

STATE OF NORTH CAROLINA

BEFORE THE NORTH CAROLINA INDUSTRIAL COMMISSION

NOVEMBER 29, 2018

PUBLIC HEARING BEFORE THE FULL COMMISSION

REGARDING

PROPOSED RULEMAKING IN TWO PROPOSED ADOPTIONS, FIFTEEN
AMENDMENTS AND TWO REPEALS IN
SUBCHAPTERS 11 NCAC 23B AND 11 NCAC 23L

GRAHAM ERLACHER & ASSOCIATES
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WINSTON-SALEM, NORTH CAROLINA 27103
336/768-1152

A P P E A R A N C E S

COMMISSIONERS:

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

I N D E X

<u>SPEAKERS:</u>	<u>PAGE</u>
Ashley Snyder	2

E X H I B I T S

	<u>IDENTIFIED</u>	<u>ADMITTED</u>
(Snyder) Exhibit Number 1	3	6
(Snyder) Exhibit Number 2	3	6

P R O C E E D I N G S

1
2 CHAIRMAN ALLEN: Good morning. We are on the
3 record. Today is November 29, 2018. I am Charlton
4 Allen, Chairman of the North Carolina Industrial
5 Commission. In compliance with the requirements of
6 Chapter 138A-15(e) of the State Government Ethics Act,
7 I remind all members of the Commission of their duty
8 to avoid conflicts of interest under Chapter 138A. I
9 also inquire as to whether there is any known conflict
10 of interest to the matters coming before the
11 Commission at this time.

12 VICE-CHAIRMAN STITH: No.

13 COMMISSIONER GRIFFIN: No.

14 COMMISSIONER HASSELL: None, Mr. Chairman.

15 CHAIRMAN ALLEN: Hearing none, we will proceed.
16 This is a North Carolina Industrial Commission public
17 hearing on proposed rulemaking. The purpose of this
18 hearing is to receive comments from the public
19 regarding two proposed adoptions, fifteen amendments
20 and two repeals as published in the *North Carolina*
21 *Register* on October 15, 2018. We have received no
22 written comments from the public thus far, and the
23 record will be held open to receive written comments
24 from the public through the close of business on
25 December 14, 2018. At this time, I would like to

1 introduce the other Commissioners. To my right - to
2 the far right is Commissioner Robinson Hassell and
3 Commissioner Philip Baddour and Vice-Chairman
4 Yolanda Stith. To my left - on the far left is
5 Commissioner Myra Griffin, and then Commissioner
6 Christopher Loutit. Anyone who wishes to speak at
7 this hearing must sign-up to do so with Ashley Snyder
8 so we have the correct spelling of your name and can
9 call you in order to speak. If anybody would like to
10 speak and has not yet signed up, please do so now.
11 The first speaker will be Ashley Snyder, the
12 rulemaking coordinator for the North Carolina
13 Industrial Commission, followed by any members of the
14 public who sign-up.

15 ASHLEY SNYDER

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

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

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

24 MS. SNYDER: Yes. I have Exhibit 1, which is a
25 copy of the proposed rules as published in the *North*

1 Carolina Register on October 15th, 2018. Next, I have
2 Exhibit 2, which is a copy of the fiscal notes for
3 Rules 11 NCAC 23B .0104, .0105, .0202, .0204, .0205,
4 .0302, .0310 and .0501.

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

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

10 MS. SNYDER: We have two proposed adoptions,
11 fifteen amendments and two repeals which have a
12 proposed effective date of February 1, 2019. On its
13 own initiative, the North Carolina Industrial
14 Commission conducted an internal review of its rules
15 governing state tort claims. The proposed adoptions,
16 amendments and repeals represent changes necessary to
17 improve and clarify the rules, provide for increased
18 efficiency, or to update the rules to reflect current
19 processes. The Commission also proposed to adopt Rule
20 11 NCAC 23L .0105 which codifies a new form, the T-42,
21 required in the proposed amendments to Rule 11 NCAC
22 23B .0203. The proposed rules for adoption are 11
23 NCAC 23B .0105, Contact Information; 11 NCAC 23L
24 .0105, Form T-42 - Application for Appointment of
25 Guardian Ad Litem. The proposed rules for amendment

1 are: 11 NCAC 23B .0101, Location of Main Office and
2 Hours of Business; 11 NCAC 23B .0102, Official Forms;
3 11 NCAC 23B .0103, Filing Fees; 11 NCAC 23B .0104,
4 Electronic Filings with the Commission; How to File;
5 11 NCAC 23B .0202, Medical Malpractice Claims by
6 Unrepresented Prison Inmates; 11 NCAC 23B .0202 [sic],
7 Infants and Incompetents; 11 NCAC 23B .0204, Motions;
8 11 NCAC 23B .0205, Mediation; 11 NCAC 23B .0208,
9 Hearing Costs; 11 NCAC 23B .02 - let's see - is that
10 .0203 [sic], Appeals to the Full Commission; 11 NCAC
11 23B .0307, Motions Before the Full Commission; 11 NCAC
12 23B .0308, Stays; 11 NCAC 23B .0310, Oral Argument; 11
13 NCAC 23B .0402, Stays; 11 NCAC 23B .0501, Waiver of
14 Rules. We have two proposed rules for appeal: 11
15 NCAC 23B .0303, Proposed Issues on Appeal and 11 NCAC
16 23B .0305, Briefs to the Full Commission. The
17 Commission has followed the permanent rulemaking
18 procedures of the Administrative Procedure Act in
19 proposing these changes. The proposed rules were
20 filed with a notice of text to the Office of
21 Administrative Hearings on September 24, 2018. They
22 were then published in the October 15, 2018 issue of
23 the *North Carolina Register*, and on the same date, the
24 Commission published a notice of this rulemaking on
25 the Commission's website and also emailed notice with

1 a link to these proposed rules to the Industrial
2 Commission's Listserv. Copies of these rules were
3 also provided to the North Carolina League of
4 Municipalities and the North Carolina Association of
5 County Commissioners as required by statute.

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

8 COMMISSIONER GRIFFIN: No.

9 COMMISSIONER HASSELL: None, Mr. Chairman.

10 COMMISSIONER GRIFFIN: No.

11 CHAIRMAN ALLEN: Okay. No questions. Thank you,
12 Ms. Snyder. You may be seated, and we'll proceed to
13 the next speaker.

14 (SPEAKER DISMISSED)

15 CHAIRMAN ALLEN: Has anyone signed up? Let the
16 record reflect no speakers - additional speakers have
17 signed up. Thank you all for participating in this
18 public hearing. The period for written comments will
19 be held open through the close of business on December
20 14, 2018. If you have any further comments, please
21 send them to Ashley Snyder as directed in the hearing
22 notice in the *North Carolina Register* and on the
23 Commission's website. I would strongly encourage
24 anyone intending to submit a written public comment to
25 please do so at your earliest convenience. The

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

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

8 CHAIRMAN ALLEN: Are there any further matters to
9 come before this public hearing?

10 VICE-CHAIRMAN STITH: No.

11 COMMISSIONER HASSELL: No.

12 COMMISSIONER GRIFFIN: No.

13 CHAIRMAN ALLEN: Okay. Hearing none, the hearing
14 is adjourned. Thank you. And we will go off the
15 record.

16 (WHEREUPON, THE HEARING WAS ADJOURNED.)

