STATE OF NORTH CAROLINA

BEFORE THE NORTH CAROLINA INDUSTRIAL COMMISSION

FEBRUARY 24, 2014

HEARING BEFORE THE FULL COMMISSION

ON

PROPOSED RULE CHANGES

GRAHAM ERLACHER & ASSOCIATES
3504 VEST MILL ROAD - SUITE 22
WINSTON-SALEM, NORTH CAROLINA 27103
336/768-1152

A P P E A R A N C E S

COMMISSIONERS:

Andrew T. Heath, Chairman and Chair of Panel

Pamela T. Young

Bernadine S. Ballance

Danny Lee McDonald

Linda Cheatham

Tammy R. Nance

I N D E X

E X H I B I T S

	IDENTIFIED	ADMITTED
(Henderson) Exhibit Number 1	2	2

P R O C E E D I N G S

CHAIRMAN HEATH: Good morning. Thank you everybody for being here today. My name is Andrew Heath. I'm the Chairman of the North Carolina Industrial Commission. With me today are Executive Secretary Meredith Henderson, who is serving as rulemaking coordinator, and Commissioners Cheatham, McDonald, Nance, Young and Ballance. The purpose of this hearing is to receive comments from the public regarding rules proposed for permanent rulemaking as directed by the Legislature and Senate Bill 174, Session Law 2013-294. We've already received some written comments from the public and the record will be open to receive additional written comments through the close of business on February 26, 2014. At this time we would like to thank a few members of the public and the Bar who have given recommendations or input regarding these rules. In particular, we would like to thank members of the Informal Advisory Council, Charlton Allen, Larry Baker, Julia Dixon, Richard Harper, Valerie Johnson and Justin Robertson. The Commission would also like to thank Executive Secretary Meredith Henderson who has been indispensible to the Commission throughout the rulemaking process. So we very much appreciate

everyone's efforts in this matter. Following the publication of the hearing notice and proposed rules, three members of the public notified the Commission of their interest and intent to speak at this public hearing. Anyone who wishes to speak at this hearing must sign up with Meredith Henderson so that we have the correct spelling of your name and can call you in order to speak. The first speaker today will be Meredith Henderson, Executive Secretary and Rulemaking Coordinator followed by the members of the public in the order that they signed up. Please approach the podium. Thank you.

MS. HENDERSON: Okay. Good morning. I'm Meredith Henderson. I'm the rulemaking coordinator for this batch of rules. I have already given the package of rules – it's thirty-six rules that are proposed - to the court reporter marked as Exhibit 1.

(Exhibit Number 1 is identified.)

The Commission has proposed fifteen rules for adoption and twenty-one rules for amendment. I'll spare everybody the reading of the numbers. They're – they're submitted into the record.

(Exhibit Number 1 is admitted.)

The legislation requiring and authorizing the Commission to make these rules, as the Chair said, is

Session Law 2013-294 or Senate Bill 174. The same legislation also directed the Commission to do this permanent rulemaking using the time frames and procedures for temporary rulemaking under North Carolina General Statute 150B-21.1(a3). The respective dates for this rulemaking have been as follows: I have proposed rules were filed with the Office of Administrative Hearings on January 24th, 2014. They were updated on the Industrial Commission's website on January 27th, 2014. They were e-mailed to the Industrial Commission's rules Listserv – or interested person's Listserv on January 27th as well. And they were placed on the Office of Administrative Hearing's website on January 29th, 2014. That's all I have and we can start with the public comments.

CHAIRMAN HEATH: Do any members of the Commission have any questions for Ms. Henderson?

MS. HENDERSON: Questions?

CHAIRMAN HEATH: There are no questions. Thank you.

MS. HENDERSON: Excellent.

CHAIRMAN HEATH: Okay. The first speaker who has signed up is Julia Dixon on behalf of the North Carolina Association of Defense Attorneys.

MS. DIXON: Good morning. Appreciate the opportunity to be here before the Commission to provide feedback and comments on the proposed rules. My name is Julia Dixon with Young Moore and Henderson. I'm here on behalf of the NCADA as well as members of the business community including the North Carolina Chamber, the North Carolina Home Builders Association and the North Carolina Retail Merchants. We appreciate the opportunity to provide feedback on all of these rules. We certainly recognize and want to thank the Commission as well as the Chairman for his leadership regarding cost and fees rules. We recognize that many of the cost and fees rules that were proposed by a joint group of the plaintiff's and defense bar were not revenue-neutral and, therefore, were not sustainable at this time. However, we remain committed to trying to find a different source of funding for the Industrial Commission so that the cost and fees that are currently assessed against defendants, in particular, can be alleviated altogether. We certainly appreciate and recognize the efforts by the Commission to try to share those costs and fees, but due to some of the language in the rules we still believe that the defendants will bear the bulk of the brunt. And so, again, thank you so much

for the work that you've done to try to lessen the impact on the employer community. We continue to encourage you to try to alleviate those costs and fees in the future if we can find another source of funding for the Industrial Commission through the General Assembly. As it relates specifically to some rules, I sort of have several categories of rules. I'm going to go in order by rule number, but I do want to just set out for you my agenda. We will talk about a few rules that we believe are not consistent with the instructions of Senate 174. We will also talk about a few rules that we believe are not in – not consistent with the Administrative Procedures Act, and then there are a few minor public policy rules as well. And, again, I'm going to go rule-by-rule based on number so – but I did want to give you a feel for what we intend to talk about. As it relates to Rule .0102, the official forms, we appreciate that the General Assembly through Senate 174 instructed the Industrial Commission to revise the subpoena. We appreciate the efforts that have been made to do so. Some of the guidance in 174 was to prevent a subpoena duces tecum from being served less than thirty days prior to a hearing. And the reason for that was due to some discovery abuses post-hearing where that subpoena was

being used as a fishing expedition for documents from carriers. We believe that the subpoena does need to be revised to reflect the various forms of service which are allowed under the Rules of Civil Procedure and we appreciate the efforts to include the via Certified Mail option as well as private process server. However, the rule - or the subpoena form then goes on to ostensibly capture all the language for a typical civil court subpoena which we believe is too broad, and I won't go into a lot of detail, but we believe the instructions under 97-80 through Senate Bill 174 were to allow for request for production of documents but to still keep discovery as simple a summary as may be which the statute requires and we've got some concerns about that form allowing discovery to become too broad. We will also submit some written comments, and so some of the comments that I made today will not be fully reflective of our written comments, so I just want to point that out. So we may have some additional comments about Rule – Rule .0102. As it relates to – oh, and one other note regarding the subpoena, the draft subpoena in the rule does not specifically note that a subpoena duces tecum should not be served thirty days prior to hearing, and so we feel like that should be added to the subpoena. As it

relates to Rule .0601, subsection (a) of this rule is duplicative of 97-18(j). And, again, we would assert that the APA does not allow for a rule to specifically regurgitate the same language of the statute and, therefore, that language is improper. As it relates to Rule .0603, the Senate Bill 174, the intent of some of the language to move "plaintiff" and "defendant" to "moving party" and "non-moving party" was to ensure that all parties have to respond to a Form 33 regardless of who filed the 33. And so the inclusion of the language "employee" in that rule – "from the employee" which is on line four seems to suggest in some sense that an employee would not have to file a Form 33. The goal ultimately is for every party to file a 33R in response to a 33 regardless of who the moving and non-moving party is. So we would ask that that minor change be made to reflect that intent. As it relates to subsections (b)(5) and (6), it indicates that witnesses need to be listed on the form. We believe that may be in contravention of some case law and that it might not be appropriate for that to be in the rule or on the form. We certainly recognize that the Form 33R has not been published but would point that out to the Commission. As it relates to Rule .0605, the rule seems to suggest that interrogatories

should relate to matters that are, quote, "relevant to an issue in dispute or that the requesting party reasonably believes may later be disputed." This is on line thirty-one. We believe that the existing standard, which is that the information must be reasonably calculated to leave the discovery of admissible evidence as appropriate. And so we're concerned about the difference in that language. Also in that same rule it notes that the Commission – this is on page two, line ten through eleven. It notes the Commission shall approve the motion in the interest of justice or to promote judicial economy. This is a motion on discovery. We believe that that potentially could open the door to a request for admissions in a workers' compensation claim which we don't believe is appropriate because, as 97-80 indicates, discovery should be a summary and simple as it may be. As it relates to subsection (6) in that rule, again, under Senate Bill 174 the notion that a subpoena duces tecum can only be served thirty days prior to the date of hearing without permission of the Commission, we feel like the language on page two, line six that says "up to the time a matter is calendared for hearing" is inconsistent with – with Senate 174 and the language in 97-80. We also believe that because of the current

calendaring system with the Commission that the language “up to the time the matter is calendared for hearing” may squelch the opportunity for discovery which we would be opposed to. As it relates to Rule 609A, we would note that there’s no statutory authority for subsection C which would require defendants to retain counsel when a medical motion is filed. We certainly would encourage our clients to hire an attorney when that happens but don’t feel that they should be forced to do so and are concerned about due process. With regard to the medical motions rule as it was created and the current procedure, we recognize that 97-25 and the changes in Senate 174 were verbose. I’ll take the blame for that. We did try in earnest to create a medical motions process that would not burden the Commission. That is why there is a distinguishing language between “informal pretrial conference” as compared to “informal telephonic hearing.” Our goal was to create a gatekeeper who could look at every motion and determine quickly, “Is this truly an emergency? Is this merely administrative?” And, if so, hear the emergency motion. If it’s administrative, kick it to the appropriate party to hear it. And then if expedited, to take two to three minutes to determine a

schedule; when will the informal telephonic hearing be held, when will deposition deadlines be set and then to schedule the informal telephonic hearing and move forward. Based on the current procedure that's been put into place by the Commission, every medical motion is treated as a full-blown informal telephonic hearing which requires not only preparation by the non-moving party but by the Commission. And so then part of the rule also requires that a summary of the medical testimony be included, which we believe is broader than the statute. So, again, our goal with 97-25 was to make it easy for the Commission and, unfortunately, I believe that it's – it's burdensome to not only the non-moving party but to the Commission, so we would point that out. As it relates to Rule .0612, as we understand the Administrative Procedures Act, whenever a rule has an exception or whenever a rule is going to be waived, the rule must set out the rationale or the reasoning that the Commission must come to in order to find that exception or to waive that rule. We believe the language on page two, line three, which notes "at a minimum" takes away that guidance or is in contravention of the guidance of the APA. The plaintiff's and defense bar worked closely together with members of the business community to come up with

the list of reasons that the Commission should allow for an exception and require defendants to pay for more than two depositions. And the use of the phrase "at a minimum" ostensibly does away with that list altogether and would allow the Commission to make that ruling for whatever purposes. We do not believe that was appropriate pursuant to the APA. This is just a general comment not specific to Senate 174 or the APA, but in Rule .0613, subsection (c) includes a definition of "cost." That cost definition appears to have been brought from Rule .0612. But in Rule .0613 it doesn't seem to be appropriate because .0613 is talking about the cost for the payment of the experts. Therefore, references to the cost affiliated with a court reporter's fee or the delivery of a transcript we believe is not appropriate in .0613. As it relates to Rule .0701, subsection (h), which is page three, line thirty-three, contains language that would allow Commission, quote, "on its own motion" to waive oral arguments of a party. Again, as noted previously as it relates to Rule .0612, we believe that the APA requires the Commission to note the specific criteria upon which they would waive a rule or waive a list for an exception and that the inclusion of "on its own motion" and allowing the Commission to waive oral

argument without specific list of reasons why the Commission should do so is inappropriate pursuant to the APA. Another just slight comment as it relates to page three, line twenty-six and twenty-seven of Rule .0701, there is a phrase that indicates "except motions related to the appellate record." As you know and, again, we appreciate the opportunity to provide comment on cost and fees rules, the defense and plaintiff's bar came together and drafted a recommendation for Rule .0701 and in our draft there is a reference to the appellate record. In light of the fact that the Commission did not adopt or publish the rule that we recommended, we feel like the reference to "appellate record" is not appropriate in the current publishing of the rule. On to Rule 10C.0109, this is again an APA comment. Subsections (b), (c) and (d) all repeat the content of 97-32.2 which we believe is in violation of the APA and shouldn't be included in the rule. We would also point out that subsections (d)(2) and (d)(3) are not supported by statutory authority. As it relates to Rule 10E.0103, we would just like to point out that subsections (b)(3) and a portion of subsection (a) contain redundant language. It's almost duplicative and would recommend that one of the phrases be

deleted. And, finally, as it relates to Rule 10E.0203, the provision in subsection (2) which is on line fourteen that notes “unless the parties agree otherwise,” this relates to a Form 26 and the payment of the cost or fee related to the submission of the Form 26. We believe the inclusion of that language in the rule will merely encourage an employee not to enter into a Form 26 agreement unless the defendants agree to pay for that cost and fee. So, again, as we get back to cost and fees, we certainly appreciate the efforts by the Commission to try to make those fees more neutral but believe the language in some of the rules and the forms as published will have the effect of continuing to burden the employers only through the state. And so we remain committed to finding a different source of funding for the Industrial Commission as other states are funded so that costs and fees can be addressed again after the funding has been addressed and the employers will not be responsible for fees and costs in the future. Those are all the comments that we have. We will certainly present written comments as well which will be a little more detailed so that if you have questions, hopefully those written comments will answer them. But I’m happy to field any questions that the

Commission may have. Thank you.

CHAIRMAN HEATH: Thank you.

(SPEAKER DISMISSED)

CHAIRMAN HEATH: The next speaker who signed up is Larry Baker on behalf of the NCADA. I do not see Larry in attendance. Is there somebody to speak on his behalf?

MS. DIXON: Larry is not going to be here today. I speak on behalf of the NCADA as well as the business community and the members that I spoke of.

CHAIRMAN HEATH: Okay. Thank you. The next speaker who signed up is Valerie Johnson on behalf of the North Carolina Advocates for Justice. I do not see Valerie here.

(CHAIRMAN HEATH CONFERS WITH MS. HENDERSON)

CHAIRMAN HEATH: Okay. Are there any other members of the gallery that would wish to make any comments on these rules – proposed rules?

(NO RESPONSE)

CHAIRMAN HEATH: We could just go off the record then while Executive Secretary Henderson searches for Valerie Johnson.

(OFF THE RECORD)

CHAIRMAN HEATH: Thank you very much for your patience. We're back on the record. We understand

that Valerie Johnson with the North Carolina Advocates for Justice will not be here in time to make comment but that that organization will be submitting – she has submitted written comments and that organization will also be submitting written comments. Thank you very much for participating in this hearing. The period for written comments will be held open through the close of business on February 26, 2014. If you have further comments, please send them to Executive Secretary Henderson as directed in the formal notice. The written comments and the comments made at the hearing today will be made part of the public record of these proceedings. The materials previously submitted by Executive Secretary Henderson are marked as Exhibit 1 and no additional materials were submitted at this hearing. Are any further matters to come before this public hearing? All right. This hearing is adjourned. Thank you.

(WHEREUPON, THE SESSION WAS ADJOURNED.)

RECORDED BY MACHINE

TRANSCRIBED BY: Kelly K. Patterson, Graham Erlacher and Associates

STATE OF NORTH CAROLINA

COUNTY OF GUILFORD

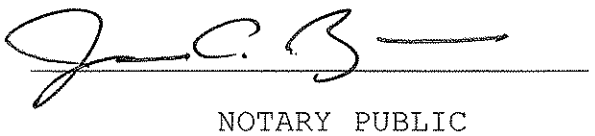
C E R T I F I C A T E

I, James C. Boyan, Notary Public, in and for the State of North Carolina, County of Guilford, do hereby certify that the foregoing three (15) pages prepared under my supervision are a true and accurate transcription of the testimony of this session which was recorded by Graham Erlacher & Associates.

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

WITNESS my Hand and Seal on this 25th day of February 2014.

My commission expires on November 12, 2017.



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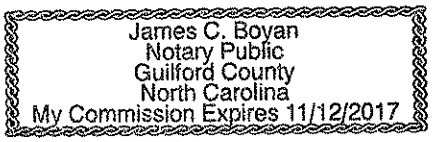

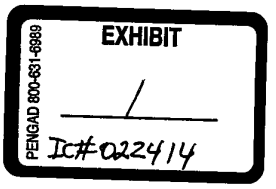

TITLE 04 – DEPARTMENT OF COMMERCE

Rulemaking Agency: *NC Industrial Commission*

Rule Citations: *04 NCAC 10A .0102, .0405, .0410, .0601, .0603, .0605, .0608, .0609A, .0612-.0613, .0701, .0704, .0801; 10B .0501; 10C .0103, .0108-.0109, .0201; 10D .0110; 10E .0103-.0104, .0201-.0203, .0301; 10G .0104A, .0107, .0110; 10H .0206; 10I .0204; 10J .0101; 10L .0101-.0104*

Public Hearing:
Date: ~~*February 14, 2014*~~ ***RESCHEDULED FOR FEBRUARY 24, 2014 DUE TO ADVERSE WEATHER***
Time: ~~*10:00 a.m.*~~ ***9:00 a.m.***
Location: ~~*Dobbs Building, 430 North Salisbury Street, Room 2149, Raleigh, NC 27603*~~ ***Dobbs Building, Room 2173, 430 North Salisbury Street, Raleigh, NC 27603***

Reason: *Pursuant to S.L. 2013-294, 28 rules adopted by the Industrial Commission in 2012 were disapproved by the General Assembly. The session law also contained directives and authority to amend and readopt the disapproved rules, as well as adopt new rules to replace former Minutes of the Industrial Commission, where necessary. Section 11 of S.L. 2013-294 states that the Industrial Commission "shall adopt permanent rules in accordance with the provisions of this act using the procedure and time lines for temporary rules set forth in G.S. 150B-21.1(a3)." It further states, "Rules adopted pursuant to this section shall not be subject to G.S. 150B-19.1(h) or G.S. 150B-21.4."*

Comment Procedures: *Comments from the public shall be directed to: Meredith Henderson, 4333 Mail Service Center, Raleigh, NC 27699-4333; email Meredith.henderson@ic.nc.gov. The comment period begins January 31, 2014 and ends* ~~*February 21, 2014.*~~ ***EXTENDED TO FEBRUARY 26, 2014 DUE TO RESCHEDULING OF PUBLIC HEARING DUE TO ADVERSE WEATHER.***

CHAPTER 10 – INDUSTRIAL COMMISSION

SUBCHAPTER 10A – WORKERS' COMPENSATION RULES

SECTION .0100 – ADMINISTRATION

04 NCAC 10A .0102 OFFICIAL FORMS

~~(a) The Industrial Commission will remain in continuous session subject to the call of the Chairman to meet as a body for the purpose of transacting such business as may come before it.~~

~~(b) In reviewing an Opinion and Award of a Deputy Commissioner or of a sole Commissioner acting as the hearing officer, the Full Commission may sit en banc or in panels of three.~~

(a) Copies of the Commission's rules and forms may be obtained by contacting the Commission in person, by written request mailed to 4340 Mail Service Center, Raleigh, NC 27699-4340, Attn.: Administrator, or from the Commission's website at http://www.ic.nc.gov/forms.html.

(b) The use of any printed forms other than those provided by the Commission is prohibited except that insurance carriers, self-insured employers, attorneys and other parties may reproduce forms for their own use, provided:

(1) no statement, question, or information blank contained on the Commission form is omitted from the substituted form, and

(2) the substituted form is identical in size and format with the Commission form.

Authority G.S. 97-80(a); 97-81(a).

SECTION .0400 – DISABILITY, COMPENSATION, FEES

04 NCAC 10A .0405 REINSTATEMENT OF COMPENSATION

~~(a) Amputation of any portion of the bone of a distal phalange of a finger or toe at or distal to the visible base of the nail will be considered as equivalent to the loss of one-fourth of such finger or toe.~~

~~(b) Amputation of any portion of the bone of the distal phalange of a finger or toe proximal to the visible base of the nail will be considered as equivalent to the loss of one-half of such finger of toe.~~

~~(c) Amputation through the forearm at a point so distal to the elbow as to permit satisfactory use of a prosthetic appliance with retention of full natural elbow function shall be considered amputation of the hand. Otherwise, it shall be considered amputation of the arm.~~

~~(d) Amputation through the lower leg at a point so distal to the knee as to permit satisfactory use of a prosthetic appliance with retention of full natural knee function shall be considered amputation of the foot. Otherwise, it shall be considered amputation of the leg.~~

(a) In a claim in which the employer, carrier, or administrator has admitted liability, when an employee seeks reinstatement of compensation pursuant to G.S. 97-18(k), the employee may notify the employer, carrier, or administrator, and the employer's, carrier's, or administrator's attorney of record, on a Form 23 Application to Reinstate Payment of Disability Compensation, or by the filing of a Form 33 Request that Claim be Assigned for Hearing.

(b) When reinstatement is sought by the filing of a Form 23 Application to Reinstate Payment of Disability Compensation, the original Form 23 Application to Reinstate Payment of Disability Compensation and the attached documents shall be sent to the Commission at the same time and by the same method by which a copy of the Form 23 and attached documents are sent to the employer, carrier, or

administrator and the employer's, carrier's, or administrator's attorney of record. The employee shall specify the grounds and the alleged facts supporting the application and shall complete the blank space in the "Important Notice to Employer" portion of Form 23 Application to Reinstate Payment of Disability Compensation by inserting a date 17 days from the date the employee serves the completed Form 23 Application to reinstate Payment of Disability Compensation on the employer, carrier, or administrator and the attorney of record, if any. The Form 23 Application to Reinstate Payment of Disability Compensation shall specify the number of pages of documents attached that are to be considered by the Commission. Within 17 days from the date the employee serves the completed Form 23 Application to Reinstate Payment of Disability Compensation on the employer, carrier, or administrator and the attorney of record, if any, the employer, carrier, or administrator shall complete Section B of the Form 23 Application to Reinstate Payment of Disability Compensation and send it to the Commission and to the employee, or the employee's attorney of record, at the same time and by the same method by which the form is sent to the Commission.

(c) If the employer, carrier, or administrator does not object within the time allowed, the Commission shall review the Form 23 Application to Reinstate Payment of Disability Compensation and attached documentation and, without an informal hearing, render an Administrative Decision or Order as to whether there is sufficient basis under the Workers' Compensation Act to reinstate compensation. This Administrative Decision and Order shall be rendered within five days of the expiration of the time within which the employer, carrier, or administrator could have filed a response to the Form 23 Application to Reinstate Payment of Disability Compensation. Either party may seek review of the Administrative Decision and Order as provided by Rule .0703 of this Subchapter.

