, and—as most hearing dockets involve communications with multiple facilities over the course of the day—the Commission believes little to no additional work will be required of any one facility. This proposed amendment should not alter the amount of work, only the timing of the work.

¹³ State Pay Database, *supra* note 8.

¹⁴ *Hours of Work and Overtime Compensation*, STATE HUMAN RESOURCES MANUAL (Salary Administration, Sept. 7, 2017), https://files.nc.gov/ncoshr/documents/files/Hours_of_Work_and_Compensation_Policy.pdf.

(3) Costs to private sector:

- The costs to the private sector are *de minimus*. While the proposed 11 NCAC 23B .0206(a) is intended to cover all Commission hearings, the majority of cases this proposed amendment addresses are inmate tort hearings.¹⁵ These hearings typically involve only a hearing officer, a self-represented inmate, State employees from NCDOJ and the DPS, and a court-reporter under contract with the Commission. The hearing schedules for other types of tort claims are currently running smoothly and the Commission does not anticipate major scheduling changes affecting these cases at this time.
- As explained above, the Commission annually contracts with private court-reporting companies to provide court-reporters at hearings and to generate hearing transcripts. For every extra hour a court reporter must remain at a hearing that continues due to extended hours, the private court-reporting companies will bear an opportunity cost of \$26.50,¹⁶ the median hourly pay for a court reporter.

(4) Benefits to the State through the Commission:

- In Fiscal Year 2018-2019, the State can expect a reduced number of pending inmate tort cases as the Commission is temporarily increasing the overall number of inmate cases heard monthly.¹⁷ This will benefit the State in the long-term by decreasing the Commission's average docket size and associated costs.

(5) Benefits to the public and private sector:

- This proposed amendment will allow the Commission flexibility in setting its docket and promote the timely administration of justice.

3. Amendment of hearing rules to allow the Commission to mandate continuous attendance of all parties at hearings unless released by the Commission – 11 NCAC 23B .0206(b)

a. Description of baseline situation:

In its current form, Rule 11 NCAC 23B .0206 does not explicitly require continuous attendance of all parties at hearings.

As discussed previously, the Industrial Commission possesses all the implied powers of a court.¹⁸ Among these implied powers is the ability to regulate

¹⁵ See *supra* note 1.

¹⁶ Court Reporters, Bureau of Labor Statistics, <https://www.bls.gov/ooh/legal/court-reporters.htm#tab-1>.

¹⁷ For further discussion, see *supra* note 7. See also *supra* section 2(b).

¹⁸ See discussion of courts' implied powers, *supra* at section 2(a).

courtroom behavior, at the discretion of each individual court.¹⁹ The Commission is an independent tribunal, but a review of other North Carolina trial courts is instructive. The Commission hears cases in Raleigh and other cities throughout North Carolina, and the local court rules in these cities take different approaches. Some court districts—including the Tenth Judicial District (Wake County) where the majority of Commission hearings occur—mandate the courtroom presence of parties.²⁰ Other districts are less specific, granting judges general power to control their courtrooms.²¹ Others, without expressly requiring attendance, impose penalties for a party’s failure to appear, including but not limited to dismissal of a case for a plaintiff’s absence or a default judgment for plaintiff for a defendant’s absence.²²

b. Description of proposed changes:

The proposed amendment to this rule recognizes the Commission’s inherent authority to require attorneys and unrepresented parties to remain in the hearing room throughout the hearing, until released by the Commission. This rule would mirror the practice of the Tenth Judicial District. The Commission has recently dealt with parties leaving a hearing without permission and now wishes to codify its inherent power, placing parties in future cases on notice.

Please note this section of the analysis overlaps with the previous section. Sometimes, the issue of continued attendance at hearings arises when the hearing continues past 5:00 PM.

c. Economic impact:

(1) Costs to the State through the Commission:

¹⁹ The North Carolina Supreme Court has promulgated *General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure* which require “courtroom decorum,” without mandating courtroom attendance. 276 N.C. 735 (1970), <https://www.nccourts.gov/assets/documents/pdf-volumes/ncsc276.pdf?6uUEcDdzWCjtxreC.1oHIUBAU0XrmKN>. In practice, individual lower courts often adopt supplementary rules covering everything from verbal forms of address to court attire.