17 RECORDED BY MACHINE

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

1 STATE OF NORTH CAROLINA

2 COUNTY OF GUILFORD

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

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

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

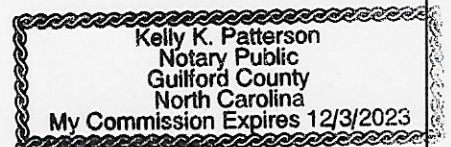
13 WITNESS my Hand and Seal on this 6th day of December
14 2018.

15 My commission expires on December 3, 2023.

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Kelly K. Patterson

NOTARY PUBLIC



NORTH CAROLINA¹

REGISTER

VOLUME 33 • ISSUE 08 • Pages 778 – 886

October 15, 2018

I. EXECUTIVE ORDERS

Executive Order No. 54	778 – 779
Executive Order No. 55	780 – 782
Executive Order No. 56	783 – 784
Executive Order No. 57	785 – 786
Executive Order No. 58	787 – 788
Executive Order No. 59	789 – 792
Executive Order No. 60	793 – 794
Executive Order No. 61	795 – 796
Executive Order No. 62	797 – 798
Executive Order No. 63	799 – 801
Executive Order No. 64	802 – 804

II. IN ADDITION

Environmental Management Commission – Public Notice	805
---	-----

III. PROPOSED RULES

Health and Human Services, Department of	
Social Services Commission	806 – 817
Insurance, Department of	
Industrial Commission	817 – 824
Public Safety, Department of	
Alcoholic Beverage Control Commission	824 – 835
Occupational Licensing Boards and Commissions	
Medical Board	835 – 838
Physical Therapy Examiners, Board of	838
Substance Abuse Professional Practice Board	838 – 844

IV. EMERGENCY RULES

Occupational Licensing Boards and Commissions	
Medical Board	845 – 849

V. TEMPORARY RULES

Insurance, Department of	
Department	850 – 851

VI. RULES REVIEW COMMISSION

852 – 882

VII. CONTESTED CASE DECISIONS

Index to ALJ Decisions	883 – 886
------------------------------	-----------

(c) The Panel shall complete its review and notify the appealing party and the Local Purchasing Agency of its decision in writing within 30 business days of the Panel's receipt of the appeal record as follows:

- (1) the decision shall include the facts and conclusions that support the determination by the Panel; or
- (2) the decision may be delayed up to an additional 15 business days if the Panel lacks sufficient information to render a decision at the initial administrative review. The Panel may request additional information from the Local Purchasing Agency or the operator.

(d) The appealing party may appeal the administrative review decision by filing a petition for a contested case hearing pursuant to G.S. 150B-23 and in accordance with G.S. 110-94. Appeals from the Panel shall be filed within 30 calendar days of notice of the Panel's decision, in accordance with G.S. 150B-23(f).

(e) The administrative review decision may direct a Local Purchasing Agency to take an action or reverse an action based upon its review of the record as set forth in Paragraph (b) of this Rule.

(f) An operator may appeal a final determination pursuant to 10A NCAC 10 .0308(k) by filing a petition for a contested case hearing pursuant to G.S. 150B-23 and in accordance with G.S. 110-94.

Authority G.S. 143B-153.

TITLE 11 – DEPARTMENT OF INSURANCE

Notice is hereby given in accordance with G.S. 150B-21.2 that the Industrial Commission intends to adopt the rules cited as 11 NCAC 23B .0105; 23L .0105, amend the rules cited as 11 NCAC 23B .0101-.0104, .0202-.0205, .0208, .0302, .0307, .0308, .0310, .0402, .0501, and repeal the rules cited as 11 NCAC 23B .0303 and .0305.

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

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

Proposed Effective Date: February 1, 2019

Public Hearing:

Date: November 29, 2018

Time: 10:00 a.m.

Location: Room 245, 2nd Floor, Department of Insurance, Albemarle Building, 325 North Salisbury Street, Raleigh, NC 27603

Reason for Proposed Action: *On its own initiative, the Industrial Commission conducted an internal review of its rules governing State tort claims. The proposed adoptions,*

amendments, and repeals represent changes necessary to improve and clarify the rules, provide for increased efficiency, or to update the rules to reflect current processes.

The Commission also proposes to adopt Rule 11 NCAC 23L .0105 which codifies a new form, the T-42, required in the proposed amendments to Rule 11 NCAC 23B .0203.

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

Comment period ends: December 14, 2018

Procedure for Subjecting a Proposed Rule to Legislative Review:

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

Fiscal impact (check all that apply).

- State funds affected** 11 NCAC 23B .0104, .0105, .0202, .0204, .0205, .0302, .0310, .0501
- Environmental permitting of DOT affected**
- Analysis submitted to Board of Transportation**
- Local funds affected** 11 NCAC 23B .0104, .0204, .0302, .0310, .0501
- Substantial economic impact (≥\$1,000,000)**
- Approved by OSBM**
- No fiscal note required by G.S. 150B-21.4** 11 NCAC 23B .0101-.0103, .0203, .0208, .0303, .0305, .0307, .0308, .0402; 23L .0105

CHAPTER 23 - INDUSTRIAL COMMISSION

SUBCHAPTER 23B – TORT CLAIMS RULES

SECTION .0100 – ADMINISTRATION

11 NCAC 23B .0101 LOCATION OF OFFICES MAIN OFFICE AND HOURS OF BUSINESS

~~For purposes of this Subchapter, the offices~~ The main office of the North Carolina Industrial Commission ~~(Commission) are~~ is located in the Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina. Documents that are not being filed electronically may be filed at the main office between the hours of 8:00 a.m. and 5:00 p.m. only. Documents ~~related to tort claims~~ are permitted to be filed electronically may be so filed until 11:59 p.m. on the required filing date.

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

11 NCAC 23B .0102 OFFICIAL FORMS

(a) Copies of the Commission's ~~rules, forms, and minutes~~ rules and forms regarding tort claims can be obtained by contacting the Commission in ~~person, person~~ at the address in Rule .0101 of this Section, by written request mailed to ~~4340 1236~~ Mail Service Center, Raleigh, NC ~~27699 4340, 27699-1236~~. Attn.: Office of the Clerk, or from the Commission's ~~website, website~~ at ~~http://www.ic.nc.gov/abtrules.html~~ and ~~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-insureds, attorneys and other~~ parties may reproduce current Commission forms for their own use, provided:

- (1) ~~No~~ no statement, question, or information blank contained on the Commission form is omitted from the substituted ~~form, form~~; and
- (2) ~~The~~ the substituted form is identical in size and format ~~with~~ to the Commission form.