(d) If the employer, carrier, or administrator timely objects to the Form 23 Application to Reinstate Payment of Disability Compensation, the Commission shall conduct an informal hearing within 25 days of the receipt by the Commission of the Form 23 Application to Reinstate Payment of Disability Compensation unless the time is extended for good cause shown. The informal hearing may be conducted with the parties or their attorneys of record personally present with the Commission. The Commission shall make arrangements for the informal hearing with a view toward conducting the hearing in the most expeditious manner. The informal hearing shall be no more than 30 minutes, with each side being given 10 minutes to present its case and five minutes for rebuttal. Notwithstanding the foregoing, the employee may waive the right to an informal hearing and proceed to a formal hearing by filing a request for hearing on a Form 33 Request that Claim be Assigned for Hearing. Either party may appeal the Administrative Decision and Order of the Commission as provided by Rule .0703 of this Subchapter. A Deputy Commissioner shall conduct a hearing which shall be a hearing de novo. The hearing shall be peremptorily set and shall not require a Form 33 Request that Claim be Assigned for Hearing. The employee has the burden of producing evidence on the issue of the employee's application to reinstate compensation. If the Deputy Commissioner reverses an order previously granting a Form 23 Application to Reinstate Payment of Disability Compensation motion, the employer shall promptly terminate compensation or otherwise comply with the Deputy Commissioner's decision, notwithstanding any appeal or application for review to the Full Commission under G.S. 97-85.

(e) If the Commission is unable to render a decision after the informal hearing, the Commission shall issue an order to that effect, that shall be in lieu of a Form 33 Request that Claim be Assigned for Hearing, and the case shall be placed on the formal hearing docket. If additional issues are to be addressed, the employee, employer, carrier, or administrator shall file a Form 33 Request that Claim be Assigned for Hearing or notify the Commission that a formal hearing is not currently necessary, within 30 days of the date of the Administrative Decision or Order. The effect of placing the case on the docket shall be the same as if the Form 23 Application to Reinstate Payment of Disability Compensation was denied, and compensation shall not be reinstated until such time as the case is decided by a Commissioner or a Deputy Commissioner following a formal hearing.

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

04 NCAC 10A .0410 SAFETY RULES

The safety rules or regulations adopted by an employer qualify as approved by the Commission within the meaning of G.S. 97-12 if the following requirements are satisfied:

(1) The rules include the general provisions of the safety rules outlined by the American National Standards Institute and the Occupational Safety and Health Act.

(2) The rules have been filed in writing with the Commission's Safety Education Director.

(3) A copy of the rules bearing a certificate of approval from the Commission has been returned to the employer. The certificate of approval shall indicate that the rules have been reviewed and found by the Safety Education Director of the Commission to be in compliance with the general rules of the American National Standards Institute and the Occupational Safety and Health Act and that the rules are approved by the Commission pursuant to G.S. 97-12.

Authority G.S. 97-12; 97-80(a).

SECTION .0600 – CLAIMS ADMINISTRATION AND PROCEDURES

04 NCAC 10A .0601 EMPLOYER'S OBLIGATIONS UPON NOTICE; DENIAL OF LIABILITY; AND SANCTIONS

~~(a) The employer or its insurance carrier shall promptly investigate each injury reported or known to the employer and at the earliest practicable time shall admit or deny the employee's right to compensation or commence payment of compensation as provided in G.S. 97-18(b), (c), or (d).~~

~~(b)~~ (a) ~~When an~~ Upon the employee's ~~employee files~~ filing of a claim for compensation with the Commission, the Commission may order reasonable sanctions against the employer or its insurance carrier ~~which~~ if it does not, within 30 days following notice from the Commission of the filing of the claim, or 90 days when a disease is alleged to be from exposure to chemicals, fumes, or other materials or substances in the workplace, ~~or within such reasonable additional time as the Commission may allow,~~ do one of the following:

(1) ~~Notify~~ File a Form 60 *Employer's Admission of Employee's Right to Compensation* to notify the Commission and the employee in writing that ~~it~~ the employer is admitting the employee's right to compensation and, if applicable, satisfy the requirements for payment of compensation under ~~G.S. 97-18(b).~~G.S. 97-18(b);

(2) ~~Notify~~ File a Form 61 *Denial of Workers' Compensation Claim* to notify the Commission and the employee that ~~it~~ the employer denies the employee's right to compensation consistent with ~~G.S. 97-18(c).~~G.S. 97-18(c);

(3) File a Form 63 *Notice to Employee of Payment of Compensation Without Prejudice* ~~Initiate payments without prejudice and without liability and satisfy the requirements of~~ consistent with G.S. 97-18(d).

~~For purposes of this Rule, reasonable sanctions shall not prohibit the employer or its insurance carrier from contesting the compensability of and its liability for the claim.~~

Requests for extensions of time to comply with G.S. 97-18(j) ~~this rule may~~ shall be addressed to the ~~Executive Secretary.~~ Claims Administration Section.

~~(c)~~(b) ~~If the employer or insurance carrier denies~~ When liability in any ~~case,~~ case is denied, the employer or insurance carrier shall provide a detailed statement of the basis of denial ~~must~~ that shall be set forth in a letter of denial or Form ~~61,~~ 61 *Denial of Workers' Compensation Claim*, and ~~which~~ that shall be sent to the ~~plaintiff or his~~ employee's attorney of ~~record, if any~~ record or the employee, if unrepresented, all known health care providers ~~which~~ who have submitted bills and provided medical records to the ~~employer/carrier,~~ employer or carrier, and the ~~Industrial~~ Commission. ~~The detailed statement of the basis of denial shall set forth a statement of the facts, as alleged by the employer, concerning the injury or any other matter in dispute; a statement identifying the source, by name or date and type of document, of the facts alleged by the employer; and a statement explaining why the facts, as alleged by the employer, do not entitle the employee to workers' compensation benefits.~~

Authority G.S. 97-18; 97-80(a); 97-81(a).

04 NCAC 10A .0603 RESPONDING TO A PARTY'S REQUEST FOR HEARING

(a) No later than 45 days from receipt of ~~the Request~~ a request for ~~Hearing,~~ hearing from an employee, the self-insured employer, insurance carrier, or counsel for the defendant(s) shall file with the ~~Industrial~~ Commission a response to the ~~Request~~ request for ~~Hearing.~~ hearing.

(b) ~~This~~ The response shall contain the following:

(1) ~~The~~ the basis of the disagreement between the parties, including a statement of the ~~specific~~ issues raised by the ~~plaintiff~~ moving party~~which~~ that are conceded and the ~~specific~~ issues raised by the ~~plaintiff~~ moving party which are ~~denied.~~ denied;

(2) ~~The~~ the date of the ~~injury,~~ injury if it is contended to be different than that alleged by the ~~plaintiff.~~ moving party;

(3) ~~The~~ the part of the body ~~injured,~~ injured if it is contended to be different than that alleged by the ~~plaintiff.~~ moving party;

(4) ~~The~~ the city and county where the injury occurred~~,~~ if they are ~~contented~~ contended to be different than that alleged by the ~~plaintiff.~~ moving party;

(5) ~~The~~ the names and addresses of all doctors and other expert witnesses whose testimony is needed by the ~~defendant(s).~~ non-moving party;

(6) ~~The~~ the names of all lay witnesses known by the ~~defendant(s)~~ non-moving party whose testimony is to be ~~taken.~~ taken;

(7) ~~An~~ an estimate of the time required for the hearing of the ~~case.~~ case; and

(8) ~~The~~ the telephone ~~number(s)~~ number(s), ~~and address(es)~~ email address(es), and mailing address(es) of the party(ies) responding to the ~~Request for Hearing.~~ request for hearing and their legal counsel.

(c) ~~Utilization of a~~ A Form ~~33R, Response to Request for Hearing,~~ 33R *Response to Request that Claim be Assigned for Hearing*, ~~which is~~ completed in full and filed with the Docket Section of the Commission, shall ~~be the sole means of~~ constitute compliance with this Rule. A copy of the Form 33R *Response to Request that Claim be Assigned for Hearing* ~~Response to Request for Hearing~~ shall be forwarded to the attorneys for all opposing parties or ~~attorneys, if such have been retained.~~ the opposing parties themselves, if unrepresented. ~~In the event of a request for hearing by a defendant, the employee shall not be required to respond. Extensions of time within which to file a response shall be granted for good cause shown.~~

Authority G.S. 97-80(a); 97-83.

04 NCAC 10A .0605 DISCOVERY

In addition to depositions and production of books and records provided for in G.S. 97-80, parties may obtain discovery by the use of interrogatories as follows:

(1) Any party may serve upon any other parties written interrogatories, up to 30 in number, including subparts thereof, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available from the party interrogated.

~~(a)~~(2) Interrogatories may, without leave of the ~~Industrial~~ Commission, be served upon any party after the filing of a Form ~~18,~~ 18 *Notice of Accident to Employer and Claim of Employee, Representative, or Dependent*, Form ~~18B,~~ 18B *Claim by Employee, Representative, or Dependent for Benefits for Lung Disease*, or Form ~~33,~~ 33 *Request that Claim be Assigned for Hearing*, or after the acceptance of a claim.

~~(b)~~(3) Each interrogatory shall be answered separately and ~~fully~~ in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers ~~are to~~ shall be signed by the person making them and the objections shall be signed by the party making them. The party on whom the interrogatories have been served shall serve a copy of the ~~answers,~~ answers and objections, if any, within 30 days after service of the interrogatories. The parties may stipulate to an extension of time to respond to the interrogatories. A motion to extend the time to respond

shall represent that an attempt to reach agreement with the opposing party to informally extend the time for response has been unsuccessful and the opposing parties' position or that there has been a reasonable attempt to contact the opposing party to ascertain its position.

~~(c)~~(4) If there is an objection to or other failure to answer an interrogatory, the party submitting the interrogatories may move the ~~Industrial~~ Commission for an order compelling answer. If the ~~Industrial~~ Commission orders answer to an interrogatory within a time certain and no answer is made or the objection is still lodged, the ~~Industrial~~ Commission may issue an order with ~~appropriate sanctions,~~ sanctions. ~~including but not limited to the sanctions specified in Rule 37 of the North Carolina Rules of Civil Procedure.~~

~~(2)~~(5) Interrogatories and requests for production of documents shall ~~may~~ relate to matters ~~which~~ that are not ~~privileged~~privileged, ~~which~~ that are relevant to an issue ~~presently~~ in ~~dispute~~ dispute, or ~~which~~ that the requesting party reasonably believes may later be disputed. ~~Signature~~ The signature of a party or attorney serving interrogatories or requests for production of documents constitutes a certificate by such person that he or she has personally read each of the ~~interrogatories,~~ interrogatories and requests for production of documents, that no such interrogatory or request for production of documents will oppress a party or cause any unnecessary expense or delay, that the information requested is not known or equally available to the requesting party, and that the interrogatory or requested document relates to an issue presently in dispute or ~~which~~ that the requesting party reasonably believes may later be in dispute. A party may serve an interrogatory, however, to obtain verification of facts relating to an issue presently in dispute. Answers to interrogatories may be used to the extent permitted by ~~the rules of evidence.~~ Chapter 08C of the North Carolina General Statutes.

(6) Up to the time a matter is calendared for a hearing, parties may serve requests for production of documents without leave of the Commission.

~~(3)~~(7) Additional methods of discovery as provided by the North Carolina Rules of Civil Procedure may be used only upon motion ~~and approval by the Industrial Commission~~ or by agreement of the parties. The Commission shall approve the motion in the interests of justice or to promote judicial economy.

~~(4) Notices of depositions, discovery requests and responses pertinent to a pending motion, responses to discovery following a motion or order to compel, and responses shall be filed with the Commission, as well as served on the opposing party. Otherwise, discovery requests and responses, including interrogatories and requests for production of documents shall not be filed with the Commission.~~

(8) Discovery requests and responses, including interrogatories and requests for production of documents, shall not be filed with the Commission, except for the following:

(a) notices of depositions;

(b) discovery requests and responses pertinent to a pending motion;

(c) responses to discovery following a motion or order to compel; and

(d) post-hearing discovery requests and responses.

The above listed documents shall be filed with the Commission, as well as served on the opposing party.

~~(5)~~(9) Sanctions ~~may~~ shall be imposed under this Rule for failure to comply with a Commission order compelling discovery. A motion by a party or its attorney to compel discovery under this Rule and ~~4 NCAC 10A .607~~ Rule .0607 of this Subchapter shall represent that informal means of resolving the discovery dispute have been attempted in good faith and state ~~briefly~~ the opposing parties' position or that there has been a reasonable attempt to contact the opposing party and ascertain its position.

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

04 NCAC 10A .0608 STATEMENT OF INCIDENT LEADING TO CLAIM

(a) ~~At the outset of taking a statement,~~ Upon the request of the employer or his agent to take a written or a recorded statement, the employer or his agent shall advise the employee that the statement ~~is being taken to~~ may be used ~~in part~~ to determine whether the claim will be paid or denied. Any plaintiff who gives his or her employer, ~~or~~ its ~~carrier~~carrier, or any agent either a written or recorded statement of the facts and circumstances surrounding his or her injury shall be furnished a copy of ~~such~~ the statement within 45 days after request. Further, any plaintiff who shall give a written or recorded statement of the facts and circumstances surrounding his injury shall, without request, be furnished a copy no less than 45 days from the filing of a Form 33 *Request that Claim be Assigned for Hearing*. ~~Such~~ The copy shall be furnished at the expense of the person, firm or corporation at whose direction the statement was taken.

(b) If any person, firm or corporation unreasonably fails to comply with this ~~rule,~~ Rule, then an order may be entered by a Commissioner or Deputy Commissioner prohibiting that person, firm or corporation, or its representative, from introducing the statement into evidence or using any part of ~~it.~~ the statement.

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

04 NCAC 10A .0609A MEDICAL MOTIONS AND EMERGENCY MEDICAL MOTIONS

~~(a) Expedited Medical Motions:~~

~~(1) Medical motions pursuant to N.C. Gen. Stat. §97-25 brought before the Office of the Executive Secretary for an administrative ruling shall comply with applicable provisions of Rule 609 and shall be submitted electronically to medicalmotions@ic.nc.gov, unless electronic submission is unavailable to the party.~~

~~(2) A party may file with the Deputy Commissioner Section a request for an administrative ruling on a medical motion. A party, also, may appeal an Order from the Executive Secretary's Office on an Expedited Medical Motion by giving notice~~

~~of appeal to the Dockets Department within 15 days of receipt of the Order or receipt of the ruling on a Motion to Reconsider the Order filed pursuant to Rule 703(1). The Motion shall contain a designation as an administrative "Expedited Medical Motion", documentation in support of the request, including the most recent medical record/s and a representation that informal means of resolving the issue have been attempted in good faith, and the opposing party's position, if known.~~

~~(A) A Pre-Trial Conference will be held immediately to clarify the issues. Parties are encouraged to consent to a review of the contested issues by electronic mail submission of only relevant medical records and opinion letters.~~

~~(B) If depositions are deemed necessary by the Deputy Commissioner, only a brief period for taking the same will be allowed. Preparation of the transcript will be expedited and will initially be at the expense of defendants. Requests for independent medical examinations may be denied unless there is a demonstrated need for the evaluation.~~

~~(C) Written arguments and briefs shall be limited in length, and are to be filed within five days after the record is closed.~~

~~(3) A party may appeal an Order by a Deputy Commissioner on an Expedited Medical Motion by giving notice of appeal to the Full Commission within 15 days of receipt of the Order or receipt of the ruling on a Motion to Reconsider the Order filed pursuant to Rule 703(1).~~

~~(A) A letter expressing an intent to appeal a Deputy Commissioner's Order on an Expedited Medical Motion shall be considered notice of appeal to the Full Commission, provided that it clearly specifies the Order from which appeal is taken.~~

~~(B) After receipt of notice of appeal, the appeal will be acknowledged by the Dockets Department within three (3) days by sending an appropriate Order under the name of the Chair of the Panel to which the appeal is assigned. The parties may be permitted to file briefs on an abbreviated schedule in the discretion of the panel chair. The panel chair will also determine if oral arguments are to be by telephone, in person, or waived. All correspondence, briefs, or motions related to the appeal shall be addressed to the panel chair with a copy to the law clerk of the panel chair.~~

~~(b) Emergency Medical Motions:~~

~~(1) Motions requesting emergency medical relief administratively shall contain the following:~~

~~(A) A boldface, or otherwise emphasized, designation as "Emergency Medical Motion."~~

~~(B) An explanation of the need for a shortened time period for review, including any hardship that warrants immediate attention/action by the Commission.~~

~~(C) A statement of the time-sensitive nature of the request, with specificity.~~

~~(D) Detailed dates and times related to the issue raised and to the date a ruling is requested.~~

~~(E) Documentation in support of the request, including the most recent medical records.~~

~~(F) A representation that informal means of resolving the issue have been attempted in good faith, and the opposing party's position, if known.~~

~~(2) A party may file an Emergency Medical Motion with the Executive Secretary's Office, the Chief Deputy Commissioner, or the Office of the Chair. A proposed Order shall be provided with the motion. The non-moving party(ies) will be advised regarding any time allowed for response and may be advised whether informal telephonic oral argument is necessary.~~

~~(3) Emergency Medical Motions and responses thereto shall be submitted electronically, unless electronic submission is unavailable to the party.~~

~~(A) Emergency Medical Motions and responses thereto filed with the Executive Secretary's Office shall be submitted to .~~

~~(B) Emergency Medical Motions filed with the Chief Deputy Commissioner shall be submitted electronically directly to the Chief Deputy Commissioner and his/her legal assistant.~~

~~(C) Emergency Medical Motions filed with the Chair of the Commission shall be submitted electronically to the Chair, his/her legal assistant, and his/her law clerk.~~

(a) Medical motions brought pursuant to G.S. 97-25, and responses thereto, shall be brought before the Office of the Chief Deputy Commissioner and shall be submitted electronically to medicalmotions@ic.nc.gov. Motions and responses shall be submitted simultaneously to the Commission and the opposing party or opposing party's counsel, if any.

(b) Once notification has been received by the parties that a medical motion has been assigned to a Deputy Commissioner, subsequent filings and communication shall be submitted directly to the Deputy Commissioner assigned.

(c) Upon receipt of a medical motion, carriers, third-party administrators and employers who are not represented shall immediately assign counsel and send notification of counsel's name, email address, telephone number and fax number to medicalmotions@ic.nc.gov. An attorney who is retained by a party in any proceeding before the Commission shall also file a Notice of Representation with the Docket Director at dockets@ic.nc.gov with a copy of the notice sent to all other counsel and all other unrepresented parties involved in the proceeding.

(d) Motions submitted pursuant to G.S. 97-25 and requesting medical relief other than emergency relief shall contain the following:

(1) a designation as a "Medical Motion" brought pursuant to G.S. 97-25;

(2) the claimant's name and, if unrepresented, claimant's email address, telephone number, and fax number. If represented, the name, email address, telephone number and fax number of claimant's counsel;

(3) the employer's name and employer code;

(4) the carrier or third party administrator's name, carrier code, email address, telephone number and fax number;

(5) the adjuster's name, email address, telephone number and fax number if counsel for the employer/carrier has not been retained;
(6) the counsel for employer/carrier's name, email address, telephone number and fax number;
(7) a statement of the treatment or relief requested;
(8) a statement of the medical diagnosis of claimant and the treatment recommendation and name of the health care provider that is the basis for the motion;
(9) a statement as to whether the claim has been admitted on a Form 60, Form 63, Form 21 or is subject to a prior Commission Opinion and Award or Order finding compensability;
(10) a statement of the time-sensitive nature of the request;
(11) an explanation of opinions known and in the possession of the employee of additional medical or other relevant experts, independent medical examiners, and second opinion examiners;
(12) if the motion requests a second opinion examination pursuant to G.S. 97-25, the motion shall specify whether the plaintiff has made a prior written request to the defendants for the examination, as well as the date of the request and the date of the denial, if any;
(13) a representation that informal means of resolving the issue have been attempted in good faith, and the opposing party's position, if known; and
(14) a proposed Order.

(e) Motions requesting emergency medical relief shall contain the following:
(1) a boldface or otherwise emphasized, designation as "Emergency Medical Motion";
(2) the claimant's name and, if unrepresented, claimant's email address, telephone number, and fax number. If represented, the name, email address, telephone number and fax number of claimant's counsel;
(3) the employer's name and employer code;
(4) the carrier or third party administrator's name, carrier code, email address, telephone number and fax number;
(5) the adjuster's name, email address, telephone number and fax number if counsel for the employer/carrier has not been retained;
(6) the counsel for employer/carrier's name, email address, telephone number and fax number;
(7) an explanation of the medical diagnosis and treatment recommendation of the health care provider that requires emergency attention;
(8) a statement of the need for a shortened time period for review, including relevant dates and the potential for adverse consequences if the recommended treatment is not provided emergently;
(9) an explanation of opinions known and in the possession of the employee of additional medical or other relevant experts, independent medical examiner, and second opinion examiners;
(10) a representation that informal means of resolving the issue have been attempted in good faith, and the opposing party's position, if known; and
(11) a proposed Order.

(f) The parties shall receive notice of the date and time of an initial informal telephonic conference to be conducted by a Deputy Commissioner to determine whether the motion warrants an expedited or emergency hearing and to clarify the issues. During the initial informal telephonic conference each party shall be afforded an opportunity to state its position and submit documentary evidence. Prior to the initial informal telephonic conference, the parties shall submit a brief medical chronology and procedural history of three pages or less, the relevant Form 60, Form 63, Form 21 or Commission Opinion and Award, and relevant medical information including medical records.
(g) At or prior to the initial informal telephonic conference, the parties may consent to a review of the contested issues by electronic mail submission of only relevant medical records and opinion letters.
(h) Depositions deemed necessary by the Deputy Commissioner shall be taken on the Deputy Commissioner's order within 35 days of the date the motion is filed. Transcripts of depositions shall be submitted electronically to the Commission within 40 days of the date of the filing of the motion.
(i) At the initial informal telephonic conference, each party shall notify the Commission and the other party as to whether a second informal telephonic conference is necessary. This second informal telephonic conference does not extend the time for resolution of the Motion.
(j) Upon receipt of an emergency medical motion, the non-moving party(ies) shall be advised by the Commission of any time allowed for response and whether informal telephonic oral argument is necessary.
(k) A party may appeal a Deputy Commissioner's Order on a motion brought pursuant to G.S. 97-25 by giving notice of appeal to the Full Commission within 15 days of receipt of the Order or receipt of the ruling on a Motion to Reconsider the Order filed pursuant to Rule .0703(b) of this Subchapter. A letter expressing an intent to appeal a Deputy Commissioner's Order on a motion brought pursuant to G.S. 97-25 shall be considered notice of appeal to the Full Commission, provided that the letter specifies the Order from which appeal is taken. After receipt of notice of appeal, the appeal shall be acknowledged by the Docket Section within three days by sending an Order under the name of the Chair of the Panel to which the appeal is assigned. The parties may file briefs on an abbreviated schedule when necessary for a determination of the issues. The panel chair shall also determine if oral arguments are to be by telephone, in person, or waived. All correspondence, briefs, or motions related to the appeal shall be addressed to the panel chair with a copy to the law clerk of the panel chair.
(l) The Commission will accept the filing of documents by non-electronic methods if electronic transmission is unavailable to the party.

