

The Times They Are a-Changin' – Again . . .

The North Carolina Industrial Commission (the “IC” or “Commission”) is vested as a court of exclusive and original jurisdiction by the General Assembly to adjudicate and administer the North Carolina Workers’ Compensation Act (the “Act”) and the approximately 65,000 workers’ compensation claims filed annually under the Act. The Commission is also a court of original jurisdiction for over 500 tort claims against state agencies annually under the North Carolina Torts Claims Act, and provides an adjudicatory and administrative process for several other types of claims in accordance with various statutory mandates. Nevertheless, workers’ compensation claims comprise the vast majority of the Commission’s caseload.

The Commission’s mediation program has for many years been one of the most successful programs of its kind throughout the country. The implementation of mediation procedures in workers’ compensation claims in the 1990’s eliminated persistent hearing backlogs, empowered the parties in pending cases to take an active role in the resolution of their disputes, minimized the need for hearings and appeals, and enabled the Commission to devote its adjudicatory resources to those cases not conducive to settlement. All of this was accomplished despite frequent procedural changes, and this past year has been no different. There have once again been several changes to the program’s rules and procedures, including a compression of the timeline for completing mediation, the assessment of a new fee, and other changes in the program’s rules and procedures. This article will briefly summarize these recent changes.

New Timeline for Completion of Mandatory Mediated Settlement Conferences

The Industrial Commission has implemented changes designed to reduce the time required to render decisions in contested cases. Specifically, for all cases in which requests for hearing are filed on or after July 1, 2014 the Commission has reduced the mediation timeframe from 6 months to 5 months. 04 NCAC 10G .0102 (a) provides that “[t]he scheduled date of the mediation conference shall be within 120 days of the mediation order.” 04 NCAC 10G .0103 (c) further provides that “the Commission may extend the deadline for completion of the conference.” Cases with hearing requests prior to July 1, 2014 have sometimes not been coded for hearing for up to six (6) months after the mediation order when the parties or a mediator have requested an extension of the deadline for the completion of the mediation conference. However, in order to expedite the process all cases with pending requests for hearing filed on or after July 1, 2014 will be coded for hearing no later than five (5) months after the mediation order regardless of whether or not the mediation conference has been scheduled and completed.

Revisions to ICMSC Rules

In January of 2014, the Commission submitted 35 proposed permanent rules to the N.C. Office of Administrative Hearings for appropriate publication. The OAH Rules Review Commission approved all 35 rules during its March and April meetings, and most of the rules became effective on July 1, 2014. However, eight of the rules received ten or more letters of objection and were subjected to legislative review.

On July 22, 2014, Senate Bill 794(Session Law 2014-77) was signed into law by Governor Pat McCrory. Senate Bill 794 disapproved the eight rules mentioned above, as well as two additional rules promulgated by the Commission in 2012 and 2014. This law provided guidance on how to revise the ten disapproved rules and required that the new rules be re-adopted through the rulemaking process in time for potential legislative review during the General Assembly's 2015 Regular Session. Senate Bill 794 did not affect the rules that became effective on July 1, 2014. On October 16, 2014, the Rules Review Commission approved the ten rules adopted by the Commission pursuant to Senate Bill 794. No letters of objection were received and, therefore, these ten rules became effective as of November 1, 2014. In addition, all new workers' compensation rules and vocational rehabilitation rules adopted and approved in 2012 and 2014 that have been held in abeyance also became effective as of November 1, 2014.

Report of Mediator Processing Fee Effective on November 1, 2014

The Commission's operations are funded in large part by the assessment of fees at various points in the IC process. As of November 1, 2014 the fee structure was modified and now includes a \$200 fee assessed in workers' compensation cases when the Commission processes mediator reports. The applicable rules provides as follows:

04 NCAC 10E .0203 FEES SET BY THE COMMISSION(Effective until July 1, 2015) In workers' compensation cases, the Commission sets the following fees:. . .

(3) two hundred dollars (\$200.00) for the processing of a I.C. Form MSC5, *Report of Mediator*, to be paid 50% by the employee and 50% by the employer(s) or the employer's carrier(s). The employer(s) or the employer's carrier(s) shall pay such fee in full upon receipt of an invoice from the Commission and, unless the parties agree otherwise, shall be reimbursed for the employee's share of such fees when the case is concluded from any compensation that may be determined to be due to the employee. The employer(s) or the employer's carrier(s) may withhold funds from any award for this purpose; . . .

Effective July 1, 2015 this rule will be renumbered as 04 NCAC 10E .0203(a) (2) but will otherwise remain as currently set forth above. Mediators must file reports in all cases regardless of the result, including in those cases which are excused from any further mediation after a mediator has been appointed, or which are withdrawn from the hearing docket, dismissed, settled or set for hearing prior to the mediation conference. Likewise, the mediator's reporting obligation is no different in those cases where a mediation conference is voluntarily convened and is not subject to a mediation order from the Commission. 04 NCAC 10G .0106(g) specifically provides that "[i]n all cases within the Commission's jurisdiction, whether mediated voluntarily or pursuant to an order of the Commission, the mediator shall report the results of the mediated settlement conference . . . ". Mediators who fail to comply with this rule will be prohibited from mediating any cases within the Commission's jurisdiction.