Authority G.S. 143-300.

11 NCAC 23B .0103 FILING FEES

(a) No tort claim shall be accepted for filing with the Commission unless the claim is accompanied by an attorney's check, certified check, money order, or electronic transfer of funds in payment of a filing fee in an amount equal to the filing fee required for the filing of a civil action in the Superior Court division of the General Court of Justice.

(b) The provisions of Paragraph (a) of this Rule notwithstanding, a tort claim that is accompanied by a Petition to Sue as an Indigent shall be accepted for filing upon the date of its receipt.

(c) A Petition to Sue as an Indigent shall consist of an affidavit sufficient to satisfy the provisions of G.S. 1-110, stating that plaintiff is unable to comply with Paragraph (a) of this Rule.

(d) If the Commission determines the plaintiff is able to pay ~~all or any part of the fees~~ fee assessed under this Rule, an Order shall be issued directing payment of ~~all or any part of that fee~~, and the plaintiff shall, within 30 days from ~~his~~ receipt of the Order, forward to the Commission an attorney's check, certified check, money order, or electronic ~~fund~~ transfer of funds for the full

amount required to be paid. Failure to submit the required amount of the filing fee within this time shall result in the tort claim being dismissed without prejudice.

(e) Upon consideration of a prison inmate's Petition to Sue as an Indigent, the Commission may determine that the inmate's tort claim is frivolous and dismiss the claim pursuant to G.S. 1-110. Appeals from the dismissal of a frivolous tort claim pursuant to ~~this statute~~ G.S. 1-110 shall proceed directly to the Full Commission and shall be decided without oral argument. ~~The Commission shall forward a copy of the file to the Attorney General's Office without cost upon plaintiff's notice of appeal to the Full Commission.~~

Authority G.S. 143-291.2; 143-300.

11 NCAC 23B .0104 FILING BY FACSIMILE TRANSMISSION ELECTRONIC FILINGS WITH THE COMMISSION; HOW TO FILE

~~Filing documents pertaining to tort claims by facsimile transmission is permitted. Any filing fee required shall be received by the Commission contemporaneously with the facsimile by electronic transfer of funds.~~

(a) All filings to the Commission in tort claims shall be submitted electronically in accordance with this Rule. Any document transmitted to the Commission in a manner not in accordance with this Rule shall not be accepted for filing. Plaintiffs without legal representation may file all documents with the Office of the Clerk of the Commission via the Commission's Electronic Document Filing Portal ("EDFP"), electronic mail, facsimile, U.S. Mail, private courier service, or hand delivery.

(b) Except as set forth in Paragraph (c) of this Rule, all documents shall be transmitted to the Commission via EDFP. Information regarding how to register for and use EDFP is available at <http://www.ic.nc.gov/training.html>. In the event EDFP is inoperable, all documents required to be filed via EDFP shall be transmitted to the Commission via electronic mail to edfp@ic.nc.gov. Documents required to be filed via EDFP that are sent to the Commission via electronic mail when EDFP is operable shall not be accepted for filing.

(c) The tort claims forms and documents listed in Table 1 shall not be required to be transmitted via EDFP provided all applicable qualifying conditions are met.

Table 1: Forms and documents exempt from EDFP filing requirements and how to file them:

DOCUMENT	QUALIFYING CONDITION(S)	HOW TO FILE
<u>Form T-1</u>	<u>No IC file number has been assigned</u>	<u>Hand delivery to the Industrial Commission's main office or by mail to 1236 Mail Service Center, Raleigh, North Carolina 27699-1236.</u>
<u>Form T-3</u>	<u>No IC file number has been assigned</u>	<u>Email to dockets@ic.nc.gov, hand delivery to the Industrial Commission's main office, or by mail to 1236 Mail Service Center, Raleigh, North Carolina; 27699-1236</u>

<u>Pre-affidavit motion under Rule 9(j)(3) of the Rules of Civil Procedure to extend the Statute of Limitations.</u>	<u>No IC file number has been assigned.</u>	<u>Hand delivery to the Industrial Commission's main office or by mail to 1236 Mail Service Center, Raleigh, North Carolina 27699-1236.</u>
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(d) A one-year waiver shall be granted to an attorney that notifies the Commission of the attorney's inability to comply with the electronic filing requirements in Paragraph (a) of this Rule due to a lack of the necessary internet technology resources. The notification shall indicate why the attorney is unable to comply with the rule and outline the attorney's plan for coming into compliance within the one-year period. The notification shall be filed with the Office of the Clerk of the Commission via facsimile or U.S. Mail. This Paragraph shall expire one year from the effective date of this Rule.

(e) Any party may apply to the Commission for an emergency temporary waiver of the electronic filing requirement set forth in Paragraph (a) of this Rule when it is unable to comply because of temporary technical problems or lack of electronic mail or internet access. The request for an emergency temporary waiver shall be included with any filing submitted via facsimile, U.S. Mail, or hand delivery due to such temporary technical or access issues.

(f) A Notice of Appeal to the North Carolina Court of Appeals shall be accepted for filing by the Commission via EDFP or U.S. Mail.

Authority G.S. 143-291; 143-291.2; 143-297; 143-300.

11 NCAC 23B .0105 CONTACT INFORMATION

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

(b) All persons or entities without legal representation with matters pending before the Commission shall advise the Commission upon any change in contact information by filing a written notice via the Commission's Electronic Document Filing Portal ("EDFP"), electronic mail, facsimile, U.S. Mail, private courier service, or hand delivery.

(c) Any plaintiff without legal representation who was an inmate in the North Carolina Division of Adult Corrections at the time of filing his or her tort claim, shall, within 30 days of release, provide the Commission with written notice of his or her post-release contact information in any manner authorized in Paragraph (b) of this Rule. Following the initial written notice of post-release contact information, the previously incarcerated plaintiff shall continue to advise the Commission upon any change in contact information in accordance with Paragraph (b) of this Rule.

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

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

SECTION .0200 - CLAIMS PROCEDURES

11 NCAC 23B .0202 MEDICAL MALPRACTICE CLAIMS BY UNREPRESENTED PRISON INMATES

(a) In any tort claim ~~medical malpractice cases~~ filed by ~~or on behalf of an unrepresented prison inmates inmate~~ where the ~~plaintiff is alleging~~ in which the Commission determines that the ~~plaintiff is alleging~~ that a health care ~~provider provider~~, as defined in G.S. ~~90-21-11 90-21.11~~, failed to comply with the applicable standard of care under G.S. ~~90-21-12 90-21.12~~, and ~~or~~ the defendant has ~~filed a Motion to Dismiss~~ moved to dismiss the ~~claim, claim~~ for failure to comply with Rule 9(j) of the North Rules of Civil Procedure, all discovery is stayed until the following occur: a recorded non-evidentiary hearing before the Commission is held for the purpose of determining whether a claim for medical malpractice has been stated and, if so, whether:

- (1) A recorded hearing in which no evidence is taken is held before a Deputy Commissioner or a Special Deputy Commissioner for the purpose of determining:
 - (A) whether a claim for medical malpractice has been stated;
 - (B)(1) whether expert testimony is necessary for the plaintiff to prevail; and plaintiff must meet the requirements of Rule 9(j)(1) or (2) of the North Carolina Rules of Civil Procedure to proceed with the claim; or
 - (2) plaintiff has alleged facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.
 - (C) if expert testimony is deemed necessary, whether the plaintiff will be able to produce such testimony on the applicable standard of care.
- (2) Upon receipt of a Motion to Dismiss and Request for Hearing from the defendant, the Commission issues an order setting the motion on a hearing docket and the case is assigned to a Deputy Commissioner or a Special Deputy Commissioner.