Authority G.S. 97-25; 97-78(f)(2); 97-78(g)(2); 97-80(a).

04 NCAC 10A .0612 DEPOSITIONS

~~(a) When additional testimony is necessary to the disposition of a case, a Commissioner or Deputy Commissioner may order the deposition of witnesses to be taken on or before a day certain not to exceed 60 days from the date of the ruling; provided, the time allowed may be~~

~~enlarged for good cause shown. The costs of such depositions shall be borne by the defendants for those medical witnesses who examined plaintiff at defendants' expense, in those instances in which defendants are requesting the depositions, and in any other case which, in the discretion of the Commissioner or Deputy Commissioner, it is deemed appropriate.~~

~~(b) In cases where a party, or an attorney for either party, refuses to stipulate medical reports and the case must be reset or depositions ordered for testimony of medical witnesses, a Commissioner or Deputy Commissioner may in his discretion assess the costs of such hearing or depositions, including reasonable attorney fees, against the party who refused the stipulation.~~

~~(c) Except under unusual circumstances, all lay evidence must be offered at the initial hearing. Lay evidence can only be offered after the initial hearing by order of a Commissioner or Deputy Commissioner. The costs of obtaining lay testimony by deposition shall be borne by the party making the request unless otherwise ordered by the Commission.~~

(a) Prior to a hearing before a Deputy Commissioner, the parties shall confer to determine the methods by which medical evidence, if any, will be submitted. In doing so, absent a well-grounded objection, the parties shall stipulate to the admission of all relevant medical records, reports, and forms, as well as opinion letters from the employee's health care providers with the goal of minimizing the use of post-hearing depositions. When a Pre-Trial Agreement is required by the Commission, the parties shall certify in the Pre-Trial Agreement that the parties have conferred to determine the methods by which medical evidence, if any, will be submitted, and the parties shall state whether there is any disagreement about the stipulation of medical evidence. The parties shall state in the Pre-Trial Agreement all experts to be deposed post-hearing.

(b) When medical or other expert testimony is requested by the parties for the disposition of a case, a Deputy Commissioner or Commissioner may order expert depositions to be taken on or before a day certain not to exceed 60 days from the date of the hearing; provided, however, the time allowed may be enlarged or shortened in the interests of justice or to promote judicial economy, or where required by the Act. The costs of up to two post-hearing depositions selected by the employee of health care providers who evaluated or treated the employee shall be borne by the employer. The employer shall also bear the costs of a deposition of a second opinion doctor selected jointly by the parties or ordered by the Commission pursuant to G.S. 97-25. The employee shall designate the health care providers the employee will depose at employer's expense in the Pre-Trial Agreement. The parties may notice depositions of additional experts, and the costs thereof shall be borne by the party noticing the depositions; provided, however, if a ruling favorable to the employee is rendered and is not timely appealed by the employer, or the employer's appeal is dismissed or withdrawn, then the employer shall reimburse the employee the costs of such additional expert depositions. Notwithstanding this provision, the parties may come to a separate agreement regarding reimbursement of deposition costs, which shall be submitted to the Commission for approval. Provided further, in (i) claims pursuant to G.S. 97-29(d) and (ii) cases involving exceptional, unique, or complex injuries or diseases, the Commission may allow additional depositions of experts to be taken at the employer's expense, when requested by the employee and when necessary to address the issues in dispute, in which case the employee shall state, and the Commission shall consider, at a minimum, the following factors when determining whether or not the employer shall bear the costs of such depositions:

(1) The name and profession of the proposed deponent;
(2) If the proposed deponent is a health care provider, whether the health care provider evaluated, diagnosed or treated the employee;
(3) The issue to which the testimony is material, relevant and necessary;
(4) The availability of alternate methods for submitting the evidence and the efforts made to utilize alternate methods;
(5) The severity or complexity of the employee's condition;
(6) The number and complexity of the issues in dispute;
(7) Whether the testimony is likely to be duplicative of other evidence; and
(8) T he opposing party's position on the request.

The term "costs" as used in this rule shall mean the expert's fee as approved by the Commission for the deposition, including the expert's time preparing for the deposition, if applicable, and shall include fees associated with the production and delivery of a transcript of the deposition to the Commission, including the court reporter's appearance fee, but shall not include costs for a party to obtain his or her own copy of the deposition transcript, or attorney's fees associated with the deposition, unless so ordered by the Commission pursuant to G.S. 97-88.1.

(c) If the claimant is unrepresented at the time of a full evidentiary hearing before a Deputy Commissioner, the Commission shall determine the best method for presenting medical evidence, if necessary, and the party responsible for bearing associated costs.

(d) If a party unreasonably refuses to stipulate to relevant medical evidence, and as a result, the case is reset or depositions are ordered for testimony of medical or expert witnesses, a Deputy Commissioner or Commissioner may assess the costs of such hearing or depositions, including reasonable attorney fees, against the party who refused the stipulation, pursuant to G.S. 97-88.1.

(e) All evidence and witnesses other than those tendered as an expert witness shall be offered at the hearing before the Deputy Commissioner. Non-expert evidence may be offered after the hearing before the Deputy Commissioner by order of a Deputy Commissioner or Commissioner. The costs of obtaining non-expert testimony by deposition shall be borne by the party making the request unless otherwise ordered by the Commission in the interests of justice or to promote judicial economy.

Authority G.S. 97-80(a); 97-88; 97-88.1.

04 NCAC 10A .0613 EXPERT WITNESSES AND FEES

~~(a) Dismissals:~~

~~(1) No claim filed under the Workers' Compensation Act shall be dismissed without prejudice at plaintiff's instance except upon order of the Industrial Commission and upon such terms and conditions as justice requires; provided, however, that no voluntary dismissal shall be granted after the record in a case is closed.~~

~~(2) Unless otherwise ordered by the Industrial Commission, a plaintiff shall have one year from the date of the Order of Voluntary Dismissal to refile his claim.~~

~~(3) Upon proper notice and an opportunity to be heard, any claim may be dismissed with or without prejudice by the Industrial Commission on its own motion or by motion of any party for failure to prosecute or to comply with these Rules or any Order of the Commission.~~

~~(b) Removals:~~

~~(1) A claim may be removed from the hearing docket by motion of the party requesting the hearing or by the Industrial Commission upon its own motion.~~

~~(2) Upon settlement of a case or approval of a form agreement, the parties shall submit a request for removal and/or a dismissal and proposed Order.~~

~~(3) A removed case may be reinstated by motion of either party; provided that cases wherein the issues have materially changed since the Order of Removal or where the motion to reinstate is filed more than one year after the Order of Removal, a Form 33 Request for Hearing will be required.~~

~~(4) When a plaintiff has not requested a hearing within two years of the filing of an Order of Removal requested by the plaintiff or necessitated by the plaintiff's conduct, and not pursued the claim, upon proper notice and an opportunity to be heard, any claim may be dismissed with prejudice by the Industrial Commission, in its discretion, on its own motion or by motion of any party.~~

(a) The parties shall file with the Deputy Commissioner or Commission within 15 days following the hearing, a list identifying all expert witnesses to be deposed and the deposition dates unless otherwise extended by the Commission in the interests of justice and judicial economy.

(b) Within 10 days after the deposition of each expert, the party that noticed the deposition shall submit to the Deputy Commissioner or Commissioner, via email, a request to approve the costs related to the expert deposition. In these requests, the party shall provide to the Deputy Commissioner or Commissioner, in a cover letter along with the invoice (if available), the following:

(1) the name of the expert and the expert's practice;
(2) the expert's fax number;
(3) the expert's area of specialty and board certifications, if any;
(4 the length of the deposition;
(5) the length of time the expert spent preparing for the deposition, excluding any time meeting with parties' counsel;
(6) whether the Commission determined that the claim was filed pursuant to G.S. 97-29(d) or involved an exceptional, unique, or complex injury or disease;
(7) whether the deponent was selected by the employee in the Pre-Trial Agreement as an expert to be deposed at employer's expense; and
(8) the party initially responsible for payment of the deposition fee pursuant to Rule .0612 of this Section.

At the time the request is made, the requesting party shall submit a proposed Order that shows the expert's name, practice name and fax number under the "Appearances" section. The proposed order shall also reflect the party initially responsible for payment of the deposition fee pursuant to Rule .0612 of this Section.

(c) The Commission shall issue an order setting the deposition costs of the expert. The term "costs" as used in this rule shall mean the expert's fee as approved by the Commission for the deposition, including the expert's time preparing for the deposition, if applicable, and shall include fees associated with the production and delivery of a transcript of the deposition to the Commission, including the court reporter's appearance fee, but shall not include costs for a party to obtain his or her own copy of the deposition transcript, or attorney's fees associated with the deposition, unless so ordered by the Commission pursuant to G.S. 97-88.1

(d) Failure to make payment to an expert witness within 30 days following the entry of a fee order shall result in an amount equal to 10 percent being added to the fee ordered to be paid to the expert.

(e) A proposed fee for cancellation of a deposition within five days of scheduled deposition may be submitted to the Deputy Commissioner for consideration and approval if in the interest of justice and judicial economy.

(f) This Rule applies to all expert fees for depositions; provided, however, either party may elect to reimburse a retained expert that did not treat or examine the employee the difference between the fee awarded by the Commission and the contractual fee of the expert.

Authority G.S. 97-80(a); G.S. 97-80(d); 97-80(f);

SECTION .0700 - APPEALS

04 NCAC 10A .0701 REVIEW BY THE FULL COMMISSION

~~(a) A letter expressing an intent to appeal shall be considered notice of appeal to the Full Commission within the meaning of N.C. Gen. Stat. §97-85, provided that it clearly specifies the Order or Opinion and Award from which appeal is taken.~~

~~(b) After receipt of notice of appeal, the Industrial Commission will supply to the appellant a Form 44 Application for Review upon which appellant must state the grounds for the appeal. The grounds must be stated with particularity, including the specific errors allegedly committed by the Commissioner or Deputy Commissioner and, when applicable, the pages in the transcript on which the alleged errors are recorded. Failure to state with particularity the grounds for appeal shall result in abandonment of such grounds, as provided in paragraph (3). Appellant's completed Form 44 and brief must be filed and served within 25 days of appellant's receipt of the transcript or receipt of notice that there will be no transcript, unless the Industrial Commission, in its discretion, waives the use of the Form 44. The time for filing a notice of appeal from the decision of a Deputy Commissioner under these rules shall be tolled until a timely motion to reconsider or to amend the decision has been ruled upon by the Deputy Commissioner.~~

~~(c) Particular grounds for appeal not set forth in the application for review shall be deemed abandoned, and argument thereon shall not be heard before the Full Commission.~~

~~(d) Appellant's Form 44 and brief in support of his grounds for appeal shall be filed in triplicate with the Industrial Commission, with a certificate indicating service on appellee by mail or in person, within 25 days after receipt of the transcript, or receipt of notice that there will be no transcript. Thereafter, appellee shall have 25 days from service of appellant's brief within which to file a reply brief in triplicate with the Industrial Commission, with written statement of service of copy by mail or in person on appellant. When an appellant fails to file a brief, appellee shall file his brief within 25 days after appellant's time for filing brief has expired. A party who fails to file a brief will not be allowed oral argument before the Full Commission. If both parties appeal, they shall each file an appellant's and appellee's brief on the schedule set forth herein. If the matter has not been calendared for hearing, any party may file with the Docket Director a written stipulation to a single extension of time not to exceed 15 days. In no event shall the cumulative extensions of time exceed 30 days.~~

~~(e) After notice of appeal has been given to the Full Commission, any motions related to the issues before the Full Commission shall be filed in triplicate with the Full Commission, with service on the other parties.~~

~~(f) No new evidence will be presented to or heard by the Full Commission unless the Commission in its discretion so permits.~~

~~(g) Cases should be cited by North Carolina Reports, and, preferably, to Southeastern Reports. Counsel shall not discuss matters outside the record, assert personal opinions or relate personal experiences, or attribute unworthy acts or motives to opposing counsel.~~

~~(h) The Industrial Commission or any one of the parties with permission of the Industrial Commission may waive oral argument before the Full Commission. In the event of such waiver, the Full Commission will file a decision, based on the record, assignments of error and briefs.~~

~~(i) A plaintiff appealing the amount of a disfigurement award shall personally appear before the Full Commission to permit the Full Commission to view the disfigurement.~~

~~(j) Briefs to the Full Commission shall not exceed 35 pages, excluding attachments. No page limit shall apply to the length of attachments. Briefs shall be prepared entirely using a 12 point font, shall be double spaced, and shall be prepared with non-justified right margins. Each page of the brief shall be numbered at the bottom right of the page. When quoting or paraphrasing testimony or other evidence in the transcript of the evidence, a parenthetic entry in the text, to include the exact page number location within the transcript of the evidence of the information being referenced shall be placed at the end of the sentence citing the information [Example: (T.p.38)]. When quoting or paraphrasing testimony or other evidence in the transcript of a deposition, a parenthetic entry in the text to include the name of the person deposed and exact page number location within the transcript of the deposition of the information being referenced shall be placed at the end of the sentence citing the information. [Example: (Smith p.15)].~~

(a) 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) 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 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 FTP site where the official transcript and exhibits can 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. The Commission shall save a copy of the parties' acknowledgement e-mails 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*.

(c) 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 expressing a request for review as set forth in Paragraph (a) of this Rule, jurisdiction shall be immediately 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 expressing a request for review of the Deputy Commissioner's decision as set forth in Paragraph (a) of this Rule.

(d) The appellant shall submit a Form 44 *Application for Review* upon which appellant shall state 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, the pages in the transcript on which the alleged errors are recorded. Grounds for review 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) 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 appellant's brief to file a responsive brief with the Commission. Appellee's brief must 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 party may file with the Docket Director a written stipulation to a single extension of time not to exceed 15 days. In no event shall the cumulative extensions of time exceed 30 days.

(f) After a request for review has been given to the Full Commission, any motions related to the issues for review before the Full Commission 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, but not limited to, 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 the Full Commission at the time of the hearing of the request for review, except motions related to the appellate record. The Full Commission, for good cause shown, may rule on such motions prior to oral argument.
(g) Cases shall be cited to the North Carolina Reports, the North Carolina Court of Appeals Reports, or the North Carolina Reporter, and when possible, to the Southeastern 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.
(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 location 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.

04 NCAC 10A .0704 REMAND FROM THE APPELLATE COURTS

(a) When a case is remanded to the Commission from the appellate courts, each party may file a statement, with or without a brief, to the Full Commission setting forth its position on the actions or proceedings, including evidentiary hearings or depositions, required to comply with the court's decision. This statement shall be filed within 30 days of the issuance of the court's mandate and shall be filed with the Commissioner who authored the Full Commission decision or the Commissioner designated by the Chairman of the Commission if the Commissioner who authored the decision is no longer a member of the Industrial Commission. The deadline to submit the statement to the Commission shall be stayed automatically upon a party filing a petition for discretionary review or rehearing to the appellate courts.
(b) Application may be made in the first instance to the Supreme Court for a writ of supersedeas to stay the execution or enforcement of a judgment, order, or other determination mandated by the Court of Appeals when a notice of appeal of right or a petition for discretionary review has been or will be timely filed, or a petition for review by certiorari, mandamus, or prohibition has been filed to obtain review of the decision of the Court of Appeals.

Authority G.S. 97-80(a); 97-86.

SECTION .0800 – RULES OF THE COMMISSION

04 NCAC 10A .0801 WAIVER OF RULES

~~In the interest of justice, these rules may be waived by the Industrial Commission. The rights of any unrepresented plaintiff will be given special consideration in this regard, to the end that a plaintiff without an attorney shall not be prejudiced by mere failure to strictly comply with any one of these 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 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.

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

SUBCHAPTER 10B – TORT CLAIMS RULES

SECTION .0500 – RULES OF THE COMMISSION

04 NCAC 10B .0501 WAIVER OF RULES

~~In the interest of justice, these rules may be waived by a Commissioner, Deputy Commissioner, or the Full Commission.~~
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 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.

Authority G.S. 143-291; 143-300.

SUBCHAPTER 10C – NORTH CAROLINA INDUSTRIAL COMMISSION RULES FOR UTILIZATION OF REHABILITATION PROFESSIONALS IN WORKERS' COMPENSATION CLAIMS

SECTION .0100 – RULES

04 NCAC 10C .0103 DEFINITIONS

As used in this Subchapter:

~~(a)~~(1) ~~RPs are~~ "Rehabilitation professional" means a medical case ~~managers and~~ manager, a ~~coordinators~~ coordinator of medical rehabilitation ~~services~~ services, ~~and/or~~ or a vocational rehabilitation professional providing vocational rehabilitation services, including ~~but not limited to,~~ state, private, or carrier based, whether on site, telephonic, or in or out of state. ~~RPs do not include direct care providers, e.g., physical therapists, occupational therapists, or speech therapists.~~ Physical therapists, occupational therapists, speech therapists, and other direct care providers are not rehabilitation professionals under the Rules in this Subchapter.

~~(b) The "parties" are the worker, the worker's attorney, the employer, the workers' compensation carrier (including claims administrator, third party administrator), and the employer or carrier's attorney(s).~~

~~(c) "Physician" means medical doctor, chiropractor, other physician, and, where the context requires, other health care providers.~~

~~(d)~~(2) "Medical rehabilitation" ~~refers to~~ means the planning and coordination of health care ~~services.~~ services by a medical case manager or coordinator, with the goal of assisting an injured worker to be restored ~~The goal of medical rehabilitation is to assist in the restoration of injured workers~~ as nearly as possible to the ~~workers'~~ worker's pre-injury level of physical function. Medical case management ~~may include but is not limited to~~ includes:

(a) case assessment; ~~assessment, including a personal interview with the injured worker;~~
(b) development, implementation and coordination of a care plan with health care ~~providers~~ providers, ~~and with~~ the ~~worker~~ worker, and his or her family;
(c) evaluation of treatment results;
(d) planning for community ~~re-entry;~~ re-entry and return to ~~work~~ work; ~~with the employer of injury and/or~~ and
(e) referral for further vocational rehabilitation services.

~~(e)~~(3) ~~"Vocational Rehabilitation"~~ "Vocational rehabilitation" ~~refers to~~ means the delivery and coordination of services under an individualized written plan, with the goal of assisting the injured ~~workers~~ worker to return to suitable ~~employment.~~ employment or participate in education or retraining, as defined by Item (5) of this Rule or applicable statute.

~~(1) Specific vocational rehabilitation services may include, but are not limited to: vocational assessment, vocational exploration, counseling, job analysis, job modification, job development and placement, labor market survey, vocational or psychometric testing, analysis of transferable skills, work adjustment counseling, job-seeking skills training, on-the-job training and retraining, and follow-up after re-employment.~~

~~(2) The vocational assessment is based on the RP's evaluation of the worker's social, medical, and vocational standing, along with other information significant to employment potential and on a face-to-face interview between the worker and the RP, to determine whether the worker can benefit from vocational rehabilitation services, and, if so, to identify the specific type and sequence of appropriate services. It should include an evaluation of the worker's expectations in the rehabilitation process, an evaluation of any specific requests by the worker for medical treatment or vocational training, and a statement of the RP's conclusion regarding the worker's need for rehabilitation services, benefits expected from services, and a description of the proposed rehabilitation plan.~~

~~(3) Job placement activities may be commenced after completion of a vocational assessment and formulation of an individualized plan for vocational services which specifies its goals and the priority for return-to-work options in each case. Placement shall only be directed toward prospective employers offering the opportunity for suitable employment, as defined herein.~~

~~(f)~~(4) "Return to work" means placement of the injured worker into suitable employment, as defined ~~herein.~~ by Item (5) of this Rule or applicable statute. ~~Return-to-work options generally should be considered in the following priority:~~

~~(1) Current job, current employer;~~

~~(2) New job, current employer;~~
~~(3) On-the-job training, current employer;~~
~~(4) New job, new employer;~~
~~(5) On-the-job training, new employer;~~
~~(6) Formal vocational training to prepare worker for job with current or new employer.~~
~~(7) Due to the high risk of small business failure, self-employment should be considered only when its feasibility is documented with reference to worker's aptitudes and training, adequate capitalization, and market conditions.~~

~~(g)~~(5) ~~"Suitable employment"~~ For claims arising before June 24, 2011, "suitable employment" means employment in the ~~local~~ labor market or self-employment ~~which~~ that is reasonably attainable and ~~which~~ that offers an opportunity to restore the worker as soon as possible and as nearly as practicable to pre-injury wage, while giving due consideration to the worker's qualifications (age, education, work experience, physical and mental capacities), impairment, vocational interests, and aptitudes. No one factor shall be considered solely in determining suitable employment. For claims arising on or after June 24, 2011, the statutory definition of "suitable employment," G.S. 97-2(22), applies.

(6) "Conditional rehabilitation professional" means a rehabilitation professional who has not met the requirements for qualified rehabilitation professionals under Paragraph (d) of Rule .0105 of this Subchapter and who desires to provide services as a rehabilitation professional in cases subject to the Rules in this Subchapter.

Authority G.S. 97-2(22); 97-25.4; 97-25.5; 97-32.2; 97-80.

04 NCAC 10C .0108 INTERACTION WITH PHYSICIANS

(a) At the initial visit with a physician the ~~RP~~ rehabilitation professional shall provide ~~professional~~ identification in the form of a company identification or business card and ~~shall~~ explain the ~~RP's~~ rehabilitation professional's role in the case.

(b) In all cases, the ~~RP~~ rehabilitation professional shall advise the worker that ~~he or she~~ the worker has the right to a private examination by the ~~medical~~ health care provider outside of the presence of the ~~RP.~~ rehabilitation professional. If the worker prefers, he or she may request that the ~~RP~~ rehabilitation professional accompany him or her during the examination. However, if the worker or the worker's attorney notifies the ~~RP~~ rehabilitation professional in writing that the worker desires a private examination, no subsequent waiver of that right shall be effective unless the waiver is ~~revoked~~ made in writing by the worker or, if represented, by the worker's attorney.

(c) If the ~~RP~~ rehabilitation professional ~~wishes~~ needs to have ~~a~~ an ~~personal~~ in-person conference with the physician following an examination, the ~~RP~~ rehabilitation professional ~~should~~ shall reserve with the physician sufficient appointment time for ~~a~~ the conference. The worker ~~must~~ shall be offered the opportunity to attend ~~this~~ the conference with the physician. If the worker or the physician does not consent to a joint conference, or if in the physician's opinion it is medically contraindicated for the worker to participate in the conference, the ~~RP~~ rehabilitation professional ~~will~~ shall note this in his or her report, ~~and~~ may ~~in such case~~ communicate directly with the physician, and shall report the substance of the communication.