ICMSC Rule Revisions That Became Effective on July 1, 2014

Most of the mediation rule revisions that became effective on July 1, 2014 involve formatting, numbering and other relatively minor revisions. However, the following changes should be noted.

04 NCAC 10G .0101 – ORDER FOR MEDIATED SETTLEMENT CONFERENCE -A rarely assessed fee for untimely motions to dispense with mediation was deleted.

04 NCAC 10G .0102 - SELECTION OF MEDIATOR - Another rarely assessed fee paid to the Commission for the substitution of mediator requests was deleted. The deletion of this fee does not in any way affect the parties' obligation to pay the administrative fees owed to mediators appointed prior to any substitution. References in the rule to "a list of mediators eligible for appointment" was also deleted, but this doesn't affect our standard procedures since only those DRC certified mediators who are willing to serve in accordance with the Commission's appointed rates and requirements and who have expressed an interest in serving as a mediator in the venue of a particular case will be appointed as a mediator in such cases.

04 NCAC 10G .0103 - THE MEDIATED SETTLEMENT CONFERENCE – The requirement of a written order to extend the time for the completion of mediation has been deleted and this rule now provides that "the Commission may extend the deadline for completion of the conference upon the Commission's own motion, a motion or stipulation of the parties or the suggestion of the mediator." The provision herein that a "mediated settlement conference is not cause for delay of other proceedings in the case" was not changed but is notable nonetheless in light of the new five month timeline for the completion of mediation referred to above.

04 NCAC 10G .0104 DUTIES OF PARTIES, REPRESENTATIVES, AND ATTORNEYS – In recognition of the fact that G.S. 143-295 provides the Attorney General with settlement authority on behalf of governmental entities and agencies for state tort claims, the attendance rule related to tort claims specifically now provides that "an employee or agent of the named governmental entity or agency is not required to attend the mediated settlement conference; the Attorney General shall attempt to make an employee or agent of the named governmental entity or agency in a state tort claim available via telecommunication, and mediation shall not be delayed due to the absence or unavailability of the employee or agent of the named governmental entity or agency." A related rule in the Tort Claims Rules - 04 NCAC 10B .0205(a) – has been revised to clarify that the mediation of IC tort claims is now mandatory, and specifically provides that the "parties to tort claims, by agreement or Order of the Commission, shall participate in mediation."

04 NCAC 10G .0104A FOREIGN LANGUAGE INTERPRETERS – This rule had previously required that interpreter fees at mediation be paid by the defendants, but with one exception now provides that the party requesting the assistance of a qualified foreign language interpreter shall bear the costs. The one exception occurs when the certified mediator, in his or her discretion, notifies the parties of the need for a qualified foreign language interpreter, in which case the "fee of the foreign language interpreter and any postponement fees necessitated by the need for a qualified foreign language interpreter shall be shared by the parties unless the parties agree otherwise."

04 NCAC 10G .0105 SANCTIONS – This rule now clarifies that sanctions, including holding a party or person in contempt, may only be assessed for the unauthorized cancellation or failure to appear at a mediation conference.

04 NCAC 10G .0107 COMPENSATION OF THE MEDIATOR – The settlement of a case is now good cause to cancel a mediation conference without the approval of the mediator or the Dispute Resolution Coordinator. However, the parties must still notify the mediator of any cancellation due to settlement and, as with any postponement or cancellation of a mediation conference *without good cause*, the “mediator may charge a cancellation fee of one hundred fifty dollars (\$150.00) if notified of the cancellation within 14 days of the scheduled date, or three hundred dollars (\$300.00) if notified within seven days of the scheduled date.”

04 NCAC 10G .0108 MEDIATOR CERTIFICATION AND DECERTIFICATION – Since the IC mediation program’s enabling legislation doesn’t specifically authorize the imposition of a CLE requirement that requirement has now been deleted and mediators are no longer required to complete CLE courses on workers’ compensation in order to be appointed to IC cases. Of course, the Commission continues to encourage mediators to complete continuing education courses in workers’ compensation, state tort law, mediation and other related fields.

04 NCAC 10G .0110 WAIVER OF RULES – The Commission’s authority to waive or vary the requirements or provisions of any of the rules in the interests of justice or to promote judicial economy have been limited. The Commission may now do so only “upon written application of a party or upon its own initiative only if the employee is not represented by counsel. 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.”

CONCLUSION

As with the Superior Court and District Court mediation programs, some mediators may wonder whether it’s really necessary to have such detailed rules in the IC program. However, the detailed nature of these rules does provide helpful guidance to participants in the mediation process, and familiarity with these rules will be a great benefit to mediators, attorneys and parties. It should also be noted that among the many plaudits that the IC program has received over the years the President of the National Association of Workers’ Compensation Judiciary recently commented in the NAWCJ October 2014 Lex and Verum newsletter that North Carolina is “remarkable for the exquisite detail with which it defines the mediation process.” Regardless of how detailed the IC mediation rules and procedures may be, if you have any questions please contact me at your convenience and I would be happy to assist you in any way that I can.