If the Commission determines that a claim for medical malpractice has been stated, and plaintiff must meet the requirements of Rule 9(j)(1) or (2) of the North Carolina Rules of Civil Procedure, the defendant shall produce medical records to the plaintiff within the time period prescribed by the Commission. Upon receipt of the medical records, the plaintiff shall then have 120 days to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure.

(b) If the defendant's Motion to Dismiss is granted, an appeal lies to the Full Commission.

(c) If defendant's Motion to Dismiss is denied, the case shall proceed as any other tort claims case. Defendant shall produce medical records to plaintiff within 45 days of the Order of the

~~Commission denying defendant's Motion to Dismiss. Plaintiff shall then have 120 days to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure.~~

Authority G.S. 143-300.

11 NCAC 23B .0203 INFANTS AND INCOMPETENTS

(a) Persons seeking to appear on behalf of an infant or incompetent, in accordance with G.S. 1A-1, Rule 17, shall apply on a ~~Form 42~~ Form T-42 Application for Appointment of Guardian Ad Litem, ad Litem. The Commission shall appoint a fit and proper person as guardian ad litem, if the Commission determines it to be in the best interest of the minor or incompetent. The Commission shall appoint the guardian ad litem only after due inquiry as to the fitness of the person to be appointed.

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

Authority G.S. 143-291; 143-295; 143-300.

11 NCAC 23B .0204 MOTIONS

(a) All motions regarding tort claims shall be filed pursuant to Rule .0104 of this Subchapter, ~~with the Docket Section, unless the case is currently calendared before a Commissioner or Deputy Commissioner. All motions in calendared cases shall be filed with the Commissioner or Deputy Commissioner.~~

(b) A motion shall state ~~with particularity~~ based, based with particularity, the relief sought, and a ~~statement of the opposing party's position, if known, or that the opposing party's position could not be ascertained after a good faith effort.~~ statement of the opposing party's position, if known, or that the opposing party's position could not be ascertained after a good faith effort. Service shall be made on all opposing attorneys of record, or on all opposing parties, if not represented.

(c) At the same time a motion is filed, the party filing the motion shall provide a copy of the motion to all opposing attorneys of record, or on all opposing parties, if not represented.

~~(e)(d)~~ (d) All motions and responses thereto filed electronically shall include a proposed Order in Microsoft Word format to be considered by the Commission.

~~(d)(c)~~ (c) By motion of the parties, or on its own motion, the Commission may enlarge the time for an act required or allowed to be done under the Rules in this Subchapter in the interests of justice or to promote judicial economy. An enlargement of time may be granted either before or after the relevant time requirement has elapsed.

~~(e)(f)~~ (f) Motions to continue or remove a case from the hearing docket shall be made as much in advance ~~as possible~~ as possible of the scheduled hearing and shall be made in writing. The moving party shall state that the other parties have been advised of the motion and relate the position of the other parties regarding the motion. Oral motions are permitted in emergency situations.

~~(f)(g)~~ (g) The responding party to a motion, with the exception of motions to continue or to remove a case from a hearing docket, has 10 days after a motion is served during which to file and serve copies of a response in opposition to the motion. The Commission may shorten or extend the time for responding to any motion in the interests of justice or to promote judicial economy.

~~(g)(h)~~ (h) Notwithstanding Paragraph ~~(f)(g)~~ of this Rule, a motion may be acted upon at any time by the Commission, despite the absence of notice to all parties and without awaiting a response. A party who has not received actual notice of the motion or who has not filed a response at the time such action is taken and who is adversely affected by the ruling may request that it be reconsidered, vacated, or modified. Motions shall be determined without oral argument, unless the Commission orders otherwise in the interests of justice.

~~(h)~~ (i) When a Motion to Amend Pleadings has been filed, served upon opposing parties, and not previously ruled upon, the Commissioner or Deputy Commissioner may permit amendment of pleadings at the time of the hearing and then proceed to a determination of the case based on the evidence presented at the time of the hearing without requiring additional pleadings.

(i) Motions to dismiss or for summary judgment filed by the defendant on the ground that plaintiff has failed to name the individual officer, agent, employee or involuntary servant whose alleged negligence gave rise to the claim, or has failed to properly name the department or agency of the State with whom such person was employed, shall be ruled upon following the completion of discovery.

(j) Motions to reconsider or amend an ~~order, opinion and award, Order or decision and order, Decision and Order,~~ made prior to giving notice of appeal to the Full Commission, shall be ~~directed~~ addressed to the Deputy Commissioner who authored the ~~Opinion and Award, Order or Decision and Order.~~

~~(k)~~ (l) Upon request of either party, or upon motion of the Commission, motions shall be set for hearing before a ~~Commissioner or Deputy Commissioner.~~

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

11 NCAC 23B .0205 MEDIATION (EFFECTIVE JULY 1, 2014)

~~(a) The parties to tort claims, by agreement or Order of the Commission, shall participate in mediation. Any party participating in mediation is bound by the Rules for Mediated Settlement and Neutral Evaluation Conferences of the Commission found in 11 NCAC 23G, except to the extent the same conflict with the Tort Claims Act or the rules in this Subchapter, in which case the Tort Claims Act and the rules in this Subchapter apply.~~

(b) An employee or agent of the named governmental entity or agency shall be available via telecommunication. Mediation shall not be delayed due to the absence or unavailability of the employee or agent of the named governmental entity or agency.

Authority G.S. 143-295; 143-296; 143-300.

11 NCAC 23B .0208 HEARING COSTS

~~Costs relating~~ Costs assessed pursuant to Rule 11 NCAC 23E .0202 in tort claims ~~payable to the Commission~~ are due upon receipt of a bill or statement from the Commission.

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

SECTION .0300 - APPEALS TO FULL COMMISSION

11 NCAC 23B .0302 NOTICE OF APPEAL APPEALS TO THE FULL COMMISSION

(a) A letter expressing an intent to Notice of appeal shall be considered notice of appeal to the Full made to the Commission within the meaning of G.S. 143-292, 15 days from the date when notice of the Deputy Commissioner's Order or Decision and Order has been received. The notice of appeal shall specify, provided that the letter specifies by tort claim number and filing date, the Order, Opinion and Award, Order or Decision and Order from which appeal is taken. The notice of appeal shall include a written statement confirming that a copy of the notice of appeal has been sent to the opposing party or parties.