(d) When the ~~RP~~ rehabilitation professional determines that it is necessary to communicate with a physician other than at a joint meeting, the ~~RP~~ rehabilitation professional shall first notify the injured worker, or ~~his/her~~ his or her attorney if represented, of the ~~RP's~~ rehabilitation professional's intent to communicate and the reasons therefore. The ~~RP~~ rehabilitation professional ~~need~~ is not required to obtain the injured worker's or his or her attorney's prior consent ~~for the following types of communication:~~ if:

(1) The communication is limited to scheduling issues or requests for time-sensitive medical records;
(2) A medical emergency is involved;
(3) The injured worker's health or medical treatment would either be adversely affected by a delay or benefited by immediate action;
(4) The communication is limited to advising the physician of the employer or carrier approval for recommended testing or treatment;
(5) The injured worker or attorney has consented to ~~such~~ the ~~communications~~ communications; ~~through a valid, current authorization;~~
(6) The communication is initiated by the physician; or
(7) The injured worker failed to show up for a scheduled appointment or arrived at a time other than the scheduled appointment time.

~~Whenever an RP~~ When a rehabilitation professional communicates with a physician without the prior consent or presence of the injured worker, the ~~RP~~ rehabilitation professional must ~~promptly~~ document the reasons for and the substance of the communication and ~~promptly~~ report ~~such~~ the reasons and substance to the injured worker or his or her attorney, if represented, pursuant to Rule ~~VI.~~ .0106 of this Subchapter.

~~(e) The RP may assist in scheduling second opinions requested by the treating physician, as well as supporting treatment. In such case, the worker shall receive at least 10 calendar days notice of an appointment for a second opinion unless otherwise agreed by the parties or required by statute.~~

~~(f) The RP may assist in obtaining from the treating physician an opinion as to the degree of permanent partial impairment retained by the worker at maximum medical improvement. The decision to obtain a second physician's opinion on the degree of impairment is not within the practice of rehabilitation. However, if requested by the party who desires a second opinion, the RP may assemble information, schedule, coordinate, and, with the worker's consent, attend the appointment with that physician.~~

~~(g) If a party requests a second opinion or an independent medical examination, the RP's involvement is limited to assembling and forwarding medical records and information, and scheduling, coordinating, and, with the worker's consent, attending the appointment with that physician.~~

(e) The following requirements apply to interactions regarding impairment ratings, independent medical examinations, second opinions or consults:

(1) When a party or health care provider requests a consult, second opinion, or independent medical examination that is authorized or ordered, the rehabilitation professional may assemble and forward medical records and information, schedule and coordinate an appointment, and, if the worker consents, have a joint meeting with the health care provider and the worker after a private exam, if requested.

(2) When any such exam is requested by the carrier, the worker shall receive at least 10 calendar days' notice of the appointment unless the parties agree otherwise or unless otherwise required by statute.

~~(h)~~(f) The ~~RP~~ rehabilitation professional shall simultaneously send ~~copies~~ to the parties copies of all written communications ~~to~~ with ~~medical~~ health care ~~providers,~~ providers and shall accurately and completely record and report all oral communications.

Authority G.S. 97-25.4; 97-25.5; 97-32.2; 97-80.

04 NCAC 10C .0109 VOCATIONAL REHABILITATION SERVICES AND RETURN TO WORK

(a) When performing the vocational assessment and formulating and drafting the individualized written rehabilitation plan for the employee required by G.S. 97-32.2(c), the vocational rehabilitation professional shall follow G.S. 97-32.2.

(b) Job placement activities may not be commenced until after a vocational assessment and an individualized written rehabilitation plan for vocational rehabilitation services specifying the goals and the priority for return-to-work options have been completed in the case in accordance with G.S. 97-32.2. Job placement activities shall be directed only toward prospective employers offering the opportunity for suitable employment, as defined by Rule .0103(5) of this Section or by applicable statute.

(c) Return-to-work options shall be considered in the following order of priority:

(1) current job, current employer;

(2) new job, current employer;

(3) on-the-job training, current employer;

(4) new job, new employer;

(5) on-the-job training, new employer;

(6) formal education or vocational training to prepare worker for job with current or new employer; and

(7) self-employment, only when its feasibility is documented with reference to the employee's aptitudes and training, adequate capitalization, and market conditions.

(d) When an employee requests retraining or education as permitted in G.S. 97-32.2(a), the vocational rehabilitation professional shall provide a written assessment of the employee's request that includes an evaluation of:

(1) the retraining or education requested;

(2) the availability, location, cost, and identity of providers of the requested retraining or education;

(3) the likely duration until completion of the requested retraining or education and the likely class schedules, class attendance requirements, and out-of-class time required for homework and study;

(4) the current or projected availability of employment upon completion; and

(5) the anticipated pay range for employment upon completion.

~~(a)~~(e) ~~The RP shall obtain from the medical provider work restrictions which fairly address the demands of any proposed employment. If ordered by a physician, the RP should obtain a Functional Capacity Evaluation (FCE) or Physical Capacity Evaluation (PCE). Any FCE or PCE obtained should measure the worker's capacities and impairments.~~ The rehabilitation professional shall obtain work restrictions from the health care provider that address the demands of any proposed employment. If ordered by a physician, the rehabilitation professional shall schedule an appointment with a third party provider to evaluate an injured worker's functional capacity, physical capacity, or impairments to work.

~~(b)~~(f) The ~~RP [Rehabilitation Professional]~~ rehabilitation professional shall refer the worker only to opportunities for suitable employment, as defined ~~herein~~ by Rule .0103(5) of this Section or by applicable statute.

~~(c)~~(g) If the ~~RP,~~ rehabilitation professional intends to utilize written or videotaped job descriptions in the return-to-work process, the ~~RP,~~rehabilitation professional shall provide a copy of the description to all parties for review before the job description is provided to the doctor. The worker or the worker's attorney shall have seven business days from the mailing of the ~~description,~~ description to notify the ~~RP~~rehabilitation professional, all parties, and the physician of any objections or amendments ~~to the job description.~~ thereto. The job description and the objections or amendments, if ~~any~~ any, shall be submitted to the physician simultaneously. This process ~~may~~ shall be expedited ~~on occasions~~ when job availability is critical. This waiting period does not apply if the worker or the worker's attorney has pre-approved the job description.

~~(d)~~(h) In preparing written job descriptions, the ~~RP~~ rehabilitation professional shall utilize standards including ~~recognized standards which may include but not be limited to~~ the Dictionary of Occupational Titles ~~and/or~~ and the Handbook for Analyzing Jobs published by the ~~U.S.~~ United States Department of Labor. ~~Labor, which are recognized as national standard references for use in vocational rehabilitation.~~

~~(e) In identifying proposed employment for the injured worker, the RP should consider the worker's transportation requirements.~~

~~(f)~~(i) ~~Follow-up~~ The rehabilitation professional may conduct follow-up after job placement ~~may be carried out~~ to verify the appropriateness of the job placement.

~~(g)~~(j) The ~~RP,~~ rehabilitation professional shall not initiate or continue placement activities ~~which~~ that do not appear reasonably likely to result in placement of the injured worker in suitable employment. The ~~RP,~~ rehabilitation professional shall report to the parties when efforts to place the worker in suitable employment do not appear reasonably likely to result in placement of the injured worker in suitable employment.

Authority G.S. 97-25.4; 97-25.5; 97-32.2; 97-2(22).

SECTION .0200 - RULES OF THE COMMISSION

04 NCAC 10C .0201 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 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.

Authority G.S. 97-25.4; 97-80.

SUBCHAPTER 10D – WORKERS' COMPENSATION RULES FOR MANAGED CARE ORGANIZATIONS

SECTION .0100 – RULES

04 NCAC 10D .0110 WAIVER OF RULES

~~For good cause, and in its discretion, subject to statutory requirements, the Commission may waive adherence to any of these 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 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.

Authority G.S. 97-25.2; 97-80(a).

SUBCHAPTER 10E – WORKERS' COMPENSATION RULES FOR UTILIZATION REVIEW

SECTION .0100 – RULES

04 NCAC 10E .0103 ADMISSION OF OUT-OF STATE ATTORNEYS TO APPEAR BEFORE THE COMMISSION

(a) Attorneys residing in and licensed to practice law in another state who seek to be admitted to practice before the Commission to represent a client in a particular claim pursuant to G.S. 84-4.1 may file a motion with the Commission that complies with the requirements of G.S. 84-4.1. If the *pro hac vice* motion is filed in a case involving a stipulated Opinion and Award regarding a death claim, the motion shall be filed with the Chief Deputy Commissioner. The North Carolina attorney with whom the out-of-state attorney associates pursuant to G.S. 84-4.1(5) may also file the motion.

(b) The motion shall be filed with the Executive Secretary of the Commission except under the following circumstances:

(1) If the pertinent claim is set for hearing before or pending decision by a Deputy Commissioner or the Full Commission, the motion shall be filed with the Deputy Commissioner or chair of the Full Commission panel, respectively.
(2) If the motion is filed in a case involving a form application regarding a death claim, the motion shall be filed with the Director of Claims Administration.
(3) If the motion is filed in a case involving a stipulated Opinion and Award regarding a death claim, the motion shall be filed with the Chief Deputy Commissioner.

(c) A proposed Order that includes the facsimile numbers for all counsel of record shall be provided with the motion.

(d) Following the payment of the fees to the North Carolina State Bar and General Court of Justice as required by G.S. 84-4.1, the out-of-state attorney or the associated North Carolina attorney shall file a statement with the Executive Secretary documenting payment of said fees and the submission of any *pro hac vice* admission registration statement required by the North Carolina State Bar.

Authority G.S. 84-4.1; 97-80(a).

04 NCAC 10E .0104 SECURE LEAVE PERIODS FOR ATTORNEYS

(a) In order to secure for the parties to actions and proceedings pending before the Industrial Commission, and to the public at large, the heightened level of professionalism that an attorney is able to provide when the attorney enjoys periods of time that are free from the urgent demands of professional responsibility and to enhance the overall quality of the attorney's personal and family life, any attorney may from time to time designate and enjoy one or more secure leave periods each year as provided in this Rule.

(b) During any calendar year, an attorney's secure leave periods pursuant to this Rule shall not exceed, in the aggregate, three calendar weeks.
(c) To request a secure leave period an attorney shall file a written request, by letter or motion, containing the information required by Paragraph (d) of this Rule with the Office of the Chair within the time provided in Paragraph (e) of this Rule. Upon such filing, the Chair shall review the request and, if appropriate, issue a letter allowing the requested secure leave period, and the attorney shall not be required to appear at any trial, hearing, deposition, or other proceeding before the Commission during that secure leave period.
(d) The request shall contain the following information:

(1) the attorney's name, address, telephone number and state bar number,
(2) the date(s) for which secure leave is being requested,
(3) the dates of all other secure leave periods during the current calendar year that have previously been designated by the attorney pursuant to this Rule,
(4) A statement that the secure leave period is not being designated for the purpose of delaying, hindering or interfering with the timely disposition of any matter in any pending action or proceeding, and
(5) a statement that no action or proceeding in which the attorney has entered an appearance has been scheduled, tentatively set, or noticed for trial, hearing, deposition or other proceeding during the designated secure leave period.

(e) To be allowed, the request shall be filed:

(1) no later than 90 days before the beginning of the secure leave period, and
(2) before any trial, hearing, deposition or other matter has been regularly scheduled, peremptorily set or noticed for a time during the designated secure leave period.

An untimely request will be automatically denied by letter. In the event that a party has been denied secure leave because the request was not timely filed and there are extraordinary circumstances, the attorney may file a motion requesting an exception. If the case has been scheduled for hearing before a Deputy Commissioner, the motion shall be addressed to the Deputy Commissioner. If the matter is scheduled for hearing before the Full Commission, the motion shall be addressed to the chair of the panel before which the hearing will be held. In all other cases, the motion should be directed to the Office of the Chair.
(f) If, after a secure leave period has been allowed pursuant to this Rule, any trial, hearing, deposition, or other proceeding is scheduled or tentatively set for a time during the secure leave period, the attorney shall file with the Deputy Commissioner or chair of the Full Commission panel before which the matter was calendared or set, and serve on all parties, a copy of the letter allowing the secure leave period with a certificate of service attached. Upon receipt, the pertinent proceeding shall be rescheduled for a time that is not within the attorney's secure leave period.
(g) If, after a secure leave period has been allowed pursuant to this Rule, any deposition is noticed for a time during the secure leave period, the attorney may serve on the party that noticed the deposition a copy of the letter allowing the secure leave period with a certificate of service attached, and that party shall reschedule the deposition for a time that is not within the attorney's secure leave period.
(h) Nothing in this Rule shall limit the inherent power of the Commission to reschedule a case to allow an attorney to enjoy a leave during a period that has not been allowed pursuant to this Rule, but there shall be no entitlement to any such leave.

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

SECTION .0200 – FEES

04 NCAC 10E .0201 DOCUMENT AND RECORD FEES

(a) The fees in this Rule apply to all subject areas within the authority of the Commission.
(b) Upon written request, to the extent permitted by Article 1 of Chapter 97, Article 31 of Chapter 143, and Chapter 132 of the North Carolina General Statutes, copies of documents and audio recordings of Commission hearings are available at the "actual cost" as defined by G.S. 132-6.2(b). The Commission shall provide the "actual cost" on the Commission's website. Certification of documents in the Commission's claim files is available upon request at a cost of one dollar ($1.00) per certification in addition to the "actual cost" for the copies of the documents. Electronic copy certification is not available.
(c) Documents shall be sent via certified mail upon request at the actual cost established by the United States Postal Service.
(d) North Carolina sales tax shall be added if applicable.

Authority G.S. 7A-305; 97-73; 97-79; 97-80; 132-6.2; 143-291.1; 143-291.2; 143-300.

04 NCAC 10E .0202 HEARING COSTS OR FEES

(a) The following hearing costs or fees apply to all subject areas within the authority of the Commission:

(1) one hundred twenty dollars ($120.00) for a hearing before a Deputy Commissioner to be charged after the hearing has been held;
(2) one hundred twenty dollars ($120.00) if a case is continued after the case is calendared for a specific hearing date, to be paid by the requesting party or parties;
(3) one hundred twenty dollars ($120.00) if a case is withdrawn, removed, or dismissed after the case is calendared for a specific hearing date;
(4) two hundred twenty dollars ($220.00) for a hearing before the Full Commission to be charged after the hearing has been held;
(5) one hundred twenty dollars ($120.00) if an appeal or request for review to the Full Commission is withdrawn or for the dismissal of an appeal or request for review due to the failure to prosecute or perfect the appeal or request for review after the appeal or request for review is scheduled for a specific hearing date;

In workers' compensation cases, these fees shall be paid by the employer unless the Commission orders otherwise, except as specified in Subparagraph (2) of this Rule.
(b) The Commission may waive fees set forth in Paragraph (a) of this Rule, or assess such fees against a party or parties pursuant to G.S. 97-88.1 if the Commission determines that the hearing has been brought, prosecuted, or defended without reasonable ground.
(c) Failure to pay fees or costs assessed by the Commission may result in penalties. The Commission may issue a notice and order to show cause as to why a fee or cost assessed by the Commission has not been paid.

Authority G.S. 7A-305; 97-73; 97-80; 143-291.1; 143-291.2; 143-300.

04 NCAC 10E .0203 FEES SET BY THE COMMISSION

(a) In workers' compensation cases, the Commission sets the following fees:

(1) four hundred dollars ($400.00) for the processing of a compromise settlement agreement to be paid 50 percent by the employee and 50 percent by the employer(s) or the employer's carrier(s). Unless the parties agree otherwise, the employer(s) or the employer's carrier(s) shall pay such fee in full when submitting the agreement to the Commission, and shall then be entitled to a credit for the employee's 50 percent share of such fee against settlement proceeds;

(2) three hundred dollars ($300.00) for the processing of a Form 21 Agreement for Compensation for Disability, Form 26 Supplemental Agreement as to Payment of Compensation, or Form 26A Employer's Admission of Employee's Right to Permanent Partial Disability to be paid by the employee and the employer in equal shares. The employer shall pay such fee in full when submitting the agreement to the Commission. Unless the parties agree otherwise or the award totals three thousand dollars ($3,000) or less, the employer shall be entitled to a credit for the employee's 50 percent share of such fee against the award;

(3) two hundred dollars ($200.00) for the processing of a I.C. Form MSC5, *Report of Mediator*, to be paid 50 percent by the employee and 50 percent 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 benefits that may be determined to be due to the employee, and the employer(s) or the employer's carrier(s) may withhold funds from any award for this purpose.

(4) a fee equal to the filing fee required to file of a civil action in the Superior Court division of the General Court of Justice for the processing of a Form 33I *Intervenor's Request that Claim be Assigned for Hearing*, to be paid by the intervenor.

(b) In tort claims cases, the filing fee is an amount equal to the filing fee required to file a civil action in the Superior Court division of the General Court of Justice.

Authority G.S. 97-10.2; 97-17; 97-18.2; 97-26(i); 97-73; 97-80; 143-291.2; 143-300.

SECTION .0300 – RULES OF THE COMMISSION

04 NCAC 10E .0301 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 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.

Authority G.S. 97-25.2; 97-25.4; 97-73; 97-80; 130A-425(d); 143-166.4; 143-296; 143-300.

SUBCHAPTER 10G – NORTH CAROLINA INDUSTRIAL COMMISSION RULES FOR MEDIATED SETTLEMENT AND NEUTRAL EVALUATION CONFERENCES

SECTION .0100 – MEDIATION AND SETTLEMENT

04 NCAC 10G .0104A FOREIGN LANGUAGE INTERPRETERS

~~(a) Services of Foreign Language Interpreters Required Unless Waived. When a person who does not speak or understand the English language is required to attend a mediation conference, the person shall be assisted by a qualified foreign language interpreter unless the right to an interpreter is waived by both parties.~~
~~(b) Qualifications of Interpreters. To qualify as a foreign language interpreter, a person must 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 N.C. Gen. Stat. §8C-1, Rule 702.~~

~~(c) Notice to Industrial Commission and Opposing Party of Need for Interpreter. Any party who is unable to speak or understand English shall so notify the Industrial Commission and the opposing party, in writing, not less than 21 days prior to the date of the mediation conference. The notice shall state with specificity the language(s) that must be interpreted.~~
~~(d) Designation of Interpreter. Upon notice of the need for an interpreter, the employer or insurer shall retain a qualified, disinterested interpreter, either agreed upon by the parties or approved by the Industrial Commission, to assist at the mediation conference.~~
~~(e) Interpreter Fees. The interpreter's fee shall constitute a cost as contemplated by N.C. Gen. Stat. §97-80. A qualified interpreter who appears at a mediation conference shall be 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 it is ultimately determined by the Commission that the request for an interpreter was unfounded, attendant costs may be assessed against the movant.~~
~~(f) Interpreter Ethics. Foreign language interpreters shall abide by the code of ethical conduct for court interpreters promulgated by the North Carolina Administrative Office of the Courts and adopted by the Industrial Commission and shall interpret, as word for word as is practicable, without editing, commenting, or summarizing, testimony or other communications.~~
(a) Any party who is unable to speak or understand English shall so notify the Commission, the mediator, and the opposing party(ies) in writing, not less than 21 days prior to the date of the mediated settlement conference. The notice shall contain the party's primary language and how the party plans to communicate in English during the mediation.
(b) If either party shall request assistance by a qualified foreign language interpreter for a party who does not speak or understand the English language, the party requesting the assistance of the foreign language interpreter shall bear the costs.
(c) If the certified mediator, in his or her discretion, notifies the parties of the need for a qualified foreign language interpreter, the parties shall retain a disinterested interpreter, who possesses the qualifications listed in Paragraph (d) of this Rule, to assist at the mediated settlement conference. 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.
(d) A qualified foreign language interpreter shall possess sufficient experience and education, or a combination of experience and education, in 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.
(e) Qualified 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.

Authority G.S. 97-80(a),(c); 143-296; 143-300.

04 NCAC 10G .0107 COMPENSATION OF THE MEDIATOR

~~(a) By Agreement. - When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator.~~
~~(b) By Commission Order - When the mediator is appointed by the Commission, the mediator's compensation shall be as follows:~~
~~(1) Conference Fees. The mediator shall be paid by the parties at the rate of $150.00 per hour for mediation services at the conference.~~
~~(2) Administrative Fees. The parties shall pay to the mediator a one time, per case administrative fee of $150.00, unless otherwise ordered by the Commission. The mediator's administrative fee shall be paid in full unless, within 10 days after the date that the mediator has been appointed, written notice is given to the mediator and the Dispute Resolution Coordinator that the issues for which a request for hearing had been filed have been fully resolved or the hearing request has been withdrawn.~~
~~(3) Postponement Fees. As used herein, the term "postpone" shall mean to reschedule or otherwise not proceed with a scheduled mediation conference after that conference has been scheduled to convene on a specific date. After a conference is scheduled to convene on a specific date it may not be postponed without the requesting party first notifying all other parties concerning the grounds for the requested postponement, or without the consent and approval of the mediator or the Dispute Resolution Coordinator. If a mediation conference is postponed without good cause, the mediator shall be paid a postponement fee unless, upon application of the party or parties charged with the fee, the fee is waived by the Commission. Unless the Commission otherwise orders, the postponement fee shall be $300.00 if the mediation conference is postponed within seven calendar days of the scheduled conference, and $150.00 if the mediation conference is postponed more than seven calendar days prior to a scheduled conference. Postponement fees shall be allocated in equal shares to the party or parties requesting the postponement unless otherwise ordered by the Commission.~~
~~(4) The settlement of a case prior to the scheduled date for mediation shall be good cause for a postponement provided that the mediator was notified of the settlement immediately after it was reached and the mediator received notice of the settlement at least fourteen (14) calendar days prior to the date scheduled for mediation.~~
~~(c) Payment by Parties - Payment shall be due upon completion of the conference; provided, that the State shall be billed at the conference and pay within 30 days of receipt of the billing, and insurance companies or carriers whose written procedures do not provide for payment of the mediator at the conference may pay within 15 days of the conference. Unless otherwise agreed to by the parties or ordered by the Commission, costs of the mediated settlement conference shall be allocated to the parties, as follows: one share by plaintiff(s); one share by the workers' compensation defendant employer or its insurer, or if more than one employer or carrier is involved, or if there is a dispute between employer(s) or carrier(s), one share by each separately represented entity; one share by participating third party tort defendants or their carrier, or if there are conflicting interests among them, one share from each such defendant or group of defendants having shared~~

~~interests; and, one share by the defendant State agency in a State Tort Claims Act case. Parties obligated to pay a share of the costs shall be responsible for equal shares; provided, however, that in workers' compensation claims the defendant shall pay the plaintiff's share of mediation, postponement, and substitution fees, as well as its own. Unless the Dispute Resolution Coordinator enters an Order allocating such fees to a particular party, the fees may be taxed as other costs by the Commission. The defendant shall be reimbursed for the plaintiff's share of such fees when the case is concluded from benefits that may be determined to be due to the plaintiff, and the defendant may withhold funds from any award for this purpose.~~

(a) By Agreement. When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator.