²⁰ See, e.g., *R. 17.4 Courtroom Presence*, LOCAL RULES FOR CIVIL SUPERIOR COURT, TENTH JUDICIAL DISTRICT, NORTH CAROLINA (last revised Nov. 13, 2015), <https://www.nccourts.gov/assets/documents/local-rules-forms/112.pdf?XAxLgDJvtvgbp9SN0U8SfgoejNvF4gmF> (“Counsel for each party and the presiding judge shall remain in the courtroom throughout the course of a trial”).

²¹ The Commission hears cases in Wilmington which lies within the Fifth District. See, e.g., *Rule 16.1 Delegation of General Authority*, LOCAL RULES FOR THE DISTRICT COURTS OF THE FIFTH JUDICIAL DISTRICT (adopted Nov. 10, 2000), <https://www.nccourts.gov/assets/documents/local-rules-forms/38.pdf?keIbWIdem7sILU0tuyzMNZG5IUWwKjwi> (“all judges . . . may open and operate such courtroom sessions as may be appropriate to dispose of all pending matters in the most expeditious manner.”) (emphasis added).

²² The Commission hears cases in Asheville which lies within the Twenty-Eighth District. See, e.g., *Rule 3: Calendar Calls, CASE MANAGEMENT PLAN AND LOCAL RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURT DIVISION, 28TH JUDICIAL DISTRICT* (NOV. 14, 2005), <https://www.nccourts.gov/assets/documents/local-rules-forms/842.pdf?jXzz0kx.Z32ctTIGCcXptlnRATat4c4> (“Attorneys or pro se litigants who do not appear or otherwise communicate as required by these rules will have their case subject to being dismissed by the Court.”).

- Some hearings may run past regular business hours, necessitating overtime compensation for Commission staff. Commission hearings are presided over by Commission officers, none of whom are subject to usual State overtime compensation policies. In lieu of pay, Commission officers working more than 40 hours per week receive “overtime compensation time” at a 1:1 ratio for each additional hour worked. Commission officers may subsequently use these accrued hours in lieu of paid vacation time.

Commissioners receive an annual salary is \$128,215.²³ Assuming an annual average of 2,000 work hours, the State incurs an average hourly cost of \$64.11 per Commissioner. The Commission Chairman receives an additional \$1,500 annually,²⁴ yielding a salary of \$129,715 and an adjusted average hourly cost of \$64.86.

Deputy Commissioners receive an average annual salary of \$100,232.05.²⁵ Assuming an annual average of 2,000 work hours, the State incurs an average hourly cost of \$50.12 per Deputy Commissioner. The Chief Deputy Commissioner receives an annual salary is \$115,494,²⁶ for an average hourly cost of \$57.75.

Special Deputy Commissioners receive an annual salary of \$62, 915.²⁷ Assuming an annual average of 2,000 work hours, the State incurs an average hourly cost of \$31.46 per Special Deputy Commissioner.

- Additionally, the Commission annually contracts with private court-reporting companies to provide court-reporters at hearings and to generate hearing transcripts. However, the current terms of these contracts require that court-reporters attend *all* hearings on their assigned days, regardless of the number. Therefore, the Commission does not foresee any cost increases during the current Fiscal Year. And, as the present number of pending inmate cases is projected to be substantially reduced by late 2018, the Commission does not anticipate cost increases in future years as a direct result of the proposed amendment.

(2) Costs to the State as an employer:

- Some hearings may run past regular business hours, necessitating overtime compensation for State employees. In matters before the Commission, the State is represented by NCDOJ attorneys. Any overtime costs will vary

²³ Pay Database, *supra* note 8.

²⁴ N.C. Gen. Stat. § 97-78(a) (2017); Pay Database, *supra* note 8.

²⁵ Because Deputy Commissioners received varying salaries based on years of experience, the current Deputy Commissioners’ official listed salaries have been averaged. N.C. Gen. Stat. § 97-78(b)(b3)(1)–(5) (2017); Pay Database, *supra* note 8.