(b) After receipt of the notice of appeal, the Commission shall acknowledge the notice of appeal in writing. Within 30 days of the acknowledgement, the Commission shall prepare and provide, at no charge to the parties, electronic copies of any official transcript and exhibits, along with a Form T-44 Application for Review. 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 T-44 Application for Review via any class of U.S. mail that is fully prepaid.

(c) Within 25 days of receipt of the official transcript and exhibits, or receipt of notice that there will be no official transcript and exhibits, the appellant shall submit a Form T-44 Application for Review or written statement stating with particularity all assignments of error and grounds for review, including, where applicable, the pages in the transcript or the record on which the alleged errors are recorded. The Form T-44 Application for Review or the written statement shall include confirmation that a copy of the document has been sent to the opposing party or parties. Failure to file the proposed issues on appeal, either by Form T-44 Application for Review or by written statement, may result in the dismissal of the appeal either upon the motion of the non-appealing party or upon the Full Commission's own motion.

(d) An appellant may file a brief in support of the grounds for appeal with the Commission, with a written statement confirming that a copy of the brief has been sent to the opposing party or parties, within 25 days after receipt of the official transcript and exhibits or receipt of notice that there will be no official transcript and exhibits. The appellee shall have 25 days from service of the appellant's brief to file a reply brief with the Commission, with a written statement confirming that a copy of the brief has been sent to the opposing party or parties. When the appellant fails to file a brief, the appellee shall file a brief within 25 days after the appellant's time for filing a brief has expired. If multiple parties appeal, each party may file an appellant's brief and appellee's brief on the schedule set forth in this Rule. If the matter has not been calendared for hearing, any party may file a written stipulation to a single extension of time not to exceed 15 days with the Office of the Clerk. In no event shall the cumulative extensions of time exceed 30 days. A party who fails to file a brief shall not be allowed oral argument before the Full Commission.

(e) 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 South Eastern Reporter. 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.

(f) Briefs to the Full Commission shall not exceed 35 pages, excluding attachments. No page limit applies to the length of attachments. Typed briefs shall be prepared using 12-point proportional 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 right of the page. When a party quotes or paraphrases testimony or evidence from the official transcript or exhibits in a brief, the party shall include, at the end of the sentence, a parenthetic entry that designates the source and page number of the quoted or paraphrased material. The party shall use "T" for transcript and "Ex" for exhibit. For example, (1) if a party quotes or paraphrases material located in the transcript on page 11, the party shall use the following format "(T 11)" and (2) if a party quotes or paraphrases material located in an exhibit on page 12, the party shall use the following format "(Ex 12)". When a party quotes or paraphrases testimony or other evidence in the transcript of a deposition, the party shall include, at the end of the sentence, a parenthetic entry that contains the name of the person deposed and the page number location within the transcript of the deposition. For example, if a party quotes or paraphrases the testimony of John Smith, located on page 11 of the transcript of the deposition, the party shall use the following format "(Smith 11)".

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

Authority G.S. 143-292; 143-300.

11 NCAC 23B .0303 PROPOSED ISSUES ON APPEAL

Authority G.S. 143-292; 143-300; 362 N.C. 191 (2008).

11 NCAC 23B .0305 BRIEFS TO THE FULL COMMISSION

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

11 NCAC 23B .0307 MOTIONS BEFORE THE FULL COMMISSION

(a) After notice of appeal has been given to the Full Commission, any motions related to the claim before the Full Commission shall be in writing and filed with the Full Commission, with service on a statement confirming that copies have been provided to the other parties. A Motion for a New Hearing must be supported by an Affidavit.

(b) A Motion for a New Hearing must be filed in writing, and supported by Affidavit. Motions related to the issues for review

on appeal, including motions for new trial, to amend the record, or to take additional evidence, filed during the pendency of an appeal to the Full Commission shall be argued before the Full Commission at the time of the hearing of the appeal.

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

11 NCAC 23B .0308 STAYS

When a case is appealed to the Full Commission, all ~~orders, opinion and awards, Orders or decision and orders~~ **Decision and Orders** of a Deputy Commissioner are stayed pending appeal.

Authority G.S. 143-292; 143-296; 143-300.

11 NCAC 23B .0310 WAIVER OF ORAL ARGUMENT

Upon the request of a party or 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.

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

(b) When presenting oral argument, each appellant(s) shall have 20 minutes to present oral argument and may reserve any amount of the 20-minute total allotment for rebuttal, unless otherwise specified by Order of the Commission. Each appellee(s) shall also have 20 minutes to present oral argument, unless otherwise specified by Order of the Commission; however, the appellee(s) may not reserve rebuttal time. In the case of cross-appeals, each appealing party may reserve rebuttal time.

(c) Any party may request additional time to present oral argument in excess of the standard twenty-minute allowance. Such requests shall be made in writing and submitted to the Full Commission no less than 10 days prior to the scheduled hearing date. The written request for additional time shall state with specificity the reason(s) for the request of additional time and the amount of additional time requested.

(d) If any party fails to appear before the Full Commission upon the call of the case, the Commission may disallow the party's right to present oral argument. If neither party appears upon the call of

the case, the Full Commission may decide the case upon the record and briefs on appeal, unless otherwise ordered.

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

Authority G.S. 143-292; 143-296; 143-300.

SECTION .0400 - APPEALS TO THE COURT OF APPEALS

11 NCAC 23B .0402 STAYS

When a case is appealed to the Court of Appeals, all ~~orders, opinion and awards, Orders or decision and orders~~ **Decision and Orders** of the Full Commission are stayed pending appeal.

Authority G.S. 143-292; 143-294; 143-296; 143-300.

SECTION .0500 – RULES OF THE COMMISSION

11 NCAC 23B .0501 WAIVER OF RULES

In the interests of justice or to promote judicial economy, the Commission may, except as otherwise provided by the rules in this Subchapter, waive or vary the requirements or provisions of any of the rules in this Subchapter in a case pending before the Commission upon ~~written application~~ **request** of a party or upon its own initiative only if the ~~employee~~ **plaintiff** 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 23L – INDUSTRIAL COMMISSION FORMS

SECTION .0100 – WORKERS’ COMPENSATION FORMS

11 NCAC 23L .0105 FORM T-42 – APPLICATION FOR APPOINTMENT OF GUARDIAN AD LITEM

(a) Persons seeking to appear on behalf of an infant or incompetent shall apply on a Form T-42, Application for Appointment of Guardian Ad Litem, in accordance with Rule 11 NCAC 23B .0203. The Form 7-42, Application for Appointment of Guardian Ad Litem, shall read as follows:

North Carolina Industrial Commission

IC File # T-_____

Application for Appointment of Guardian Ad Litem

The use of this Form is required under Rule 11 NCAC 23B .0203

_____ Plaintiff(s) v. _____ Defendant(s)

To the North Carolina Industrial Commission:

The undersigned _____ respectfully shows unto the North Carolina Industrial Commission that _____ is an infant or incompetent without general or testamentary guardian in this State, and that by reason thereof can bring an action only by a guardian ad litem; that the infant or incompetent has a cause of action against the defendants on account of the following matter and things:

The undersigned is a reputable person closely connected with the infant or incompetent having the relationship with the infant or incompetent as follows: _____

Wherefore, the undersigned prays the Commission that a fit and proper person be appointed Guardian Ad Litem for the infant or incompetent for the purpose of bringing on his or her behalf an action as above set out.