(b) By Commission Order. When the mediator is appointed by the Commission, the mediator's compensation shall be as follows:

(1) Conference Fees. The mediator shall be paid by the parties at the rate of one hundred fifty dollars ($150.00) per hour for mediation services provided at the mediated settlement conference.

(2) Administrative Fees. The parties shall pay to the mediator a one time, per case administrative fee of one hundred fifty dollars ($150.00). The mediator's administrative fee shall be paid in full unless, within 10 days after the mediator has been appointed, written notice is given to the mediator and to the Dispute Resolution Coordinator that the issues for which a request for hearing was filed have been fully resolved or that the hearing request has been withdrawn.

(3) Postponement Fees. As used in this Subchapter, the term "postpone" means to reschedule or otherwise not proceed with a scheduled mediated settlement conference after the conference has been scheduled to convene on a specific date. After a conference is scheduled to convene on a specific date, the conference may not be postponed unless the requesting party notifies all other parties of the grounds for the requested postponement and obtains the consent and approval of the mediator or the Dispute Resolution Coordinator. If the conference is postponed without good cause, the mediator shall be paid a postponement fee. The postponement fee shall be three hundred dollars ($300.00) if the conference is postponed within seven calendar days of the scheduled date, and one hundred fifty dollars ($150.00) if the conference is postponed more than seven calendar days prior to the scheduled date. Unless otherwise ordered by the Commission in the interests of justice, postponement fees shall be allocated in equal shares to the party or parties requesting the postponement. As used in this Rule, "good cause" shall mean that the reason for the postponement involves a situation over which the party seeking the postponement has no control, including but not limited to, a party or attorney's illness, a death in a party or attorney's family, a demand by a judge that a party or attorney for a party appear in court, or inclement weather such that travel is prohibitive.

(4) The settlement of a case prior to the scheduled date of the mediated settlement conference shall be good cause to cancel the mediation without the approval of the mediator or the Dispute Resolution Coordinator. The parties shall notify the mediator of any cancellation due to settlement. The mediator may charge a cancellation fee of one hundred fifty dollars ($150.00) if notified of the cancellation within fourteen days of the scheduled date, or three hundred dollars ($300.00) if notified within seven days of the scheduled date.

(c) Payment by Parties. Payment is due upon completion of the mediated settlement conference; provided, that the State shall be billed at the conference and shall pay within 30 days of receipt of the bill, and insurance companies or carriers whose written procedures do not provide for payment of the mediator at the conference may pay within 15 days of the conference. Unless otherwise agreed to by the parties or ordered by the Commission due to a party or parties violating a Rule in this Subchapter, the costs of the conference shall be allocated to the parties, as follows:

(1) one share by plaintiff(s);

(2) one share by the workers' compensation defendant-employer or its insurer, or if more than one employer or carrier is involved, or if there is a dispute between employer(s) or carrier(s), one share by each separately represented entity;

(3) one share by participating third-party tort defendants or their carrier, or if there are conflicting interests among them, one share from each defendant or group of defendants having shared interests; and

(4) one share by the defendant State agency in a Tort Claims Act case.

Parties obligated to pay a share of the costs are responsible for equal shares; provided, however, that in workers' compensation claims the defendant shall pay the plaintiff's share of mediation, postponement, and substitution fees, as well as defendant's own share. If plaintiff requests postponement of the mediated settlement conference, defendants shall be entitled to a credit for the postponement fee.

(d) Unless the Dispute Resolution Coordinator enters an order allocating such fees to a particular party due to the party violating a Rule in this Subchapter, the fees may be taxed as other costs by the Commission. After the case is concluded, the defendant shall be reimbursed for the plaintiff's share of such fees from benefits that may be determined to be due to the plaintiff, and the defendant may withhold funds from any award for this purpose.

Authority G.S. 97-80(a),(c); 143-296; 143-300; Rule 7 of Rules Implementing Statewide Mediated Settlement Conference in Superior Court Civil Actions.

04 NCAC 10G .0110 WAIVER OF RULES

~~In the interest of justice, or to comply with the law from time to time as it may be amended or declared, the Commission may waive any requirement of these 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 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.

Authority G.S. 97-80(a),(c); 143-296; 143-300.

SUBCHAPTER 10H – RULES OF THE INUDUSTRIAL COMMISSION RELATING TO THE LAW-ENFORCEMENT OFFICERS', FIREMENS', RESCUE SQUAD WORKERS' AND CIVIL AIR PATROL MEMBERS' DEATH BENEFITS ACT

SECTION .0200 – RULES OF COMMISSION

04 NCAC 10H .0206 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 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.

Authority G.S. 97-80(a); 143-166.4.

SUBCHAPTER 10I – CHILDHOOD VACCINE-RELATED INJURY RULES OF THE NORTH CAROLINA INDUSTRIAL COMMISSION

SECTION .0200 – RULES OF COMMISSION

04 NCAC 10I .0204 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 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.

Authority G.S. 97-80(a); 130A-425(d).

SUBCHAPTER 10J – FEES FOR MEDICAL COMPENSATION

SECTION .0100 – FEES FOR MEDICAL COMPENSATION

04 NCAC 10J .0101 FEES FOR MEDICAL COMPENSATION

(a) The Commission has adopted and published a Medical Fee Schedule, pursuant to the provisions of G.S. 97-26(a), setting maximum amounts, except for hospital fees pursuant to G.S. 97-26(b), that may be paid for medical, surgical, nursing, dental, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, original artificial members as may reasonably be necessary at the end of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances. The amounts prescribed in the applicable published Fee Schedule shall govern and apply according to G.S. 97-26(c).

(b) The Commission's Medical Fee Schedule contains maximum allowed amounts for medical services provided pursuant to Chapter 97 of the General Statutes. The Medical Fee Schedule utilizes 1995 through the present, Current Procedural Terminology (CPT) codes adopted by the American Medical Association, Healthcare Common Procedure Coding Systems (HCPCS) codes, and jurisdiction-specific codes. A listing of the maximum allowable amount for each code is available on the Commission's website at http://www.ic.nc.gov/ncic/pages/feesched.asp and in hardcopy at 430 N. Salisbury Street, Raleigh, North Carolina.

(c) The following methodology provides the basis for the Commission's Medical Fee Schedule:

(1) CPT codes for General Medicine are based on 1995 North Carolina Medicare values multiplied by 1.58, except for CPT codes 99201-99205 and 99211-99215, which are based on 1995 Medicare values multiplied by 2.05.
(2) CPT codes for Physical Medicine are based on 1995 North Carolina Medicare values multiplied by 1.36.
(3) CPT codes for Radiology are based on 1995 North Carolina Medicare values multiplied by 1.96.
(4) CPT codes for Surgery are based on 1995 North Carolina Medicare values multiplied by 2.06.

(d) The Commission's Hospital Fee Schedule, adopted pursuant to G.S. 97-26(b), provides for payment as follows:
(1) Inpatient hospital fees: Inpatient services are reimbursed based on a Diagnostic Related Groupings (DRG) methodology. The Hospital Fee Schedule utilizes the 2001 Diagnostic Related Groupings adopted by the State Health Plan. Each DRG amount is based on the amount that the State Health Plan had in effect for the same DRG on June 30, 2001. DRG amounts are further subject to the following payment band that establishes maximum and minimum payment amounts:
(A) The maximum payment is 100 percent of the hospital's itemized charges.
(B) For hospitals other than critical access hospitals, the minimum payment is 75 percent of the hospital's itemized charges. Effective February 1, 2013, the minimum payment rate is the amount provided for under Subparagraph (5) below, subject to adjustment on April 1, 2013 as provided therein.
(C) For critical access hospitals, the minimum payment is 77.07 percent of the hospital's itemized charges. Effective February 1, 2013, the minimum payment rate is the amount provided for under Subparagraph (5) below, subject to adjustment on April 1, 2013 as provided therein.
(2) Outpatient hospital fees: Outpatient services are reimbursed based on the hospital's actual charges as billed on the UB-04 claim form, subject to the following percentage discounts:
(A) For hospitals other than critical access hospitals, the payment shall be 79 percent of the hospital's billed charges. Effective February 1, 2013, the payment is the amount provided for under Subparagraph (5) below, subject to adjustment on April 1, 2013 as provided therein.
(B) For critical access hospitals, the payment shall be 87 percent of the hospital's billed charges. For purposes of the hospital fee schedule, critical access hospitals are those hospitals designated as such pursuant to federal law (42 CFR 485.601 et seq.). Effective February 1, 2013, the critical access hospital's payment is the amount provided for under Subparagraph (5) below, subject to adjustment on April 1, 2013 as provided therein.
(3) Ambulatory surgery fees: Ambulatory surgery center services are reimbursed at 79 percent of billed charges. Effective February 1, 2013, the ambulatory surgery center services are reimbursed at the amount provided for under Subparagraph (5) below, subject to adjustment on April 1, 2013 as provided therein.
(4) Other rates: If a provider has agreed under contract with the insurer or managed care organization to accept a different amount or reimbursement methodology, that amount or methodology establishes the applicable fee.
(5) Payment levels frozen and reduced pending study of new fee schedule: Effective February 1, 2013, inpatient and outpatient payments for each hospital and the payments for each ambulatory surgery center shall be set at the payment rates in effect for those facilities as of June 30, 2012. Effective April 1, 2013, those rates shall then be reduced as follows:
(A) Hospital outpatient and ambulatory surgery: The rate in effect as of that date shall be reduced by 15 percent.
(B) Hospital inpatient: The minimum payment rate in effect as of that date shall be reduced by 10 percent.
(6) Effective April 1, 2013, implants shall be paid at no greater than invoice cost plus 28 percent.

(e) Employers, insurers, and managed care organizations, or administrators on their behalf, may review and reimburse charges for medical compensation, including, but not limited to, medical, hospital, and dental fees, without submitting the charges to the Commission for review and approval.

~~(e)~~(f) A provider of medical compensation shall submit its statement for services within 75 days of the rendition of the service, or if treatment is longer, within 30 days after the end of the month during which multiple treatments were provided. However, in cases where liability is initially denied but subsequently admitted or determined by the Commission, the time for submission of medical bills shall run from the time the health care provider received notice of the admission or determination of liability. Within 30 days of receipt of the statement, the employer, carrier, or managed care organization, or administrator on its behalf, shall pay or submit the statement to the Commission for approval or send the provider written objections to the statement. If an employer, carrier, administrator, or managed care organization disputes a portion of the provider's bill, the employer, carrier, administrator, or managed care organization, shall pay the uncontested portion of the bill and shall resolve disputes regarding the balance of the charges through its contractual arrangement or through the Commission.

~~(f)~~(g) Pursuant to G.S. 97-18(i), when the 10 percent addition to the bill is uncontested, payment shall be made to the provider without notifying or seeking approval from the Commission. When the 10 percent addition to the bill is contested, any party may request a hearing by the Commission pursuant to G.S. 97-83 and G.S. 97-84.

~~(g)~~(h) When the responsible party seeks an audit of hospital charges, and has paid the hospital charges in full, the payee hospital, upon request, shall provide reasonable access and copies of appropriate records, without charge or fee, to the person(s) chosen by the payor to review and audit the records.

~~(h)~~(i) The responsible employer, carrier, managed care organization, or administrator shall pay the statements of medical compensation providers to whom the employee has been referred by the treating physician authorized by the insurance carrier for the compensable injury or body part, unless the physician has been requested to obtain authorization for referrals or tests; provided that compliance with the request shall not unreasonably delay the treatment or service to be rendered to the employee.

~~(i)~~(j) Employees are entitled to reimbursement for sick travel when the travel is medically necessary and the mileage is 20 or more miles, round trip, at the business standard mileage rate set by the Internal Revenue Service per mile of travel and the actual cost of tolls paid. Employees are entitled to lodging and meal expenses, at a rate to be established for state employees by the North Carolina Director of Budget, when it is medically necessary that the employee stay overnight at a location away from the employee's usual place of residence.

Employees are entitled to reimbursement for the costs of parking or a vehicle for hire, when the costs are medically necessary, at the actual costs of the expenses.

~~(j)~~(k) Any employer, carrier or administrator denying a claim in which medical care has previously been authorized is responsible for all costs incurred prior to the date notice of denial is provided to each health care provider to whom authorization has been previously given.

Authority G.S. 97-18(i); 97-25; 97-25.6; 97-26; 97-80(a); 138-6.

SUBCHAPTER 10L – INDUSTRIAL COMMISSION FORMS

SECTION .0100 – WORKERS' COMPENSATION FORMS

04 NCAC 10L .0101 FORM 21 – AGREEMENT FOR COMPENSATION FOR DISABILITY

(a) The parties to a workers' compensation claim shall use the following Form 21, *Agreement for Compensation for Disability*, for agreements regarding disability and payment of compensation therefor pursuant to G.S. 97-29 and 97-30. Additional issues agreed upon by the parties such as payment of compensation for permanent partial disability may also be included on the form. This form is necessary to comply with 04 NCAC 10A .0501, where applicable. The Form 21, *Agreement for Compensation for Disability*, shall read as follows:

North Carolina Industrial Commission
Agreement for Compensation for Disability
(G.S. 97-82)

IC File # _____
Emp. Code # _____
Carrier Code # _____
Carrier File # _____
Employer FEIN _____

The Use Of This Form Is Required Under The Provisions of The Workers' Compensation Act

_____
Employee's Name

_____
Address

_____
City State Zip

_____
Home Telephone Work Telephone
Social Security Number: _____ Sex: ☐ M ☐ F Date of Birth: _____

_____
Employer's Name Telephone Number

_____
Employer's Address City State Zip

_____
Insurance Carrier

_____
Carrier's Address City State Zip

_____
Carrier's Telephone Number Carrier's Fax Number

We, The Undersigned, Do Hereby Agree And Stipulate As Follows:

1. All parties hereto are subject to and bound by the provisions of the Workers' Compensation Act and _____ is the carrier/administrator for the employer.
2. The employee sustained an injury by accident or the employee contracted an occupational disease arising out of and in the course of employment on or by _____
3. The injury by accident or occupational disease resulted in the following injuries: _____
_____
4. The employee ☐ was/ ☐ was not paid for the entire day when the injury occurred.
5. The average weekly wage of the employee at the time of the injury, including overtime and all allowances, was $_____, subject to verification unless otherwise agreed upon in line 9 below.
6. Disability resulting from the injury or occupational disease began on _____
7. The employer and carrier/administrator hereby undertake to pay compensation to the employee at the rate of $_____ per week beginning _____, and continuing for _____ weeks.
8. The employee ☐ has / ☐ has not returned to work for _____

on _____, at an average weekly wage of $_____.

9. State any further matters agreed upon, including disfigurement, permanent partial, or temporary partial disability: _____

10. If applicable, the Second Injury Fund Assessment is $_____. Check ☐ is ☐ is not attached.

11. The date of this agreement is _____. Date of first payment: _____ Amount: _____

12. IMPORTANT NOTICE TO EMPLOYEE: The Industrial Commission's fee for processing this agreement is $300.00 to be paid in equal shares by the employee and the employer. You are not required to pay your portion of the fee in advance, and if your award is $3,000.00 or less, you are not responsible for any portion of the fee. If your award is more than $3,000.00, the employer shall deduct $150.00 from your award, unless you and your employer agree otherwise.

Check one of the boxes below if the award is more than $3,000.00:

☐ The employer will deduct $150.00 from the amount to be paid pursuant to this agreement.

☐ The employee and employer have agreed that the employer will pay the entire fee.

_____

Name Of Employer Signature Title

_____

Name Of Carrier / Administrator Signature Title

By signing I enter into this agreement and certify that I have read the "Important Notices to Employee" printed on the Pages 1 and 2 of this form.

_____

Signature of Employee Address

_____

Signature of Employee's Attorney Address

North Carolina Industrial Commission

The Foregoing Agreement Is Hereby Approved:

_____

Claims Examiner Date

_____

Attorney's Fee Approved

☐ Check Box If No Attorney Retained.

☐ Check Box If Employee Is In Managed Care.

IMPORTANT NOTICE TO EMPLOYEE CLAIMING ADDITIONAL WEEKLY CHECKS OR LUMP SUM PAYMENTS

Once your compensation checks have been stopped, if you claim further compensation, you must notify the Industrial Commission in writing within two years from the date of receipt of your last compensation check or your rights to these benefits may be lost.

IMPORTANT NOTICE TO EMPLOYEE INJURED BEFORE JULY 5,1994 CLAIMING ADDITIONAL MEDICAL BENEFITS

If your injury occurred before July 5, 1994, you are entitled to medical compensation as long as it is reasonably necessary, related to your workers' compensation case, and authorized by the carrier or the Industrial Commission.

IMPORTANT NOTICE TO EMPLOYEE INJURED ON OR AFTER JULY 5, 1994 CLAIMING ADDITIONAL MEDICAL BENEFITS

If your injury occurred on or after July 5, 1994, your right to future medical compensation will depend on several factors. Your right to payment of future medical compensation will terminate two years after your employer or carrier/administrator last pays any medical compensation or other compensation, whichever occurs last. If you think you will need future medical compensation, you must apply to the Industrial Commission in writing within two years, or your right to these benefits may be lost. To apply you may also use Industrial Commission Form 18M.

IMPORTANT NOTICE TO EMPLOYER

The employee must be provided a copy when the agreement is signed by the employee. Failure to file Form 28B, Report Of Compensation And Medical Compensation Paid, within 16 days after last payment pursuant to this agreement may subject the employer or carrier/administrator to a penalty. Pursuant to Rule 501, within 20 days after receipt of the agreement executed by the employee, the employer or carrier/administrator must submit the agreement to the Industrial Commission, or show good cause for not submitting the agreement.

NEED ASSISTANCE?

If you have questions or need help and you do not have an attorney, you may contact the Industrial Commission at (800) 688-8349.

Form 21
04/2014

Self-Insured Employer or Carrier, Mail to:
NCIC - Claims Section
4335 Mail Service Center
Raleigh, NC 27699-4335
Telephone: (919) 807-2502
Helpline: (800) 688-8349
Website: http://www.ic.nc.gov/

(b) The copy of the form described in Paragraph (a) of this Rule can be accessed at http://www.ic.nc.gov/forms/form21.pdf. The form may be reproduced only in the format available at http://www.ic.nc.gov/forms/form21.pdf and may not be altered or amended in any way.

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

04 NCAC 10L .0102 FORM 26 – SUPPLEMENTAL AGREEMENT AS TO PAYMENT OF COMPENSATION
(a) If the parties to a workers' compensation claim have previously entered into an approved agreement on a Form 21, *Agreement for Compensation for Disability*, or a Form 26A, *Employer's Admission of Employee's Right to Permanent Partial Disability*, they shall use the following Form 26, *Supplemental Agreement as to Payment of Compensation*, for agreements regarding subsequent, additional disability and payment of compensation therefor pursuant to G.S. 97-29 and 97-30. Additional issues agreed upon by the parties such as payment of compensation for permanent partial disability may also be included on the form. This form is necessary to comply with 04 NCAC 10A .0501, where applicable. The Form 26, *Supplemental Agreement as to Payment of Compensation*, shall read as follows:

North Carolina Industrial Commission
Supplemental Agreement as to Payment
of Compensation (G.S. 97-82)

IC File # _____
Emp. Code # _____
Carrier Code # _____
Carrier File # _____
Employer FEIN _____

The Use Of This Form Is Required Under The Provisions of The Workers' Compensation Act

_____
Employee's Name

_____
Address

_____
City State Zip

_____
Home Telephone Work Telephone
Social Security Number: _____ Sex: ☐ M ☐ F Date of Birth: _____

_____
Employer's Name Telephone Number

_____
Employer's Address City State Zip

_____
Insurance Carrier

_____
Carrier's Address City State Zip

_____
Carrier's Telephone Number Carrier's Fax Number

We, The Undersigned, Do Hereby Agree and Stipulate As Follows:
1. Date of injury: _____
2. The employee ☐ returned to work / ☐ was rated on _____ (date), at a weekly wage of $_____.
3. The employee became totally disabled on _____.
4. Employee's average weekly wage ☐ was reduced / ☐ was increased on _____, from $_____ per week to $_____ per week.

5. The employer and carrier/administrator hereby undertake to pay compensation to the employee at the rate of $_____ per week
Beginning _____, and continuing for _____ weeks. The type of disability compensation is

_____

6. State any further matters agreed upon, including disfigurement or temporary partial disability:

_____

7. IMPORTANT NOTICE TO EMPLOYEE: The Industrial Commission's fee for processing this agreement is $300.00 to be paid in equal shares by the employee and the employer. You are not required to pay your portion of the fee in advance, and if your award is $3,000.00 or less, you are not responsible for any portion of the fee. If your award is more than $3,000.00, the employer shall deduct $150.00 from your award, unless you and your employer agree otherwise.
Check one of the boxes below if the award is more than $3,000.00:
☐ The employer will deduct $150.00 from the amount to be paid pursuant to this agreement.
☐ The employee and employer have agreed that the employer will pay the entire fee.
8. The date of this agreement is _____.

_____

Name Of Employer Signature Title

_____

Name Of Carrier/Administrator Signature Title

By signing I enter into this agreement and certify that I have read the "Important Notices to Employee" printed on Pages 1 and 2 of this form.

_____

Signature of Employee Address

_____

Signature of Employee's Attorney Address

☐ Check box if no attorney retained.

North Carolina Industrial Commission
The Foregoing Agreement Is Hereby Approved:

_____

Claims Examiner Date

_____

Attorney's fee approved

IMPORTANT NOTICE TO EMPLOYEE CLAIMING ADDITIONAL WEEKLY CHECKS OR LUMP SUM PAYMENTS
Once your compensation checks have been stopped, if you claim further compensation, you must notify the Industrial Commission in writing within two years from the date of receipt of your last compensation check or your rights to these benefits may be lost.

IMPORTANT NOTICE TO EMPLOYEE INJURED BEFORE 5 JULY 1994 CLAIMING ADDITIONAL MEDICAL BENEFITS
If your injury occurred before 5 July 1994, you are entitled to medical compensation as long as it is reasonably necessary, related to your workers' compensation case, and authorized by the carrier or the Industrial Commission.

IMPORTANT NOTICE TO EMPLOYEE INJURED ON OR AFTER 5 JULY 1994 CLAIMING ADDITIONAL MEDICAL BENEFITS
If your injury occurred on or after 5 July 1994, your right to future medical compensation will depend on several factors. Your right to payment of future medical compensation will terminate two years after your employer or carrier/administrator last pays any medical compensation or other compensation, whichever occurs last. If you think you will need future medical compensation, you must apply to the Industrial Commission in writing within two years, or your right to these benefits may be lost. To apply you may also use Industrial Commission Form 18M.