²⁶ The Chief Deputy Commissioner’s salary is set at 90% of a full Commissioner’s salary. N.C. Gen. Stat. § 97-78(b)(b2) (2017); Pay Database, *supra* note 8.

²⁷ Pay Database, *supra* note 8.

depending on the salary of the NCDOJ attorney in each case. However, as an example of estimated costs, inmate tort cases are handled by Assistant Attorneys General from the NCDOJ's Tort Claims Section. The current annual salary for these particular Assistant Attorneys General is \$67,545.²⁸ Assuming an annual average of 2,000 work hours, the State incurs an average hourly cost of \$33.77 for each Assistant Attorney General. The State's standard overtime rate is either (1) 1½ times the employee's regular hourly rate or (2) a relative compensatory time off on the basis of 1½ times time amount of time worked.²⁹ Using either overtime compensation method, a Commission hearing which runs overtime would therefore cost the State \$50.66 per hour per Assistant Attorney General, respectively.

- Commission hearings involving inmates require the assistance of the Department of Public Safety (DPS) at various North Carolina correctional facilities. DPS staff members escort inmates to-and-from the designated hearing room at each facility and also operate the necessary telecommunications equipment to connect with off-site hearing officers and State-employed defendants. Although DPS staff are State employees, correctional centers are 24-hour facilities and some staff should be on-hand at all times to facilitate hearings. Additionally, these DPS staff are already required to facilitate hearings, and—as most hearing dockets involve communications with multiple facilities over the course of the day—the Commission believes little to no additional work will be required of any one facility. This proposed amendment should not alter the amount of work, only the timing of the work.

(3) Costs to private sector:

- The costs to the private sector are *de minimus*. While the proposed 11 NCAC 23B .0206(a) is intended to cover all Commission hearings, the majority of cases this proposed amendment addresses are inmate tort hearings.³⁰ These hearings typically involve only a hearing officer, a self-represented inmate, State employees from NCDOJ and the DPS, and a court-reporter under contract with the Commission. The Commission has not experienced significant difficulties with parties in other types of cases and does not anticipate this proposed amendment will affect private parties at this time.

(4) Benefits to the State through the Commission:

- This proposed amendment is designed to promote the timely administration of justice and to minimize the costs of needlessly-

²⁸ Pay Database, *supra* note 8.

²⁹ *Hours of Work and Overtime Compensation*, *supra* note 14.

³⁰ *See supra* note 1.

protracted or postponed cases. In Fiscal Year 2018-2019, the Commission is currently processing approximately 525 pending inmate tort cases, further increasing its docket size. The ability to mandate the attendance of parties is paramount to maintaining such a fast-paced schedule.

(5) Benefits to the public and private sector:

- Codifying a brightline rule allows the Commission to discipline violating parties. This proposed amendment will promote the timely administration of justice and allow the Commission to hold parties accountable for their actions.

4. Amendment of hearing rules to allow the Commission discretion in ordering a telephone- or video-conference in cases involving property damage of less than five hundred dollars (\$500.00) – 11 NCAC 23B .0206(d)

a. Description of baseline situation:

In its current form, Rule 11 NCAC 23B .0206 *requires* the Commission to order a *telephonic* hearing in cases involving property damage of less than five hundred dollars (\$500.00).

b. Description of proposed changes:

The Commission is proposing two amendments to the current rule. The first proposed amendment adds discretionary language—changing “shall” to “may”—to grant the Commission flexibility in ordering a hearing in cases involving property damage of less than five hundred dollars (\$500.00). The second proposed amendment adds the option of a video-conference hearing to reflect technological advances.

c. Economic impact:

(1) Costs to the State through the Commission

- The costs to the State through the Commission are *de minimus*. The first amendment grants the Commission flexibility in ordering hearings in certain cases, rather than always requiring a hearing. It may decrease costs, but cannot increase them. The second amendment merely acknowledges technological advances.

(2) Costs to the State as an employer:

- The costs to the State as an employer are *de minimus*. The same State employees facilitate, oversee, and participate in this class of hearings

regardless of their frequency. Likewise, these employees will use the existing telephone- or video-conference technology.