Signature of Applicant _____ Date _____

(Please complete page 2 of form)

Order Appointing Guardian Ad Litem

It appearing to the North Carolina Industrial Commission from the above application that _____ is an infant or incompetent having no general or testamentary guardian within this State and that said infant or incompetent appears to have a good cause of action against the defendant(s); and it further appearing to the Commission after due inquiry that _____ is a fit and proper person to be appointed guardian ad litem for the infant or incompetent for the purpose of bringing this action on his or her behalf;

It is therefore ordered that _____ be and is hereby appointed guardian ad litem of _____ to bring action on his or her behalf.

This _____ day of _____.

Commissioner or Deputy Commissioner _____

Please type or print:

Full name and address of minor or incompetent:

Birth date of minor: _____

Full name and address of proposed guardian ad litem:

Important Information for Parties

Parties should take notice of the provisions set forth in Rule 11 NCAC 23B .0203.

11 NCAC 23B .0203 Infants and Incompetents

(a) Persons seeking to appear on behalf of an infant or incompetent, in accordance with G.S. 1A-1, Rule 17, shall apply on a Form T-42 Application for Appointment of Guardian ad Litem. The Commission shall appoint a fit and proper person as guardian ad litem, if the Commission determines it to be in the best interest of the minor or incompetent. The Commission shall appoint the guardian ad litem only after due inquiry as to the fitness of the person to be appointed.

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

SEND TO:

dockets@ic.nc.gov
Office of the Clerk
1236 Mail Service Center
Raleigh, NC 27699-1236
Main telephone: (919) 807-2500
Helpline (800) 688-8349
Website: http://www.ic.nc.gov

FORM T-42

(b) A copy of the form described in Paragraph (a) of this Rule can be accessed at <http://www.ic.nc.gov/formt42.pdf>. The form may be reproduced only in the format available at <http://www.ic.nc.gov/forms/formt42.pdf> and may not be altered or amended in any way.

Authority G.S. 143-291; 143-295; 143-300.

TITLE 14B – DEPARTMENT OF PUBLIC SAFETY

Notice is hereby given in accordance with G.S. 150B-21.2 that the Alcoholic Beverage Control Commission intends to amend the rules cited as 14B NCAC 15A .1603, .1604, and .1701.

Link to agency website pursuant to G.S. 150B-19.1(c):
www.abc.nc.gov

Proposed Effective Date: March 1, 2019

Public Hearing:

Date: December 12, 2018

Time: 10:00 a.m.

Location: ABC Commission Hearing Room, 400 East Tryon Road, Raleigh, NC 27610

Reason for Proposed Action: *To adopt a permanent rule to eliminate the requirement that a distiller representative be present for the ABC Commission, a privately owned bonded warehouse, or a local ABC board to destroy distressed liquor, as directed by the General Assembly in S.L. 2018-100, Sec. 2.*

Comments may be submitted to: Walker Reagan, 400 East Tryon Road, Raleigh, NC 27610; phone (919) 779-8367; fax (919) 661-6165; email walker.reagan@abc.nc.gov

Comment period ends: December 14, 2018

Procedure for Subjecting a Proposed Rule to Legislative Review:

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

Fiscal impact (check all that apply).

- State funds affected
- Environmental permitting of DOT affected Analysis submitted to Board of Transportation
- Local funds affected
- Substantial economic impact (≥\$1,000,000)
- Approved by OSBM

No fiscal note required by G.S. 150B-21.4

CHAPTER 15 - ALCOHOLIC BEVERAGE CONTROL COMMISSION

SUBCHAPTER 15A - ORGANIZATIONAL RULES: POLICIES AND PROCEDURES

SECTION .1600 - WAREHOUSE STORAGE OF SPIRITUOUS LIQUORS

14B NCAC 15A .1603 REQUIREMENTS FOR STORAGE

All privately-owned bonded warehouses holding permits for the storage of spirituous liquors are required to:

- (1) store all liquor ~~separately~~ separate and apart from other merchandise;
- (2) store all military codes ~~separately~~ separate and apart from state codes;
- (3) store all liquor of the same code together and spaced evenly for inventory purposes;
- (4) submit to the Commission monthly reports of all spirituous liquors received and delivered so that a perpetual inventory may be kept at the Commission, which report must match the inventory at the bonded warehouse at all times and upon inspections for inventory purposes;
- (5) take at their expense, and submit to the Commission, semi-annual inventories of all spirituous liquors being held in the bonded warehouse, which inventories may be observed by representatives of the Commission or the State Auditor's Office;
- (6) return all distressed liquor received to the distiller within 30 days of its ~~receipt, or destroy in the presence of a distiller representative; receipt; or~~
- (7) ~~destroy, in the presence of the distiller representative for the brand involved, destroy~~ all liquor that becomes distressed after it is received. received, after notifying the distiller and obtaining in writing the distiller's approval to destroy the distressed liquor. The distiller, or a representative of the distiller, shall be given an opportunity to:
 - (a) be present in person or by video conference at the destruction, or
 - (b) request proof of destruction by photographs or video recordings showing the distressed liquor before and after the destruction.

The distiller shall be provided with a written or electronic copy of the Unsalable Merchandise Report for the distressed liquor destroyed. The

**Regulatory Impact Analysis
Electronic Filings with the Commission; How to File**

Agency: North Carolina Industrial Commission
 Contact: Ashley Snyder – (919) 807-2524
 Proposed New Rule Title:
 Rules proposed for amendment: Rule 11 NCAC 23B .0104
 (See proposed rule text in Appendix 1)

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

Statutory Authority: G.S. §§ 143-291; 143-291.2; 143-297; 143-300

Introduction/Background:

The Industrial Commission’s Rule 11 NCAC 23A .0108 requiring electronic filing of documents in most circumstances except by individuals without counsel went into effect on February 1, 2016. A revision went into effect in February 2017 to reflect changes to the Commission’s ability to accept more document types via EDPF. Since February 2017, the Commission has been able to accept via EDPF most tort filings, however, unlike in workers’ compensation cases, there has been no requirement that tort filings be submitted via EDPF.