IMPORTANT NOTICE TO EMPLOYER

This form is to be used only to supplement Form 21, Agreement for Compensation for Disability (G.S. 97-82), or an award in cases in which subsequent conditions require a modification of a former agreement or award. The employee must be provided a copy of the form when the agreement is signed by the employee. Failure to file Form 28B, Report of Compensation and Medical Compensation Paid, within 16 days after last payment pursuant to this agreement may subject the employer or carrier/administrator to a penalty. Pursuant to Rule 501, within 20 days after receipt of the agreement executed by the employee, the employer or carrier/administrator must submit the agreement to the Industrial Commission, or show good cause for not submitting the agreement.

NEED ASSISTANCE?

If you have questions or need help and you do not have an attorney, you may contact the Industrial Commission at (800) 688-8349.

Form 26

04/2014

Self-Insured Employer or Carrier Mail to:
NCIC - Claims Administration
4335 Mail Service Center
Raleigh, North Carolina 27699-4335
Main Telephone: (919) 807-2500
Helpline: (800) 688-8349
Website: http://www.ic.nc.gov/

(b) The copy of the form described in Paragraph (a) of this Rule can be accessed at http://www.ic.nc.gov/forms/form26.pdf. The form may be reproduced only in the format available at http://www.ic.nc.gov/forms/form26.pdf and may not be altered or amended in any way.

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

04 NCAC 10L .0103 FORM 26A – EMPLOYER'S ADMISSION OF EMPLOYEE'S RIGHT TO PERMANENT PARTIAL DISABILITY

(a) The parties to a workers' compensation claim shall use the following Form 26A, *Employer's Admission of Employee's Right to Permanent Partial Disability*, for agreements regarding the employee's entitlement to and the employer's payment of compensation for permanent partial disability pursuant to G.S. 97-31. Additional issues agreed upon by the parties, including, but not limited to, election of payment of temporary partial disability pursuant to G.S. 97-30 may also be included on the form. This form is necessary to comply with 04 NCAC 10A .0501, where applicable. The Form 26A, *Employer's Admission of Employee's Right to Permanent Partial Disability*, shall read as follows:

North Carolina Industrial Commission
Employer's Admission of Employee's Right to Permanent Partial Disability
(G.S. 97-31)

IC File # _____
Emp. Code # _____
Carrier Code # _____
Carrier File # _____
Employer FEIN _____

The Use Of This Form Is Required Under The Provisions of The Workers' Compensation Act

_____
Employee's Name

_____
Address

_____
City _____ State _____ Zip

_____
Home Telephone _____ Work Telephone
Social Security Number: _____ Sex: □ M □ F Date of Birth: _____

_____
Employer's Name _____ Telephone Number

_____
Employer's Address _____ City State Zip

_____
Insurance Carrier

_____
Carrier's Address _____ City State Zip

_____
Carrier's Telephone Number _____ Carrier's Fax Number

WE, THE UNDERSIGNED, DO HEREBY AGREE AND STIPULATE AS FOLLOWS:

1. All the parties hereto are subject to and bound by the provisions of the Workers' Compensation Act and _____ is the Carrier/Administrator for the Employer.
2. The employee sustained an injury by accident or the employee contracted an occupational disease arising out of and in the course of employment on _____.
3. The injury by accident or occupational disease resulted in the following injuries: _____.
4. The employee □ was □ was not paid for the 7 day waiting period.

If not, was salary continued? □ yes □ no. Was employee paid for the date of injury? □ yes □ no

5. The average weekly wage of the employee at the time of the injury, including overtime and all allowances, was $_____. This results in a weekly compensation rate of $_____.
6. The employee □ has □ has not returned full time to work for _____ on _____, at an average weekly wage of $_____.
7. Claimant was released □ with permanent restrictions □ without permanent restrictions.
8. Permanent partial disability compensation will be paid to the injured worker as follows:
   ____ weeks of compensation at rate of $_____ per week for ____% rating to _____ (body part)
   ____ weeks of compensation at rate of $_____ per week for ____% rating to _____ (body part)
   ____ weeks of compensation at rate of $_____ per week for ____% rating to _____ (body part)

Total amount of permanent partial disability compensation is $_____. Date of first payment: _____.

9. State any further matters agreed upon, including disfigurement, loss of teeth, election of temporary partial disability, waiting period or other: _____.
10. An overpayment is claimed in the amount of $_____. Overpayment was calculated as follows: _____.

If overpayment claimed, a Form 28B is attached. □ yes □ no

11. If applicable, the Second Injury Fund Assessment is $_____. A check □ is □ is not included.
12. IMPORTANT NOTICE TO EMPLOYEE: The Industrial Commission's fee for processing this agreement is $300.00 to be paid in equal shares by the employee and the employer. You are not required to pay your portion of the fee in advance, and if your award is $3,000.00 or less, you are not responsible for any portion of the fee. If your award is more than $3,000.00, the employer shall deduct $150.00 from your award, unless you and your employer agree otherwise.

Check one of the boxes below if the award is more than $3,000.00:

□ The employer will deduct $150.00 from the amount to be paid pursuant to this agreement.

□ The employee and employer have agreed that the employer will pay the entire fee.

The undersigned hereby certify that the material medical and vocational reports related to the injury have been provided to the employee or his attorney and have been filed with the Industrial Commission for consideration pursuant to G.S. 97-82(a) and Industrial Commission Rule 501(3).

_____

Name Of Employer Signature Title Date

_____

Name Of Carrier/Administrator Signature Direct Phone Number Title Date

By signing I enter into this agreement and certify that I have read the "Important Notices to Employee" printed on pages 2 and 3 of this form.

_____

Signature of Employee Address Date

_____

Signature of Employee's Attorney Address Date

□ Check box if no attorney retained.

North Carolina Industrial Commission
The Foregoing Agreement Is Hereby Approved:

_____

Claims Examiner Date

_____

Attorney's fee approved

IMPORTANT NOTICE TO EMPLOYEE CLAIMING ADDITIONAL WEEKLY CHECKS OR LUMP SUM PAYMENTS
Once your compensation checks have been stopped, if you claim further compensation, you must notify the Industrial Commission in writing within two years from the date of receipt of your last compensation check or your rights to these benefits may be lost.

IMPORTANT NOTICE TO EMPLOYEE INJURED BEFORE JULY 5,1994 CLAIMING ADDITIONAL MEDICAL BENEFITS
If your injury occurred before July 5, 1994, you are entitled to medical compensation as long as it is reasonably necessary, related to your workers' compensation case, and authorized by the carrier or the Industrial Commission.

IMPORTANT NOTICE TO EMPLOYEE INJURED ON OR AFTER JULY 5, 1994 CLAIMING ADDITIONAL MEDICAL BENEFITS
If your injury occurred on or after July 5, 1994, your right to future medical compensation will depend on several factors. Your right to payment of future medical compensation will terminate two years after your employer or carrier/administrator last pays any medical compensation or other compensation, whichever occurs last. If you think you will need future medical compensation, you must apply to the

Industrial Commission in writing within two years, or your right to these benefits may be lost. To apply you may also use Industrial Commission Form 18M.

IMPORTANT NOTICE TO EMPLOYER
The employee must be provided a copy when the agreement is signed by the employee. Failure to file Form 28B, Report Of Compensation And Medical Compensation Paid, within 16 days after last payment pursuant to this agreement may subject the employer or carrier/administrator to a penalty. Pursuant to Rule 501, within 20 days after receipt of the agreement executed by the employee, the employer or carrier/administrator must submit the agreement to the Industrial Commission, or show good cause for not submitting the agreement.

NEED ASSISTANCE?
If you have questions or need help and you do not have an attorney, you may contact the Industrial Commission at (800) 688-8349.

Form 26A
01/2014

Self-Insured Employer or Carrier Mail to:
NCIC - Claims Administration
4335 Mail Service Center
Raleigh, North Carolina 27699-4335
Main Telephone: (919) 807-2500
Helpline: (800) 688-8349
Website: http://www.ic.nc.gov/

(b) A copy of the form described in Paragraph (a) of this Rule can be accessed at http://www.ic.nc.gov/forms/form26a.pdf. The form may be reproduced only in the format available at http://www.ic.nc.gov/forms/form26a.pdf and may not be altered or amended in any way.

Authority G.S. 97-30; 97-31; 97-80(a); 97-82.

04 NCAC 10L .0104 FORM 36 – SUBPOENA
(a) The parties to a workers' compensation claim shall use the following Form 36, *Subpoena*, to subpoena a person(s) to appear and testify and/or produce documents for inspection before the Commission. The Form 36, *Subpoena*, shall read as follows:

STATE OF NORTH CAROLINA File No._____
_____ County North Carolina Industrial Commission

_____

VERSUS

_____

SUBPOENA
G.S. 1A-1, Rule 45; G.S. 8-59; G.S. 97-80(e)
Party Requesting Subpoena
__ NCIC/State/Plaintiff ___ Defendant ___
NOTE TO PARTIES NOT REPRESENTED BY COUNSEL: Subpoenas may be produced at your request, but must be signed and issued by a Commissioner, Deputy Commissioner, or the Executive Secretary.
TO: Name and Address Of Person Subpoenaed_____
Alternate Address_____
Telephone No._____
Alternate Telephone No._____
YOU ARE COMMANDED TO: (check all that apply):
__ appear and testify, in the above entitled action, before the Industrial Commission at the place, date and time indicated below.
__ appear and testify, in the above entitled action, at a deposition at the place, date and time indicated below.
__ produce and permit inspection and copying of the following items, at the place, date and time indicated below.
__ See attached list. (List here if space sufficient)

_____
Location Of Hearing/Place Of Deposition/Place To Produce_____
Date To Appear/Produce_____
Time To Appear/Produce__:____ AM __ PM
Name And Address Of Applicant Or Applicant's Attorney_____
Date_____
Signature of Official or Attorney_____
__ Deputy Commissioner __ Commissioner __ Executive Secretary _____ Attorney
Telephone No. Of Applicant Or Applicant's Attorney_____
RETURN OF SERVICE
I certify this subpoena was received and served on the person subpoenaed as follows:

By_____
_____ personal delivery.
_____ registered or certified mail, receipt requested and attached.
_____ service by Sheriff.
_____ I was unable to serve this subpoena. Reason unable to serve: _____
Service Fee $_____
__Paid
__Due
Date Served_____
Name Of Authorized Server (Type Or Print)_____
Signature of Authorized Server_____
Title_____
NOTE TO PERSON REQUESTING SUBPOENA: A copy of this subpoena must be delivered, mailed or faxed to the attorney for each party in this case. If a party is not represented by an attorney, the copy must be mailed or delivered to the party. This does not apply in criminal cases.
NOTE: Rule 45, North Carolina Rules of Civil Procedure, Subsections (c) and (d).
(c) Protection of Persons Subject to Subpoena
(1) Avoid undue burden or expense. - A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena. The court shall enforce this subdivision and impose upon the party or attorney in violation of this requirement an appropriate sanction that may include compensating the person unduly burdened for lost earnings and for reasonable attorney's fees.
(2) For production of public records or hospital medical records. - Where the subpoena commands any custodian of public records or any custodian of hospital medical records, as defined in G.S. 8-44.1, to appear for the sole purpose of producing certain records in the custodian's custody, the custodian subpoenaed may, in lieu of personal appearance, tender to the court in which the action is pending by registered or certified mail or by personal delivery, on or before the time specified in the subpoena, certified copies of the records requested together with a copy of the subpoena and an affidavit by the custodian testifying that the copies are true and correct copies and that the records were made and kept in the regular course of business, or if no such records are in the custodian's custody, an affidavit to that effect. When the copies of records are personally delivered under this subdivision, a receipt shall be obtained from the person receiving the records. Any original or certified copy of records or an affidavit delivered according to the provisions of this subdivision, unless otherwise objectionable, shall be admissible in any action or proceeding without further certification or authentication. Copies of hospital medical records tendered under this subdivision shall not be open to inspection or copied by any person, except to the parties to the case or proceedings and their attorneys in depositions, until ordered published by the judge at the time of the hearing or trial. Nothing contained herein shall be construed to waive the physician-patient privilege or to require any privileged communication under law to be disclosed.
(3) Written objection to subpoena. - Subject to subsection (d) of this rule, a person commanded to appear at a deposition or to produce and permit the inspection and copying of records, books, papers, documents, electronically stored information, or tangible things may, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, serve upon the party or the attorney designated in the subpoena written objection to the subpoena, setting forth the specific grounds for the objection. The written objection shall comply with the requirements of Rule 11. Each of the following grounds may be sufficient for objecting to a subpoena:
a. The subpoena fails to allow reasonable time for compliance.
b. The subpoena requires disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection.
c. The subpoena subjects a person to an undue burden or expense.
d. The subpoena is otherwise unreasonable or oppressive.
e. The subpoena is procedurally defective.
(4) Order of court required to override objection. - If objection is made under subdivision (3) of this subsection, the party serving the subpoena shall not be entitled to compel the subpoenaed person's appearance at a deposition or to inspect and copy materials to which an objection has been made except pursuant to an order of the court. If objection is made, the party serving the subpoena may, upon notice to the subpoenaed person, move at any time for an order to compel the subpoenaed person's appearance at the deposition or the production of the materials designated in the subpoena. The motion shall be filed in the court in the county in which the deposition or production of materials is to occur.
(5) Motion to quash or modify subpoena. - A person commanded to appear at a trial, hearing, deposition, or to produce and permit the inspection and copying of records, books, papers, documents, electronically stored information, or other tangible things, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, may file a motion to quash or modify the subpoena. The court shall quash or modify the subpoena if the subpoenaed person demonstrates the existence of any of the reasons set forth in subdivision (3) of this subsection. The motion shall be filed in the court in the county in which the trial, hearing, deposition, or production of materials is to occur.
(6) Order to compel; expenses to comply with subpoena. - When a court enters an order compelling a deposition or the production of records, books, papers, documents, electronically stored information, or other tangible things, the order shall protect any person who is not a party or an agent of a party from significant expense resulting from complying with the subpoena. The court may order that the person to whom the subpoena is addressed will be reasonably compensated for the cost of producing the records, books, papers, documents, electronically stored information, or tangible things specified in the subpoena.
(7) Trade secrets; confidential information. - When a subpoena requires disclosure of a trade secret or other confidential research, development, or commercial information, a court may, to protect a person subject to or affected by the subpoena, quash or modify the

subpoena, or when the party on whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship, the court may order a person to make an appearance or produce the materials only on specified conditions stated in the order.

(8) Order to quash; expenses. - When a court enters an order quashing or modifying the subpoena, the court may order the party on whose behalf the subpoena is issued to pay all or part of the subpoenaed person's reasonable expenses including attorney's fees.

(d) Duties in Responding to Subpoena

(1) Form of response. - A person responding to a subpoena to produce records, books, documents, electronically stored information, or tangible things shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(2) Form of producing electronically stored information not specified. - If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it ordinarily is maintained or in a reasonably useable form or forms.

(3) Electronically stored information in only one form. - The person responding need not produce the same electronically stored information in more than one form.

(4) Inaccessible electronically stored information. - The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, after considering the limitations of Rule 26(b)(1a).The court may specify conditions for discovery, including requiring the party that seeks discovery from a nonparty to bear the costs of locating, preserving, collecting, and producing the electronically stored information involved.

(5) Specificity of objection. - When information subject to a subpoena is withheld on the objection that it is subject to protection as trial preparation materials, or that it is otherwise privileged, the objection shall be made with specificity and shall be supported by a description of the nature of the communications, records, books, papers, documents, electronically stored information, or other tangible things not produced, sufficient for the requesting party to contest the objection.

INFORMATION FOR WITNESS

NOTE: If you have any questions about being subpoenaed as a witness, you should contact the person named on Page One of this Subpoena in the box labeled "Name And Address Of Applicant Or Applicant's Attorney."

DUTIES OF A WITNESS

- Unless otherwise directed by the presiding Deputy Commissioner or Commissioner, you must answer all questions asked when you are on the stand giving testimony.
- In answering questions, speak clearly and loudly enough to be heard.
- Your answers to questions must be truthful.
- If you are commanded to produce any items, you must bring them with you to court or to the deposition.
- You must continue to attend court until released by the court. You must continue to attend a deposition until the deposition is completed.

BRIBING OR THREATENING A WITNESS

It is a violation of State law for anyone to attempt to bribe, threaten, harass, or intimidate a witness. If anyone attempts to do any of these things concerning your involvement as a witness in a case, you should promptly report that to the presiding Deputy Commissioner or Commissioner.

Form 36 (Rev. 01/14)

(b) The copy of the form described in Paragraph (a) of this Rule can be accessed at http://www.ic.nc.gov/forms/form36.pdf. The form may be reproduced only in the format available at http://www.ic.nc.gov/forms/form36.pdf and may not be altered or amended in any way.

Authority G.S. 1A-1, Rule 45; 8-59; 97-80(a),(e).

NORTH CAROLINA INDUSTRIAL COMMISSION

IN RE: RULEMAKING BY THE NORTH CAROLINA INDUSTRIAL COMMISSION PURSUANT TO SESSION LAW 2013-294.

PROPOSED RULES FOR ADOPTION 04 NCAC 10A .0410, 04 NCAC 10C .0201, 04 NCAC 10E .0103, 04 NCAC 10E .0104, 04 NCAC 10E .0201, 04 NCAC 10E .0202, 04 NCAC 10E .0203, 04 NCAC 10E .0301, 04 NCAC 10H .0206, 4 NCAC 10I .0204, 004 NCAC 10L .0101, 04 NCAC 10L .0102, 04 NCAC 10L .0103, 04 NCAC 10L .0104.

PROPOSED RULES FOR AMENDMENT, 04 NCAC 10A .0102, 04 NCAC 10A .0405, 04 NCAC 10A .0601, 04 NCAC 10A .0603, 04 NCAC 10A .0605, 04 NCAC 10A .0608, 04 NCAC 10A .0609A, 04 NCAC 10A .0612, 04 NCAC 10A .0613, 04 NCAC 10A .0701, 04 NCAC 10A .0704, 04 NCAC 10A .0801, 04 NCAC 10B .0501, 04 NCAC 10C .0103, 04 NCAC 10C .0108, 04 NCAC 10C .0109, 04 NCAC 10D .0110, 04 NCAC 10G .0104A, 04 NCAC 10G .0107, 04 NCAC 10G .0110, 04 NCAC 10J .0101.

ORDER by ANDREW T. HEATH, Chair.

FILED: FEB 27 2014

This matter is before the undersigned on the Commission's Motion to add written comments *sua sponte* to the record of the February 24, 2014 Public Hearing held by the Commission in this matter. Following the February 24, 2014 Public Hearing, the record was held open for the submission of written comments through February 26, 2014. Written comments were received before and after the public hearing from organizations and individuals.

IT IS HEREBY ORDERED that the following written comments shall be included in the record of the February 24, 2014 Public Hearing:

1. A three-page letter from Charles C. Kyles, Director, Workers' Compensation, Duke University, received February 20, 2014;

2. A two-page letter from Kathy Thaman of Southern Rehabilitation Network, Inc., received February 24, 2014;

3. A two-page letter from Leann Lewis of Coventry Workers' Comp Services, received February 26, 2014;

4. A five-page letter from Julia E. Dixon, of Young, Moore and Henderson, P.A., on behalf of the North Carolina Association of Defense Attorneys, North Carolina Chamber, North Carolina Home Builders Association, and North Carolina Retail Merchants Association, received February 26, 2014;

5. A five-page letter and five-page attachment of proposed rule changes from Jeri L. Whitfield, Lisa Shortt, and Laura D. Burton of Smith Moore Leatherwood LLP, received February 26, 2014;

6. A four-page letter from Henry N. Patterson, Jr. of Patterson Harkavy, LLP, on behalf of the North Carolina State AFL-CIO, received February 26, 2014;

This the 27th day of February 2014.

ANDREW T. HEATH
CHAIRMAN

Duke UNIVERSITY

Duke Box 90448
Durham, North Carolina 27708

Charles C. Kyles, J.D.
Director
H/R Workers' Compensation

Telephone: (919) 684-6767
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February 20, 2014

Via Electronic Mail & U.S. Mail

The Honorable Meredith R. Henderson
Executive Secretary
North Carolina Industrial Commission
4333 Mail Service Center
Raleigh, NC 27699-4333
Email: meredith.henderson@ic.nc.gov

Re: Comment to Proposed Rulemaking of the N.C. Industrial Commission

Dear Executive Secretary Henderson:

Duke University and Duke University Health System ("Duke") is one of the largest private employers and the largest self-insured private employer in North Carolina. With a staff of experienced, licensed claims adjusters, Duke is proud to self-administer its workers' compensation program for the benefit of its more than 35,000 employees.

Duke offers the following comments to the Workers' Compensation Rules proposed by the North Carolina Industrial Commission:

04 NCAC 10A. 0609A **Medical Motions and Emergency Medical Motions**

Paragraph (f) provides for an initial telephonic conference conducted by a Deputy Commissioner to discuss the parameters of every medical motion filed. The third sentence requires that, prior to the conference, "the parties shall submit a brief medical chronology and procedural history of three pages or less" as well as other Industrial Commission forms and medical records.

The proposed requirement for "the parties [to] submit a brief medical chronology and procedural history of three pages or less" is ambiguous, unduly burdensome, and prejudicial for several reasons:

(1) At the stage of a disputed medical issue when a medical motion has been filed by one party and a response by the other, the parties are unlikely to be able to agree to the language of a joint statement of the medical chronology and procedural history. Rather, these are more likely to be at the center of the disputed issue. While it may be possible for each party to submit its own statement, the parties should not be required to attempt to negotiate a joint statement in the short time prior to an initial telephone conference. If the proposed rule is intended to require separate statements from the individual parties, the language should be amended for clarification.

(2) There is no necessity for a rule requiring the parties (jointly or separately) to submit a brief medical chronology and procedural history as a separate document if that information is already contained within a well-drafted motion or response as dictated by the requirements of effective advocacy. As drafted, the proposed rule would require duplication of effort and needless filings.

(3) The three-page limitation is arbitrary and does not further the ends of justice. Many workers' compensation claims involve complex medical treatment by multiple treating physicians that continues over a period of months or years. The procedural history of litigated claims may also be long and complex. Such cases may not lend themselves to a three-page statement of medical chronology and procedural history. Truncated or excessively summarized statements may be misleading to the Commission.

(4) Statements filed with the Commission pursuant to this proposed rule, especially if jointly prepared, may be misconstrued as binding stipulations or admissions, which would be prejudicial to the parties. In view of the temporal requirement to submit the statement prior to the telephone conference, and the three-page length limitation, the statements required by this rule as drafted may be imprecise, truncated, or excessively summarized.

(5) As drafted, the proposed rule is prejudicial to the parties because it limits the effective advocacy of counsel by unnecessarily constraining the ability of parties and their respective counsel to present and argue their positions as they see fit.