(3) Costs to private sector:

- The costs to the private sector are *de minimus*. While the proposed 11 NCAC 23B .0206(a) is intended to cover all Commission hearings, the majority of cases this proposed amendment addresses are inmate tort hearings.³¹ Inmate tort hearings typically involve only a hearing officer, a self-represented inmate, State employees from NCDOJ and the DPS, and a court-reporter under contract with the Commission.

(4) Benefits to the State through the Commission:

- The State will benefit through the Commission due to increased flexibility, potentially saving the State the costs of unordered hearings. As previously stated,³² the State would ordinarily incur the following average hourly costs:
 - \$64.86 for the Commission Chairman,
 - \$64.11 per Commissioner,
 - \$57.75 for the Chief Deputy Commissioner,
 - \$50.12 per Deputy Commissioner, and
 - \$31.46 per Special Deputy Commissioner.

(5) Benefits to the public and private sector:

- Through the Commission's use of telephone- and video-conferences, the public and private sectors will continue to benefit from the timely administration of justice and the ability to forego costly in-person hearings on certain issues. Parties will benefit from decreased transportation costs to-and-from the hearing site. Video-conference technology confers several added benefits over older telephonic conferences, including an enhanced simulation of an actual courtroom and an improved ability to better judge the credibility of parties and witnesses from visual cues. In inmate tort cases, the public and private sectors will benefit from the decreased risk of violence, formerly created by placing multiple state employees in close proximity to sometimes-violent inmates during in-person hearings.³³

5. Amendment of hearing rules to allow the Commission discretion in cancelling or delaying hearings due to inclement weather or natural disaster – 11 NCAC 23B .0206(e)

a. Description of baseline situation:

³¹ See *supra* note 1.

³² See full discussion of commission staff salaries, *supra* at 2(c)(1) and 3(c)(1).

³³ For a recent account of occasional inmate violence, see, e.g., Alexander, Warren-Hicks & Gallagher, *supra* note 2.

In its current form, Rule 11 NCAC 23B .0206 requires the Commission to cancel or delay hearings when proceedings before the General Courts of Justice are cancelled or delayed due to inclement weather or natural disaster.

b. Description of proposed changes:

The proposed amendments to this rule insert discretionary language—adding “Unless otherwise ordered by the Commission”—to allow the Commission flexibility in unusual weather conditions. The Commission hears cases all across North Carolina and regional conditions often vary. However, mirroring the General Courts of Justice in the county in which a Commission hearing occurs remains the default rule.

c. Economic impact:

(1) Costs to the State through the Commission:

- The costs to the State through the Commission are *de minimus*. While the proposed amendment would grant the Commission flexibility in its emergency closing practices, any business before the Commission would continue upon reopening.

(2) Costs to the State as an employer:

- The costs to the State as an employer are *de minimus*. While the proposed amendment would grant the Commission flexibility in its emergency closing practices, any business before the Commission would continue upon reopening.

(3) Costs to private sector:

- The costs to the private sector are *de minimus*. Private parties to hearings before the Commission would be subject to the same inclement weather or natural disasters under either the old or new policy. As for inmate tort hearings, these typically involve only a hearing officer, a self-represented inmate, State employees from NCDOJ and the DPS, and a court-reporter under contract with the Commission.

(4) Benefits to the State through the Commission:

- The Commission will benefit from additional flexibility in its operating procedures, allowing it to deviate from the practice of local General Courts of Justice during inclement weather or natural disaster, as needed.

(5) Benefits to the public and private sector:

- The public and private sector will benefit from the Commission's additional flexibility. Hearings and other public business could proceed, avoiding undue delay, if the Commission judges that inclement weather or natural disaster will not impact its operations. Conversely, the Commission could unilaterally suspend its operations if adverse weather in some region(s) of North Carolina render travel to an unaffected hearing site unsafe, e.g. regional winter snowstorms barring transit to Raleigh.