The success of EDPF in workers’ compensation cases is largely due to the Commission’s rule requiring the use of EDPF for most filings. The Commission now receives approximately 30,000 documents via EDPF every month, the great majority of which are workers’ compensation documents filed pursuant to Rule 11 NCAC 23A .0108. During fiscal year 2017-2018, 15,359 documents were filed in state tort cases with the Commission. Of these, only 651 were filed via EDPF. The Commission currently accepts filings in tort cases via email, facsimile, hand delivery, and U.S. Mail.

Proposed Rule Amendments and Their Estimated Impact:

The proposed rule amendments include the following:

1. *Amendment of Rule 11 NCAC 23B .0104 entitled “Filing by Facsimile Transmission” to become a comprehensive filing rule titled “Electronic Filings with the Commission; How to File”*

This rule will mandate and describe requirements for using EDPF for all state tort claim-related documents filed with the Commission. The proposed rule exempts parties without legal representation from the electronic filing requirement and provides different filing instructions where no Commission file number has been

assigned. The rule also will allow any attorney a one-year waiver due to a lack of internet technology resources upon filing with the Industrial Commission's Clerk's Office a notification outlining the attorney's plan for coming into compliance within the one-year period. The Rule also will allow anyone to request an emergency temporary waiver of the electronic filing requirement because of temporary technical problems.

a. Description of baseline situation:

Currently, documents in tort cases filed with the Commission are filed via email, facsimile, hand-delivery, U.S. Mail, and EDFP. In fiscal year 2017-2018, 15,359 documents were filed with the Commission in state tort cases. Of those, 14,708 were filed in some way other than EDFP. Of the 197 cases that were not filed by inmates during fiscal year 2017-2018, 125 of those cases listed a plaintiff's counsel. Most filings in cases where the plaintiff is not represented by counsel are filed via U.S. Mail. Of the 678 tort claims filed in fiscal year 2017-2018, 481 were filed by inmates. Although the Commission is not currently able to count the number of open inmate tort claims where the plaintiff is represented by counsel, it is estimated that the number is less than ten. The only means for filing documents available to unrepresented inmates is U.S. Mail. In all state tort claims, the defendant agency is represented by an attorney, usually from the Attorney General's Office.

(1) Baseline use of filing methods other than EDFP:

Filing documents with the Commission by electronic mail involves addressing an e-mail to the correct e-mail address and attaching the documents to be filed by clicking and dragging them to the electronic mail or browsing and selecting them. This filing method requires that documents be created electronically or that electronic copies of paper documents be created in order to be attached. Faxes received by the Commission are similar in that the documents are emailed to the intended Commission staff and then the documents are saved to the desktop and uploaded into the file.

While electronic mail is preferred over paper filings, moving documents from e-mails to the Commission's electronic claim file system is cumbersome and creates opportunities for misfiling. Each attachment to an e-mail must be dragged to the staff member's computer "desktop" and then uploaded to the electronic file using a browse and select method. An alternative method is to drag all the documents to the "desktop" then combine them into one .pdf which is then uploaded using a browse and select method. The staff member must also choose the document type from a drop-down menu and click to confirm and submit.

U.S. Mail and hand delivery of documents requires Commission staff to date-stamp documents, return date-stamped copies to the sender, and scan the documents into the file using the method above. The Commission does not keep separate statistics for how documents in tort claims are filed, but

documents that are manually uploaded whether they are delivered by email, U.S. Mail, facsimile or by courier account for 95% percent of the documents received in tort files.

(2) EDFP baseline use:

EDFP requires users to register and receive an NCID. Users must review brief training materials regarding how to use EDFP. Documents are uploaded to EDFP using the file number of the claim and a browse and select function for each document to be uploaded. For each document uploaded, the user must select the document type from a drop-down menu. To complete the upload, the user must review and click to confirm and submit. The user receives a receipt confirming the upload via e-mail.

On the Commission side, staff members process documents submitted via EDFP by confirming the correct file number and party names; one or more of the documents in a particular filing may also be opened and viewed to confirm that the correct document types were used. Thereafter, the staff member clicks “Process Documents” and the documents appear in the electronic file. This procedure greatly reduces the time spent moving electronic documents around to get them into the correct claim file.

EDFP is currently required for the filing of almost all documents in workers’ compensation cases where an IC file number has been assigned. EDFP is currently available for all tort filings where an IC file number has been assigned, however it is not required for any tort filings. Currently, approximately 5% of filings received in tort cases are filed via EDFP.

b. Economic Impact:

(1) Costs to State through the Commission:

The Commission does not anticipate any significant costs related to the proposed rule change. The work performed by Commission staff related to planning and programming EDFP document types for tort cases was included in the cost of building out EDFP in the September 12, 2016 11 NCAC 23A .0609A fiscal note that accompanied the second phase rule effective February 1, 2017.

There will be an initial increase in calls or emails from external users to confirm the rule change. There may also be a brief period during which some external users fail to comply with the new rule and the Commission must correspond with them to reject the incorrect filings and inform them of the change. However, this is likely to occur in a relatively small number of cases for only a few weeks and the corrective action by the Commission will take a matter of 1-3 minutes per case. Therefore, the Commission expects minimal cost impact from the change.

(2) Costs to the State as an employer:

While it is unlikely that the State as an employer will have to expend additional funds to be able to comply with the technological aspects of the proposed rule changes, State employees such as attorneys and paralegals representing the State will file documents via EDPF under this rule. Similarly, any local government will be required to fill documents according to this Rule. State employees already have NCID credentials and will only have to obtain access to EDPF to use the system. The time it takes to use EDPF for filing vs. other means isn't calculable, as the Commission doesn't track the method used for filing documents in state tort claims other than EDPF; EDPF takes approximately 1 -2 minutes longer than email or desktop faxing but U.S. Mail takes 3-4 minutes longer than EDPF. Filing by hand delivery adds approximately ten minutes as the walk between the NC Industrial Commission and the Attorney General's Office is ten minutes. It is noted that couriers usually bring more than one document for filing on a trip to the Industrial Commission.

For those items currently filed via email, the additional time will result in an opportunity cost. The other filing methods described above take longer than filing via EDPF and will therefore result in a savings.

The opportunity cost of the 1-2 additional minutes required to file a document via EDPF instead of email will equate to \$0.56 - \$1.12 per filing. As an example of estimated costs, inmate tort cases are handled by Assistant Attorneys General from the NCDOJ's Tort Claims Section. The current annual salary for these particular Assistant Attorneys General is \$67,545.¹ Assuming an annual average of 2,000 work hours, the State incurs an average hourly cost of \$33.77 for each Assistant Attorney General, meaning an opportunity cost of \$0.56 per minute.

(3) Costs to private sector filers, including attorneys and pro se plaintiffs.