For the foregoing reasons, Duke objects to the proposed rule as drafted. Duke requests that its objection be resolved by deleting the third sentence of paragraph (f).

In the alternative, Duke requests that its objection be resolved by restating the third sentence of paragraph (f) as follows:

> Prior to the initial informal telephonic conference, the ~~parties~~ moving party shall submit ~~a brief medical chronology and procedural history of three pages or less,~~ the relevant Form 60, Form 63, Form 21 or Commission Opinion and Award, and relevant medical information including medical records.

In the further alternative, Duke requests that its objection be resolved by restating the third sentence of paragraph (f) and adding an additional sentence as follows:

> Prior to the initial informal telephonic conference, ~~the parties shall~~ each party shall, if not already included in its motion or response, submit all materials to be considered by the Deputy Commissioner, including but not limited to a brief medical chronology and procedural history ~~of three pages or less~~, the relevant Form 60, Form 63, Form 21 or Commission Opinion and Award, and relevant medical information including medical records. Nothing submitted by the parties at this stage shall be considered as a binding admission or stipulation unless expressly so designated by the party making the purported admission or stipulation.

04 NCAC 10A .0613 Expert Witnesses and Fees

Paragraph (b) requires in its first sentence that the party that noticed an expert deposition request an order approving the expert witness fee and associated costs "within 10 days after the deposition of each expert."

The proposed requirement to submit the fee request "within 10 days after the deposition" is unduly burdensome.

Duke has no objection in principle to a rule requiring the prompt payment of expert witness fees. However, expert witnesses may not always submit their invoices within 10 days after the deposition. The noticing party cannot submit a fee request with all of the information enumerated in paragraph (b) until the expert's invoice has been received. The noticing party should be allowed sufficient time to receive the invoice, review it, and submit the fee request.

For the foregoing reason, Duke objects to the proposed rule as drafted. Duke requests that its objection be resolved by restating the first sentence of paragraph (b) as follows:

> ~~Within 10 days after~~ After the deposition of each expert, the party that noticed the deposition ~~shall~~ shall, within 10 days after receiving the expert's fee invoice, submit to the Deputy Commissioner or Commissioner, via email, a request to approve the costs related to the expert deposition.

Please do not hesitate to contact me to discuss the proposed rules and the forgoing objections to the same. Duke appreciates the work done by the Industrial Commission and we trust that the Commission will consider these comments before adopting the final rules.

Very truly yours

DUKE UNIVERSITY
DUKE UNIVERSITY HEALTH SYSTEM

Charles C. Kyles
Director, Workers' Compensation

cc: Kyle Cavanaugh, Vice President, Administration
Joyce T. Williams, Asst. Vice President, Benefits
Kate S. Hendricks, Deputy General Counsel

SOUTHERN REHABILITATION NETWORK, INC.

February 24, 2014

Meredith Henderson
North Carolina Industrial Commission
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Meredith.Henderson@ic.nc.gov

Re: Comments re: Rules

Dear To Whom It May Concern:

Being unable to attend the rescheduled public hearing on this matter, I am submitting my comments via letter. I have practiced in the area of workers' compensation case management, primarily in vocational rehabilitation, for 33 years. I am employed with Southern Rehabilitation Network, Inc. and have worked with other private case management companies in North Carolina during my career.

I am the current President of IARP of the Carolinas. IARP is the International Association of Rehabilitation Professionals and is made up of a variety of rehabilitation professionals including case managers.

I serve on the Rehabilitation Advisory Group at the invitation of Karen Smith, BSN, RN, COHN-S, Section Director for Rehabilitation Nursing at the NCIC. Additionally, I serve on the Chairman's Advisory Council at the invitation of Chairman Andrew T. Heath.

My long career in workers' compensation rehabilitation and case management has provided me with valuable experience in examining how vocational professionals accomplish our work and how we share it with others. With this in mind, I have some comments related to Rule 04 NCAC 10C .0109 Vocational Rehabilitation Services and Return to Work

Item (h) The use of the Dictionary of Occupational Titles (DOT) and Handbook for Analyzing Jobs in providing job descriptions

Comment: The DOT is utilized in Social Security hearings to help determine the ability of a disability applicant to engage in "substantial gainful employment" in the US economy. The Handbook for Analyzing Jobs is an outstanding resource and guide useful in helping a vocational rehabilitation professional decide the important various aspects of a job that should be examined as part of a job analysis. Moreover, it acts as a guide in explaining what the various jobs in the DOT mean with regard to training times, general educational development (reasoning, math, language), physical demands of jobs, and other aspects of work. These CONCEPTS are basic tools of the trade for a vocational rehabilitation professional or vocational expert.

My concern is that this rule not be misinterpreted by any party to mean that the job description must actually appear in the DOT or that the vocational professional's job description must enumerate every aspect of work as outlined in The Handbook for Analyzing Jobs. If this is the case, a number of occurrences are possible including, but not limited to:

- Increased expense for the payer of the vocational services by the required investment of significantly more time in preparing reports that detail every aspect of work in The Handbook for Analyzing Jobs.
- The claim that no work is available for a given injured worker because a specific DOT title/number cannot be provided

- Very long depositions and hearings when vocational professionals are called to testify due to the amount of information that may be required in a report

The DOT and Handbook for Analyzing Jobs are outstanding, valuable resources. Resource is the key word. The process utilized in formulating the DOT which is explained via The Handbook for Analyzing Jobs is an extremely valuable process and is the foundation of good vocational work when completing job descriptions as well as looking at the transferrable skills of injured workers and other clients. My concern is that this portion of the rule not be misconstrued. Vocational professionals should utilize the basic PROCESSES of the DOT and The Handbook, but should not be required to provide a single DOT Code or outline each aspect of the job utilizing The Handbook. If the word STANDARDS as used in the Rule refers to the general process, I have no issue. As previously stated, my concern rests with potential for misinterpretation.

Thank you for your time in reviewing these comments.

Respectfully,

Kathy Thaman

Kathy Thaman, MS, CRC, CLCP, MSCC
Vice President Products & Services

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February 26, 2014

North Carolina Insurance Commission

Submitted electronically to: Meredith Henderson, Executive Secretary

Re: Request for Comments on Proposed Agency Rules

Ms. Henderson,

Thank you for the opportunity to provide written commentary with regard to the aforementioned. The comments provided relate to issues concerning that addition of paragraph (e) in section 04 NCAC 10J.0101, Fees for Medical Compensation, which is effective July 1, 2014. Paragraph (e) states:

> Employers, insurers, and managed care organizations, or administrators on their behalf, may review and reimburse charges for medical compensation, including, but not limited to, medical, hospital, and dental fees, without submitting the charges to the Commission for review and approval.

After a review of the proposed rules, and consideration of those rules in an operational context, we would like to provide the following comments.

1. **Effective Date**
   Issue: The added paragraph does not make it clear whether the change is applicable to dates of injury on and after July 1, 2014, dates of service on and after July 1, 2014, or something else.

   Solution: Add specificity to effective date.

2. **DRG Version**
   Issue: In order to begin reviewing inpatient facility bills, bill review vendors will need to install the appropriate version of DRG. Section (d) (1) refers to, "the 2001 Diagnostic Related Groupings adopted by the State Health Plan", which does not exactly match the standard terminology used for referencing DRG. The appropriate reference to DRG is by version rather than year. Medicare updates DRG on a fiscal year basis, beginning each October; therefore, a reference to what the State Health Plan used in 2001 does not specify the DRG version bill review vendors will need to program for.

   Solution: Specify exact version of DRG to be used. DRG version 18 was in effect as of Medicare's fiscal year 2000, effective for discharges between October 1, 2000 and September 30, 2001.

3. **DRG Reimbursement Methodology**
   Issue: Besides the payment band restrictions applicable to inpatient reimbursement outlined in section (d), there are no other deviations from standard Medicare-based DRG reimbursement mentioned in the rule. Few workers' compensation jurisdictions use all of Medicare's rules and payment policies when determining reimbursement for inpatient facilities.

   Solution: Add language to clarify applicability of Medicare-based rules and policies, such as: Whenever a component of the Medicare program is revised and effective, use of the revised component shall be required for compliance with NCIC rules.
   If there is potential for conflict in other rules, add language to confirm the rule(s) that take precedence.

I thank you for the opportunity to review the proposed rules and provide the feedback above, and for your consideration of the aforementioned comments.

Best regards always,

Leann Lewis
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NORTH CAROLINA
ASSOCIATION OF
DEFENSE ATTORNEYS

February 26, 2014

Meredith Henderson, Executive Secretary
North Carolina Industrial Commission
4333 Mail Service Center
Raleigh, NC 27699-4333

Re: Comments to Proposed Rules of the North Carolina Industrial Commission

Dear Executive Secretary Henderson:

As the Workers' Compensation Section Chair for the North Carolina Association of Defense Attorneys ("NCADA"), I write to provide comment on rules recently published by the North Carolina Industrial Commission.

The NCADA, together with the North Carolina Chamber ("Chamber"), North Carolina Home Builders Association ("Home Builders"), and North Carolina Retail Merchants Association ("Retail Merchants"), appreciate the opportunity to provide written comment on the proposed rules of the North Carolina Industrial Commission. Of those rules that relate specifically to costs and fees, pursuant to Commission request and after lengthy compromise negotiations, representatives of the business community and both sides of the bar recommended rules that would eliminate, reduce or share costs and fees. Those recommendations were not revenue neutral. While we acknowledge the Commission has worked hard to address the business community's concerns that costs and fees be assigned equitably, we believe the rules currently proposed fall short. Similar to other state boards and commissions, the Industrial Commission should not be receipt supported and should certainly not be supported by costs and fees paid solely or primarily by employers. Thus, the employer community remains committed to finding alternative funding sources for the Industrial Commission so that no costs or fees will need to be charged against either party. Thus, the NCADA, Chamber, Home Builders, and Retail Merchants recommend that the Commission revisit each and every rule that assesses costs and fees if the General Assembly can provide an alternate source of funding for the Commission.

Below is a list of rules to which the NCADA and members of the business community write to provide specific comments:

04 NCAC 10A .0102

- Pursuant to the Commission's December 19, 2013 request to the NCADA for feedback, we provided comment on January 9, 2014 regarding numerous forms that we recommend be evaluated and modified. Once the Commission is no longer under severe time constraints for rule publication, we respectfully request that all forms be reviewed thoroughly and re-published for public comment pursuant to Chapter 150B of the General Statues of North Carolina.

- As it relates to proposed Forms 21, 26 and 26A, we oppose the inclusion of the phrase "unless you and your employer agree otherwise" in the "Important Notice to Employee" section of each form. We also oppose the requirement to specifically note whether or not the fee for review of the agreement is to be paid by the employee as compared to the employer. These requirements will encourage employees to require that employers pay the related fee in the majority of cases, which is contrary to our current goal of equitably sharing costs and fees between the parties.
- While SL2013-294 specifically instructed the Commission to draft a new subpoena, the subpoena proposed by the Commission cites specifically to the Rules of Civil Procedure regarding issues other than service and is too broad for application in a workers' compensation claim. G.S. 97-80(e) merely notes that a subpoena may be served pursuant to the Rules of Civil Procedure. G.S. 97-80(a) notes discovery "shall be as summary and simple as reasonably may be." G.S. 97-80(e) notes specifically that a *subpoena duces tecum* shall not be issued by a party less than 30-days prior to hearing without leave of the Commission, which limits the use of the subpoena as a discovery tool. Although we have no objection to broadening discovery rules to allow for limited requests for production of documents that are reasonably calculated to lead to the discovery of admissible evidence, the statutes were designed to limit requests for production of documents and ensure that a *subpoena duces tecum* is not used as a discovery tool. Therefore, we recommend that the proposed subpoena be revised to delete references to the Rules of Civil Procedure that begin on page 2 at line 21. In light of the prohibition against serving a *subpoena duces tecum* less than 30-days prior to hearing without leave of the Commission, we also recommend the subpoena reflect this language on its face.

04 NCAC 10A .0601

- Subsection (a) of this rule is duplicative of G.S. 97-18(j), which is not permitted pursuant to G.S. 150B-19(4). Furthermore, the rule as published appears to intentionally omit the provision that indicates "reasonable sanctions shall not prohibit the employer or its insurance carrier from contesting the compensability of and its liability for the claim." This same language is specifically noted in G.S. 97-18(j). It is unclear why the proposed rule recites verbatim portions of the statute, but deletes others.

04 NCAC 10A .0603

- SL2013-294 specifically instructed the Commission to delete all references to "plaintiff" and "defendant" in this rule. The Commission was further instructed to insert the phrases "moving party" and "nonmoving party." The legislative intent behind these instructions was to require a nonmoving party to file a Form 33R in response to a Form 33 regardless of whether the nonmoving party is an employee or an employer. The addition of the phrase "from an employee" in subsection (a) undermines the legislative intent. Therefore, we recommend that the subsection be amended as follows: "(a) No later than 45 days from receipt of a request for hearing, the nonmoving party shall file with the Commission a response to the request for hearing."
- Subsections (5) and (6) of the rule require premature disclosure of witnesses, which is arguably in conflict with case law. Moreover, the pre-trial agreement suffices to notify both parties of the anticipated hearing witnesses. As it relates to the actual Form 33R, the NCADA would refer the Commission to its comments of January 9, 2014.

04 NCAC 10A .0605

- SL2013-294 amended G.S. 97-80(f) to note "the Commission may by rule provide for and **limit the use of interrogatories and other forms of discovery**, including production of books, papers, records, and other tangible things." (emphasis added) G.S. 97-80(a) further notes that "discovery . . . shall be as summary and simple as reasonably may be." While we have no objection to limited requests for production of documents that are reasonably calculated to lead to the discovery of admissible evidence, we do not believe discovery in a quasi-judicial system should comport with discovery in the civil judicial system.
- Moreover, subsection (7) notes that "[a]dditional methods of discovery as provided by the North Carolina Rules of Civil Procedure may be used only upon motion or by agreement of the parties." The addition of the phrase "The Commission **shall approve the motion** in the interests of justice or to promote judicial economy" located on page 2 at lines 10-11 ostensibly suggests that a party may file a motion to serve a request for admissions, and that the Commission "shall approve the motion," which we assert is contrary to the mandate in G.S. 97-80(a) that discovery be as be as "summary and simple as reasonably may be."
- Subsection (6) of the rule implicitly requires leave of the Commission to serve a request for production of documents once a matter is calendared for hearing. In some cases, because cases are calendared for hearing more than 30-days in advance, the prohibition against discovery once a claim has been calendared would dramatically impact the ability to serve discovery and receive responses, which could impact a party's due process rights, particularly in claims involving *pro se* claimants. Therefore, we recommend replacing the phrase "Up to the time a matter is calendared for a hearing" with "The parties may serve requests for production of documents without leave of the Commission until 30-days prior to the date of hearing." This change would be more consistent with G.S. 97-80(e).

04 NCAC 10A .0609A

- There is no statutory authority for subsection (c) of this rule, which requires employers to retain counsel when a medical motion is filed. Therefore, the rule is in violation of G.S. 150B-19.1(1). In addition to other concerns, this provision could violate an employer's due process rights when a medical motion is filed by a *pro se* claimant.
- The General Assembly deliberately distinguished between an "informal telephonic pretrial conference" and an "informal telephonic hearing." The purpose of the telephonic pretrial conference was to (a) determine if a motion was administrative, expedited or emergent and (b) in the case of an expedited medical motion, determine the timeline for the nonmoving party to respond to the expedited motion and for the informal telephonic hearing to be scheduled. Moreover, G.S. 97-25(f) specifically noted that medical motions that are not emergent or expedited should be handled administratively pursuant to the rules governing motions practices in contested cases, meaning the administrative motions should not be subject to an informal telephonic hearing and should instead be ruled upon by the Executive Secretary.

- The procedure established by Rule 609A located on page 4 at line 14 that requires the submission of a medical chronology and procedural history is not authorized by the statute and is therefore in violation of G.S. 150B-19.1(1).
- The current medical motions procedure unfairly burdens the nonmoving party and creates an unnecessarily heavy work load for the Commission since current practice requires that each and every medical motion, regardless of type, be heard via an informal telephonic hearing that typically is held within five days of the filing of the medical motion.

04 NCAC 10A .0612

- The Commission asked both sides of the bar and members of the business community to propose language for this rule. Compromise negotiations generated a proposed rule that was previously submitted to the Commission and did not contain the phrase "at a minimum," which is located on page 2 at line 3. Chapter 150B prohibits an agency from adopting a rule that allows for the waiver or modification of a requirement in the rule. Subsection (b) of proposed Rule 612 requires employers to pay for two post-hearing depositions of health care providers who evaluated or treated the employee. A modification or exception to that requirement may be permissible in cases subject to G.S. 97-29(d) and claims that involve unique, exceptional, and complex injuries or diseases. G.S. 150B-19(6) notes that specific guidelines must be established in order for a requirement in the rule to be modified or waived. In an effort to comport with the Administrative Procedure Act, both bars recommended a list of factors the Commission should rely upon when determining whether to modify the requirement that employers only pay for two post-hearing depositions of health care providers who evaluated or treated the employee. The addition of the phrase "at a minimum" in subsection (b) of Rule 612 allows the Commission unfettered discretion to consider additional factors when determining whether to assess additional deposition costs against employers, which we assert is a violation of G.S. 150B-19(6). We therefore recommend that the phrase "at a minimum" be deleted.

04 NCAC 10A .0613

- Subsection (c) of this rule includes the definition of "costs" as outlined in Rule 612. However, Rule 613 speaks only to the payment of experts. Therefore, references to costs affiliated with a court reporter's fees or the delivery of a transcript is not appropriate in this rule.

04 NCAC 10A .0701

- The use of the word "e-mails" on page 2 at line 26 should be deleted because the Commission has not required that acknowledgement of receipt of a Form 44 and transcript be sent via e-mail. Deletion of the word "emails" will give the parties flexibility to use more than one method for acknowledging receipt of the transcript and Form 44.
- Subsection (h) of the rule contains language that would allow the Commission, "on its own motion," to waive oral argument by a party and make a decision based on the briefs, which is a violation of G.S. 150B-19(6).
- The phrase "except motions related to the appellate record" should be deleted from page 3 at lines 26-27 because the rule as written does not create an appellate record.

04 NCAC 10C .0109

- Subsections (b), (c) and (d) of the rule all repeat content in G.S. 97-32.2, which is a violation of G.S. 150B-19(4). Therefore, we recommend that all three sections be deleted. Moreover, subsections (d)(2) and (d)(3) are not supported by statutory authority in violation of G.S. 150B-19.1(1).
- Subsection (e) needs a comma to be placed between the words "capacity" and "physical" on page 1 at line 33.

04 NCAC 10E .0103

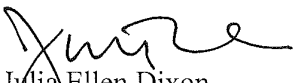
- Subsection (b)(3) and part of subsection (a) contain redundant language related to death claims. We recommend that the sentence in subsection (a) located on page 1 beginning at line 7 that reads, in part, "If the *pro hac vice* motion is filed in a case involving a stipulated Opinion and Award regarding a death claim. . ." be deleted.

04 NCAC 10E .0203

- The use of the phrase "unless the parties agree otherwise" in subsections (a)(1)-(3) will encourage employees to refuse to enter into form agreements unless employers pay the full fee associated with agreements reviewed. The practical effect of the inclusion of that phrase will be to require employers to pay the entire cost or fee—a result that, again, is inequitable. The threshold amount below which employers must pay the entire fee is a sufficient protection to employees. Therefore, we recommend that the phrase "unless the parties agree otherwise" be removed from all three subsections in the rule.

On behalf of the NCADA, Chamber, Home Builders, and Retail Merchants we wish to publicly thank the Commission under the leadership of Chairman Heath for its dedication to the administrative rule making process and for allowing members of the business community to be heard on related matters. Please do not hesitate to contact leaders for each respective organization or me should you have any questions.

Very truly yours,



Julia Ellen Dixon
Workers' Compensation Section Chair
North Carolina Association of Defense Attorneys

February 26, 2014

VIA EMAIL meredith.henderson@ic.nc.gov

Meredith Henderson, Executive Secretary
North Carolina Industrial Commission
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Re: Comments to Proposed Rules

Dear Executive Secretary Henderson:

We respectfully submit comments to proposed Rules 04, NCAC 10A .0612 Depositions, .0613 Expert Witnesses and Fees, and .0603 Responding to a Party's Request for Hearing. We have over 50 combined years of experience before the North Carolina Industrial Commission. Our practice generally involves the representation of employers and carriers, and we are often involved in complex occupational disease cases. The primary issues about which we are concerned deals with costs which are required by the proposed rules to be paid by the defendants. The proposed rules exceed the statutory authority for the award of costs and the shifting of costs to the defendants.

Workers' Compensation Act

There are three statutes in the Workers' Compensation Act that address the authority of the Industrial Commission to assess the costs of depositions against any party.

First, pursuant to N.C. Gen. Stat. § 97-74, "the Industrial Commission shall tax as a part of the costs in cases in which compensation is awarded a reasonable allowance for the services of members of the advisory medical committee attending such hearings…" The AMC's purpose was to provide independent and unbiased opinion as to the existence of an occupational disease. It is significant that § 97-74 only allows the Industrial Commission to tax such costs when "**compensation is awarded**" to Plaintiff.

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Second, N.C. Gen. Stat. § 97-80(b) provides that "the Commission…shall have the power … to tax costs against the parties" including costs of the depositions ordered to be taken by the Commission pursuant to § 97-80(d). Section 97-80(b) provides authority to tax costs against "the parties"—not just against defendants. Subsection (d) of this statute provides:

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

The taxing of costs should take into consideration the prevailing party. See for example § 97-74 *supra.* The statute gives no authority to the Commission to award costs for a discovery deposition, nor does it allow for costs to be assessed if the party does not make the mandatory pre-deposition showing regarding the materiality of the evidence sought to be obtained by deposition. Per N. C. Gen. Stat. § 7A-314 expert witness fees may be assessed only if the expert witness testified pursuant to a subpoena.

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

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

As a matter of law, the IC rules must conform to the statutory mandate. See § 97-80 (a), and *Evans v. Asheville Citizens Times Co*., 246 N.C. 669, 100 S. E. 2d (1957). As noted above, Rule 612 provides authority to assess deposition costs to defendants for <u>medical depositions of doctors who examine plaintiff at the defendant's expense or for medical depositions taken at the defendants request, when deemed necessary by the Deputy Commissioner and so ordered</u>. Thus the rule only provides for the defendant to be required to pay for the deposition of a treating physician where the defendant paid for the initial exam—which, by definition would occur either in an admitted claim, or a pay without prejudice claim, or as a result of an independent medical evaluation requested by defendant or agreed to be financed by defendant—such as a panel exam which the defendant agreed to pay.