Summary of Aggregate Impact:

Based on the monetized costs and benefits cited above, the Commission estimates the proposed rule amendments will amount to minor short-term increases in overtime costs to Commission and state employees, due to the number of pending inmate tort cases. However, as these cases are scheduled to be heard by late 2018, these costs will no longer exist by the time the proposed amendments take effect. The substantive effect of these the proposed amendments will be to codify some of the Commission's inherent powers and increase operational flexibility in future cases.

APPENDIX I

Rule 11 NCAC 23B .0206 is proposed for amendment as follows:

11 NCAC 23B .0206 HEARINGS

(a) The Commission may, on its own motion, order a hearing, rehearing, or pre-trial conference of any tort claim in dispute. The Commission shall set the date, time, and location of the hearing, and provide notice of the hearing to the parties. Within the Commission's discretion, any pre-trial conference, as well as hearings of claims in which the plaintiff is incarcerated at the time of the hearing, may be conducted via videoconference or telephone conference. The date and time of the hearing shall not be limited by the business hours of the Commission. Where a party has not notified the Commission of the attorney representing the party prior to the mailing of calendars for hearing, notice to that party constitutes notice to the party's attorney. Any scheduled hearings shall proceed to completion unless recessed, continued, or removed by Order of the Commission.

(b) When an attorney is notified to appear for a pre-trial conference, motion hearing, hearing, or any other appearance the attorney shall, consistent with ethical requirements, appear or have a partner, associate, or other attorney appear. Counsel for each party or any party without legal representation shall remain in the hearing room throughout the course of the hearing, unless released by the Commission.

(c) A motion for a continuance shall be allowed only by the Commissioner or Deputy Commissioner before whom the case is set in the interests of justice or to promote judicial economy.

(d) In cases involving property damage of less than five hundred dollars (\$500.00), the Commission may, upon its own motion or upon the motion of either party, order a videoconference or telephone conference hearing on the matter.

(e) Unless otherwise ordered by the Commission, in the event of inclement weather or natural disaster, hearings set by the Commission shall be cancelled or delayed when the proceedings before the General Courts of Justice in that county are cancelled or delayed.

(f) Unless otherwise ordered or waived by the Commission, applications for issuance of a writ of *habeas corpus ad testificandum* requesting the appearance of witnesses incarcerated by the North Carolina Division of Adult Corrections, shall be filed in accordance with the rules of this Subchapter, with a copy to the opposing party or counsel, for review by the Commission in accordance with G.S. 143-296.

~~(b) The Commission shall set a contested case for hearing in a location deemed convenient to witnesses and the Commission, and conducive to an early and just resolution of disputed issues.~~

~~(e) The Commission may issue writs of habeas corpus ad testificandum in cases arising under the Tort Claims Act. Requests for issuance of a writ of habeas corpus ad testificandum shall be sent to the Docket Section of the Commission if the case has not been set on a calendar for hearing. If the case has been set on a hearing calendar, the request shall be sent to the Commissioner or Deputy Commissioner before whom the case is set.~~

~~(d) The Commission shall give notice of a hearing in every case. A motion for a continuance shall be allowed only by the Commissioner or Deputy Commissioner before whom the case is set in the interests of justice or to promote~~

~~judicial economy. Where a party has not notified the Commission of the attorney representing the party prior to the mailing of calendars for hearing, notice to that party constitutes notice to the party's attorney.~~

~~(e) In cases involving property damage of less than five hundred dollars (\$500.00), the Commission shall, upon its own motion or upon the motion of either party, order a telephonic hearing on the matter.~~

~~(f) All subpoenas shall be issued in accordance with Rule 45 of the North Carolina Rules of Civil Procedure, with the exception that production of public records or hospital records as provided in Rule 45(e)(2), shall be served upon the Commissioner or Deputy Commissioner before whom the case is calendared, or upon the Docket Section of the Commission should the case not be calendared.~~

~~(g) In the event of inclement weather or natural disaster, hearings set by the Commission shall be cancelled or delayed when the proceedings before the General Court of Justice in that county are cancelled or delayed.~~

History Note: Authority G.S. 143-296; 143-300;

Eff. January 1, 1989;

Recodified from 04 NCAC 10B .0202 Eff. April 17, 2000;

*Amended Eff. **** **, ****; July 1, 2014; January 1, 2011; May 1, 2000.*