This rule is consistent with Rule 26 of the North Carolina Rules of Civil Procedure, which provides in relevant part:

> Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivision (b)(4)a2 of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)a2 of this rule the court may require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

Only two cases could be found in North Carolina in which the Industrial Commission awarded an expert witness fee as deposition costs pursuant to N.C. Gen. § 97-80. In *Grantham v. R.G. Barry*, 115 N.C. App. 293, 444 S.E.2d 659 (1994), plaintiff requested expert fees for its expert witness, Dr. Schiller. Citing to §97-80(a), the Court stated that N.C. Gen. Stat. § 97-80(a) (1991 & Supp.) gives the "Commission or any member thereof, or any person deputized by it, . . . the power, for the purpose of [the Workers' Compensation Act], to tax costs against the parties . . .." The Court upheld the Deputy Commissioner's refusal to grant the request for fees of $3,197.60 on the grounds that these charges were "charges incurred by plaintiff to prosecute her claim. Defendants are not responsible for paying bills incurred by plaintiff to obtain expert toxicological support for her claim." *Id.* at 302. The Commission awarded $350 for the deposition testimony and file review.

Harvey v. Raleigh Police Dep't, 85 N.C. App. 540, 355 S.E.2d 147 (1987) is the other case in which deposition costs have been assessed based on the above statute. In *Harvey*, the Court did not find that the Deputy Commissioner abused his discretion when he assessed the costs of plaintiff's expert's deposition against the defendant. The opinion does not reflect whether an expert witness fee was awarded or just the cost of the deposition. *Harvey* and *Grantham* do not set forth a tradition suggesting that defendants should pay all costs, win or lose; rather, these cases stand for the principle that the Commission has the discretionary authority to direct costs as provided by statute.

Third, pursuant to N.C. Gen. Stat. § 97-88.1, the **Industrial Commission** may assess **costs** and attorney's fees if it determines that "any hearing has been brought, prosecuted, or defended without reasonable ground[.]" The determination of whether to shift costs based on this statute is in the discretion of the Commission, and its award or denial of an award will not be disturbed absent an abuse of discretion." *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 54-55, 464 S.E.2d 481, 486 (1995), *disc. review denied*, 343 N.C. 516, 472 S.E.2d 26 (1996). An abuse of discretion results only where a decision is "'manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.'" *Long v. Harris*, 137 N.C. App. 461, 465, 528 S.E.2d 633, 635 (2000) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)). "In determining whether a hearing has been defended without reasonable ground, the Commission (and a reviewing court) must look to the evidence introduced at the hearing. 'The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness.'" *Cooke v. P.H. Glatfelter/Ecusta*, 130 N.C. App. 220, 225, 502 S.E.2d 419, 422-23 (1998) (quoting *Sparks v. Mountain Breeze Rest.*,

55 N.C. App. 663, 665, 286 S.E.2d 575, 576 (1982)). This statute is consistent with N.C. Gen. Stat. § 6-1, which allows costs to be awarded "[t]he party for whom judgment is given…." Costs are not awarded to a party who does not prevail. *See generally* N.C. Gen. Stat. § 6-18, 6-19.

Thus, as the three statutes contained in the Workers' Compensation Act indicate, there is no automatic mechanism by which costs should be assessed against Defendant. Rather, deposition costs are within the discretion of the Commission and the outcome of the matter is an essential factor in such an assessment.

Defendants object to being assessed costs of trial and deposition testimony that they did not request without a finding that Plaintiffs suffer from an occupational disease. Such cost shifting means that Defendant is funding mass screening and litigation against itself for the questionable diagnoses of occupational diseases that Plaintiffs often do not have. This scheme insures that Plaintiffs' counsel incur no financial risk for bringing claims against employers and instead are rewarded for bringing any action whether valid or not. The expense of litigation is a major consideration to defendants—even where defendants know the claim is unjustified by the facts at issue.

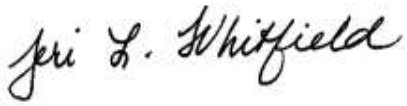
North Carolina General Statutes Limit The Definition of Costs

In addition to the issue of whether Defendant should be forced to bear the costs of discretionary expert fees, a second issue arises as to what constitutes "costs." There is no definition of "costs" contained in the Workers' Compensation Act or in the Workers' Compensation Rules. However, costs related to civil actions are specifically defined by the North Carolina General Statutes. Under North Carolina law, costs can only be reimbursed when expressly allowed by specific statutory authority. *See, e.g.*, *Estate of Smith v. Underwood*, 127 N.C. App. 1, 12, 487 S.E.2d 807, 815 (1997). The items enumerated in Section 7A-305(d) "are complete and exclusive and constitute a limit on the trial court's discretion to tax costs." N.C. Gen. Stat. § 7A-305(d) (2011). While the costs included in Section 7A-305(d) are costs the court is "required to assess," *Springs v. City of Charlotte*, 704 S.E.2d 319, 327 (N.C. Ct. App. Jan. 18, 2011) (citation omitted), those costs include "[r]easonable and necessary fees of expert witnesses *solely* for actual time spent providing testimony at trial, deposition, or other proceedings." N.C. Gen. Stat. § 7A-305(d)(11) (emphasis added). Thus, neither courts nor the Industrial Commission have authority to award *any* and all fees to experts. *Springs*, 704 S.E.2d at 328. There is "no authority in the current statutes authorizing the trial court to assess costs for an expert witness' preparation time." *Id.* The *Springs* holding is consistent with the reasoning in the *Grantham v. R.G. Barry*, 115 N.C. App. 293 (1994), supra, in which the Deputy Commissioner found that fees associated with obtaining expert support for plaintiff's claim would not be proper to assess against defendants.

Thank you for the opportunity to submit comments to the proposed Rules.

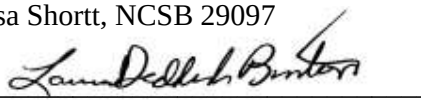
Sincerely,

SMITH MOORE LEATHERWOOD LLP



Jeri L. Whitfield, NCSB 8092

Lisa Shortt, NCSB 29097



Laura D. Burton, NCSB 24203

JLW/cd

COMMENTS TO PROPOSED RULES

IC Proposed Rule:
04 NCAC 10A .0612 DEPOSITIONS
(b) When medical or other expert testimony is requested by the parties for the disposition of a case, a Deputy Commissioner or Commissioner may order expert depositions to be taken on or before a day certain not to exceed 60 days from the date of the hearing; provided, however, the time allowed may be enlarged or shortened in the interests of justice or to promote judicial economy, or where required by the Act. The costs of up to two post-hearing depositions selected by the employee of health care providers who evaluated or treated the employee shall be borne by the employer.

Authors' Proposed Revision:
04 NCAC 10A .0612 DEPOSITIONS
(b) When medical or other expert testimony is requested by the parties for the disposition of a case, a Deputy Commissioner or Commissioner may order expert depositions to be taken on or before a day certain not to exceed 60 days from the date of the hearing; provided, however, the time allowed may be enlarged or shortened in the interests of justice or to promote judicial economy, or where required by the Act. The costs of up to two post-hearing depositions selected by the employee of health care providers who evaluated or treated the employee *at defendants' expense* shall be borne by the employer.

Comment1: We request that the phrase "health care providers who evaluated or treated the employee" be further clarified to include the language appearing in current Rule 612 which provides: "The costs of such depositions shall be borne by defendants for those medical witnesses who examined plaintiff at defendants' expense." This allows the employee in an admitted claim to present evidence without bearing the costs of a deposition of a medical care provider. However, there is no statutory basis for requiring a defendant to pay the plaintiff's litigation costs in cases in which the employee is unsuccessful.

If this rule requiring the defendants to pay the costs of depositions is not limited to physicians who evaluated or treated the plaintiff at defendants' expense, at a minimum, it should be limited to physicians who have regularly treated the Employee in the case of an occupational disease or exposure claim or to whom the employee immediately sought treatment and evaluation in the case of accidental workplace injury. The reason for requesting this clarification is that it is often the case in claims of occupational exposure that employees are sent to selected medical "experts" for the purpose of a diagnosis of an alleged occupational disease, where the "expert" routinely diagnoses the occupational disease of "asbestosis" based upon x-rays which are not taken in the routine course of a medical practice, are not read by a radiologist, and often are taken on equipment no longer used by the medical profession. These experts do not offer treatment or follow-up and often charge fees far in excess of actual treating physicians. In short, these retained "experts" are selected for litigation and to the extent the employee intends to offer them as witnesses, the employer should not bear the costs of these experts. Similarly, in the case of an alleged accidental injury, the employer should not bear the cost of plaintiffs' retained litigation expert where the claim is ultimately unsuccessful.

IC Proposed Rule:
(b) . . . The parties may notice depositions of additional experts, and the costs thereof shall be borne by the party noticing the depositions; provided, however, if a ruling favorable to the employee is rendered *and is not timely appealed by the employer, or the employer's appeal is dismissed or withdrawn, then the employer shall* reimburse the employee the costs of such additional expert depositions.

Authors' Proposed Revisions:
(b) . . . The parties may notice depositions of additional experts, and the costs thereof shall be borne by the party noticing the depositions; provided, however, if a *final* ruling favorable to the employee is rendered then, *in the discretion of the Commission or Deputy Commissioner, the costs thereof may be assessed against the employer. The employer may be required by the Commission to reimburse the employee the costs of such additional expert depositions.*

Comment 2: We request that the Industrial Commission be given discretion to decide whether to shift the cost of expert depositions, which allows the Commission to determine the reasonableness of the request.

IC Proposed Rule:
(b) . . . Notwithstanding this provision, the parties may come to a separate agreement regarding reimbursement of deposition costs, which shall be submitted to the Commission for approval. Provided further, in (i) claims pursuant to G.S. 97-29(d) and (ii) cases involving exceptional, unique, or complex injuries or diseases, the Commission may allow additional depositions of experts to be taken at the employer's expense, when requested by the employee and when necessary to address the issues in dispute, in which case the employee shall state, and the Commission shall consider, at a minimum, the following factors when determining whether or not the employer shall bear the costs of such depositions:
(1) The name and profession of the proposed deponent;
(2) If the proposed deponent is a health care provider, whether the health care provider evaluated, diagnosed or treated the employee;
(3) The issue to which the testimony is material, relevant and necessary;
(4) The availability of alternate methods for submitting the evidence and the efforts made to utilize alternate methods;
(5) The severity or complexity of the employee's condition;
(6) The number and complexity of the issues in dispute;
(7) Whether the testimony is likely to be duplicative of other evidence; and
(8) The opposing party's position on the request.

Authors' Proposed Revisions:
(b) . . . Notwithstanding this provision, the parties may come to a separate agreement regarding reimbursement of deposition costs, which shall be submitted to the Commission for approval. Provided further, in (i) claims pursuant to G.S. 97-29(d) and (ii) cases involving exceptional, unique, or complex injuries or diseases, *the Commission may require the parties to agree upon a*

mutually acceptable expert (either selected by the parties or via a procedure adopted by the Commission) to examine the employee, if requested, and provide expert opinion evidence at the employer's expense, when necessary to address the issues in dispute. The Commission shall consider, at a minimum, the following factors when determining whether or not the employer shall bear the costs of such depositions:
(1) The name and profession of the proposed deponent;
(2) If the proposed deponent is a health care provider, whether the health care provider evaluated, diagnosed or treated the employee;
(3) The issue to which the testimony is material, relevant and necessary;
(4) The availability of alternate methods for submitting the evidence and the efforts made to utilize alternate methods;
(5) The severity or complexity of the employee's condition;
(6) The number and complexity of the issues in dispute;
(7) Whether the testimony is likely to be duplicative of other evidence; and
(8) The opposing party's position on the request.

Comment 3: Again, this rule should only tax costs against the defendant if the employee prevails. See comments 1 and 2 above.

A proposed rule should be considered that forces the parties to agree on mutual experts for whom the Employer will bear the costs. (A proposed rule of that nature could benefit all because the parties are more likely to resolve the cases without the need for a hearing. The additional benefit is that the employer would pay the costs of the expert, and therefore the cost of the expert would not be paid by the plaintiff, even if the plaintiff did not prevail.)

Absent such an agreement or the use of a mutual expert, the shifting of costs should occur only when the plaintiff prevails. This is consistent with the structure of the Act which provided for the use of an Advisory Medical Committee under N.C. Gen. Stat. §97-72, and provided that ***in cases in which compensation is awarded,*** *the Commission can tax a reasonable allowance for the services of members of the AMC. N.C. Gen. Stat. §97-74. This is consistent with N.C. Gen. Stat. § 6-1, which allows costs to be awarded "[t]he party for whom judgment is given…." Costs are not awarded to a party who does not prevail. See generally N.C. Gen. Stat. §§ 6-18, 6-19."*

IC Proposed Rule

(b). . . The term "costs" as used in this rule shall mean the expert's fee as approved by the Commission for the deposition, including the expert's time preparing for the deposition, if applicable, and shall include fees associated with the production and delivery of a transcript of the deposition to the Commission, including the court reporter's appearance fee, but shall not include costs for a party to obtain his or her own copy of the deposition transcript, or attorney's fees associated with the deposition, unless so ordered by the Commission pursuant to G.S. 97-88.1.

Comment 4: The statutory and common law definition of "costs" would exclude the expert's time preparing for the deposition. See N.C. Gen. Stat. § 7A-305(d): "The following expenses, when incurred, are assessable or recoverable, as the case may be. The expenses set forth in this subsection are complete and exclusive and constitute a limit on the trial court's discretion to tax costs pursuant to G.S. 6-20: . . . (11) Reasonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings." See generally N.C. Gen. Stat. § 6-18, 6-19. (However, a treating physician is allowed to bill the defendant for time spent treating the plaintiff including the preparation of reports. This is handled as a medical bill, not a "cost." CPT code 99080 is used for the preparation of special or lengthy reports.) There is no statutory authority to require the employer to pay for the expert's time preparing for the deposition. There is no statutory authority to support requiring the employer in a denied claim to pay for the expert's fee and deposition costs where the employee is unsuccessful. There is no support in law or equity for making the employer finance the employee's litigation against the employer itself, when the employee's claim is not meritorious.

We request that the Industrial Commission follow North Carolina law in its definition of costs that it can assess against the Employer. There is no definition of "costs" contained in the Workers' Compensation Act. However, costs related to civil actions are specifically defined by the North Carolina General Statutes. Under North Carolina law, costs can only be reimbursed when expressly allowed by specific statutory authority. See, e.g., Estate of Smith v. Underwood, 127 N.C. App. 1, 12, 487 S.E.2d 807, 815 (1997). The items enumerated in Section 7A-305(d) "are complete and exclusive and constitute a limit on the trial court's discretion to tax costs." N.C. Gen. Stat. § 7A-305(d) (2011). While the costs included in Section 7A-305(d) are costs the court is "required to assess," Springs v. City of Charlotte, 704 S.E.2d 319, 327 (N.C. Ct. App. Jan. 18, 2011) (citation omitted), those costs include "[r]easonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings." N.C. Gen. Stat. § 7A-305(d)(11) (emphasis added). Thus, neither courts nor the Industrial Commission have authority to award any and all fees to experts. Springs, 704 S.E.2d at 328. There is "no authority in the current statutes authorizing the trial court to assess costs for an expert witness' preparation time." Id. The Springs holding is consistent with the reasoning in the Grantham v. R.G. Barry, 115 N.C. App. 293 (1994), supra, in which the Deputy Commissioner found that fees associated with obtaining expert support for plaintiff's claim would not be proper to assess against defendants. While a party may come to an agreement for fees with an expert it retains, it is fundamentally unfair and not authorized by North Carolina statutes for the Industrial Commission to assess fees against the employer for time spent by an expert it did not retain in preparing for a deposition it did not request. Again, this issue would be resolved if the parties came to an agreement on the use of an expert and the employer agreed to assume that expense.

IC Proposed Rule:

04 NCAC 10A .0613 EXPERT WITNESSES AND FEES

. . .

(c) The Commission shall issue an order setting the deposition costs of the expert. The term "costs" as used in this rule shall mean the expert's fee as approved by the Commission for the deposition, including the expert's time preparing for the deposition, and shall include fees associated with the production and delivery of a transcript of the deposition to the Commission, including the court reporter's appearance fee, but shall not include costs for a party to obtain his or her own copy of the deposition transcript, or attorney's fees associated with the deposition, unless so ordered by the Commission pursuant to G.S. 97-88.1.

Author's Proposed Revisions:

(c) The Commission shall issue an order setting the deposition costs of the expert. The term "costs" as used in this rule shall mean the expert's fee as approved by the Commission for the deposition, excluding the expert's time preparing for the deposition, and shall include fees associated with the production and delivery of a transcript of the deposition to the Commission, including the court reporter's appearance fee, but shall not include costs for a party to obtain his or her own copy of the deposition transcript, or attorney's fees associated with the deposition, unless so ordered by the Commission pursuant to G.S. 97-88.1.

See Comment 4 above.

General Comment: We request that it be made explicit that employees' designation of experts for which costs are assessed against employer should not be made in contravention of existing rules regarding the selection and responsibility for payment of certain experts. For example, cost shifting should not occur if plaintiff retains a vocational rehabilitation expert outside of the provisions of N.C. Gen. Stat. § 97-32.2 (b).

IC Proposed Rule:

04 NCAC 10A.0603 RESPONDING TO A PARTY'S REQUEST FOR HEARING

This rule is written to imply that only the employee can request a hearing. It should be changed to read:

(a) No later than 45 days from receipt of a request for hearing from a party, the opposing party or parties shall file with the Commission a response to the request for hearing.

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Reply to Chapel Hill Office

February 26, 2014

Via Electronic Mail to meredith.henderson@ic.nc.gov

Honorable Meredith R. Henderson
Executive Secretary
North Carolina Industrial Commission
Raleigh, North Carolina

Re: Comment on Industrial Commission Permanent Rules Proposed Pursuant to Section Law 2013-294

Dear Ms. Henderson:

I am filing these comments on behalf of the North Carolina State AFL-CIO.

The North Carolina State AFL-CIO appreciates the hard work of the Industrial Commission, and all of the interested parties, in developing these rules consistent with the North Carolina Administrative Procedure Act.

These comments are limited to two proposed rules that impact uniquely on the workers' compensation claims of employees not represented by lawyers.

PROPOSED RULE 04 NCAC 10E.0203 (a) (2). FEES SET BY COMMISSION

The North Carolina State AFL-CIO opposes the adoption and urges the deletion of the proposed subdivision (a) (2) or, alternatively, urges deletion of the language in (a) (2) that imposes an obligation on the employee to pay 50% of this fee and authorizes the employer to take a credit for the employee's share.

The proposed subdivision presently reads:

> (a)(2) three hundred dollars ($300.00) for the processing of a Form 21 *Agreement for Compensation for Disability*, Form 26, *Supplemental Agreement as to Payment of Compensation*, or Form 26A, *Employer's Admission of Employee's Right to Permanent Partial Disability* to be paid by the employee and the employer in equal shares. The employer shall pay such fee in full when submitting the agreement to

> the Commission. Unless the parties agree otherwise or the award totals $3,000 or less, the employer shall be entitled to a credit for the employee's 50% share of such fee against the award;

As proposed, this subdivision is: 1) impermissible under the mandatory benefit payment provisions of the Workers' Compensation Act; 2) inconsistent with the basic premises underlying the workers' compensation system; and 3) contrary to the recommendation of the informal committee, comprised of representatives of the plaintiff and the defense bar.

First, proposed subdivision (a)(2) acts to impermissibly reduce the compensation rates set by the General Assembly. Employees found to suffer from permanent partial, temporary partial, or temporary total disability are statutorily entitled to a specific compensation rate. G.S. §§ 97-29,-30,-31. In effect, proposed subdivision (a)(2) acts to reduce that compensation rate by charging claimants a "processing fee." This deprives the injured employee of compensation he or she is entitled to receive and thus is inconsistent with the Act.

Moreover, proposed subdivision (a)(2) is inconsistent with the basic premises underlying the workers' compensation system. Workers' compensation is an insurance system for covering employees' workplace injuries in lieu of reliance on tort law. Workers' compensation systems are generally supported by legislative appropriations and assessments on employers and insurers. Fees and expenses incurred by employers and insurers in participating in the workers' compensation system are taken into account in establishing premiums and as costs of carrying on their business. These expenses are the costs of doing business by employers and insurers and, in effect, offset taxable income. On the other hand, fees assessed against injured employees reduce the modest benefits to which they are statutorily entitled with no corresponding tax saving. Requiring injured employees to absorb employers' costs of doing business in this manner is antithetical to the principles underlying the workers' compensation system.

Given these clear deficiencies, it is unsurprising that proposed subdivision (a)(2) is inconsistent with the recommendations given by the informal committee comprised of representatives of the plaintiff's and defense bar. Defense attorney Julia Ellen Dixon presented this recommendation to the Commission on October 16, 2013. To compensate for the revenue lost by elimination of these fees, Ms. Dixon reiterated the insurers and employers' "commitment to seek alternative sources of funding for the Commission."

The consequences of this change are especially important given that many employees entering into Form 21, Form 26, and Form 26A agreements proceed without legal representation. Such employees will be less likely to take into consideration the fee-split provision when negotiating with employers.

The North Carolina State AFL-CIO supports the deletion of the proposed subdivision (a)(2). In the alternative, it supports deleting the language requiring the employee to pay an equal share of subdivision (a)(2)'s fee. Should the Commission adopt the latter approach, the North Carolina State AFL-CIO encourages the Commission to agree that this subdivision will be removed altogether, along with those provisions requiring fees for the processing of forms 21, 26, and 26A, upon identification of the alternative sources of funding projected by Ms. Dixon.

PROPOSED RULE 04 NCAC 10A .0801. WAIVER OF RULES

The North Carolina State AFL-CIO supports the restoration of language deleted from the previous rule and the addition of language to help assure that indigent employees or employees otherwise without sufficient financial resources are able to proceed with his or her claim. This is particularly important since the proposed rules now impose responsibility on injured workers for additional costs and expenses in some circumstances.

This rule as proposed reads:

> 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 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 parties' 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.

The North Carolina State AFL-CIO proposes that the following additional language be added to reinstate language previously deleted recognizing the particular vulnerability of unrepresented workers, and addressing workers indigent or otherwise without sufficient financial resources, to proceed with their claims.

> The rights of any unrepresented employee will be given special consideration to the end that an employee without an attorney shall not be prejudiced by a failure to strictly comply or inability to comply with any one of these Rules. In the interests of justice, the Industrial Commission may waive the Rules for any unrepresented or represented employee, when

such waiver is necessary for an indigent employee or employee otherwise without sufficient financial resources to proceed with his or her claim.

Thank you for the opportunity to participate in this process.

Respectfully,

Henry N. Patterson, Jr.
N.C. State Bar No. 3366

HNPjr/bo

Cc: James Andrews, President, North Carolina State AFL-CIO