There are potential costs to the private sector associated with the additional time of uploading via EDPF instead of filing by email, but again, the Commission does not track the method used for filing documents with the Commission other than EDPF. Pro se plaintiffs won't be required to file documents via EDPF and will still be able to utilize any of the filing methods they choose to use now. The Commission has no data regarding how many of the 13,850 tort claim filings that were not filed via EDPF during fiscal year 2017-2018 were also filed by attorneys.

(4) Benefits to the State through the Commission

The proposed rule changes will further improve the efficiency of receiving and processing documents at the Commission. There are numerous benefits that will accrue to the Commission and result in

¹ State Pay Database, *supra* note 8.

customer service improvements to all outside stakeholders. Below is a list of the anticipated improvements to efficiency at the Commission where documents are filed by attorneys in compliance with the new rule:

- Reduced time to upload documents to the electronic claim file of 1-2 minutes per set of documents filed via email or fax, and 5-20 minutes per set of documents filed via U.S. Mail or hand-delivery. With an assumed average total compensation rate of \$26.08 per hour for Commission administrative assistants and a 260-day work year the costs savings would be \$0.44-\$0.86 per emailed filing and \$2.17-\$8.68 per mail or hand-delivered filing. Again, the total number of increased filings via EDFP differentiated by current filing method cannot be estimated.
- The approximately 1-2 minutes spent returning file-stamped copies to U.S. Mail filers will be eliminated, estimated to save \$0.44-\$0.86 per mailing. An automatically-generated document receipt will take the place of file-stamped copies when EDFP is required to be utilized.
- Reduced usage of in-house scanning department due to reduced number of documents filed on paper. This will save on the cost of scan cover sheets, time to complete coversheets and pack documents into boxes for scanning, time and resources for scanning department to scan, and time for the deputy commissioner's section to do quality control before recycling them.
- Costs for recycling and shredding services may also go down if fewer bins are required to be emptied per week.

(5) Benefits to the public and private sector as filers:

The proposed rule changes will have no effect on State tort claimants proceeding without counsel.

The proposed rule changes will benefit the public and private sector (attorneys, paralegals) in several ways. Below is a list of anticipated benefits that will accrue to users of the Commission:

- Filing via EDFP instead of U.S. Mail will save money on mailing costs. Filing via EDFP is free; U.S. Mail charges often exceed \$1.00 and attorney's offices often include copies to be file-stamped and returned in a self-addressed stamped envelope
- This savings will also be a time savings, as it takes approximately 3-4 minutes longer to prepare a mailing than to electronically file documents via EDFP. An average of \$90 per hour is a reasonable estimate of the hourly opportunity cost to firms representing tort

claimants. This would result in a savings of \$4.50-\$6.00 per filing. Public sector administrative staff have an estimated total hourly compensation rate of \$35.71, which would result in time savings of \$1.78-\$2.36 per document filed. It is also noted that 20 minutes spent hand-delivering documents to the Commission is also time saved. It is noted that the Attorney General's office sends a staff person to the Commission once a day. It is unknown whether the courier is always administrative staff. Because it is not known how many documents are filed via hand delivery, U.S. Mail, or email, an estimated annual cost savings cannot be calculated.

- The savings will also be in the cost of paper and printer ink. The Commission will no longer accept paper copies of documents filed with the Commission under the proposed rule.
- Users' customer service experience will improve based on the following:
 - Commission staff will have more time to answer calls and inquiries on substantive matters.
 - Commission staff will be able to process documents more efficiently which will improve turnaround times.

Summary of aggregate impact:

Although specific numbers for costs and savings could not be accurately determined as a whole, it is estimated that the total savings from decreased filing time from hand delivery and U.S. Mail, staff time, and decreased need for paper, etc. will outweigh the initial costs of implementation for the State. The savings to the private sector also outweigh any costs.

APPENDIX 1

Rule 11 NCAC 23B .0104 is proposed for amendment as follows:

11 NCAC 23B .0104 ~~FILING BY FACSIMILE TRANSMISSION~~ ELECTRONIC FILINGS WITH THE COMMISSION; HOW TO FILE

~~Filing documents pertaining to tort claims by facsimile transmission is permitted. Any filing fee required shall be received by the Commission contemporaneously with the facsimile by electronic transfer of funds.~~

(a) All filings to the Commission in tort claims shall be submitted electronically in accordance with this Rule. Any document transmitted to the Commission in a manner not in accordance with this Rule shall not be accepted for filing. Plaintiffs without legal representation may file all documents with the Office of the Clerk of the Commission via the Commission's Electronic Document Filing Portal ("EDFP"), electronic mail, facsimile, U.S. Mail, private courier service, or hand delivery.

(b) Except as set forth in Paragraph (c) of this Rule, all documents shall be transmitted to the Commission via EDFP. Information regarding how to register for and use EDFP is available at <http://www.ic.nc.gov/training.html>. In the event EDFP is inoperable, all documents required to be filed via EDFP shall be transmitted to the Commission via electronic mail to edfp@ic.nc.gov. Documents required to be filed via EDFP that are sent to the Commission via electronic mail when EDFP is operable shall not be accepted for filing.

(c) The tort claims forms and documents listed in Table 1 shall not be required to be transmitted via EDFP provided all applicable qualifying conditions are met.

Table 1: Forms and documents exempt from EDFP filing requirements and how to file them:

<u>DOCUMENT</u>	<u>QUALIFYING CONDITION(S)</u>	<u>HOW TO FILE</u>
<u>Form T-1</u>	<u>No IC file number has been assigned</u>	<u>Hand delivery to the Industrial Commission's main office or by mail to 1236 Mail Service Center, Raleigh, North Carolina 27699-1236.</u>
<u>Form T-3</u>	<u>No IC file number has been assigned</u>	<u>Email to dockets@ic.nc.gov, hand delivery to the Industrial Commission's main office, or by mail to 1236 Mail Service Center, Raleigh, North Carolina; 27699-1236</u>
<u>Pre-affidavit motion under Rule 9(j)(3) of the Rules of Civil</u>	<u>No IC file number has been assigned.</u>	<u>Hand delivery to the Industrial Commission's main office or by</u>

<u>Procedure to extend the Statute of Limitations.</u>		<u>mail to 1236 Mail Service Center, Raleigh, North Carolina 27699-1236.</u>
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(d) A one-year waiver shall be granted to an attorney that notifies the Commission of the attorney's inability to comply with the electronic filing requirements in Paragraph (a) of this Rule due to a lack of the necessary internet technology resources. The notification shall indicate why the attorney is unable to comply with the rule and outline the attorney's plan for coming into compliance within the one-year period. The notification shall be filed with the Office of the Clerk of the Commission via facsimile or U.S. Mail. This Subparagraph shall expire one year from the effective date of this Rule.

(e) Any party may apply to the Commission for an emergency temporary waiver of the electronic filing requirement set forth in Paragraph (a) of this Rule when it is unable to comply because of temporary technical problems or lack of electronic mail or internet access. The request for an emergency temporary waiver shall be included with any filing submitted via facsimile, U.S. Mail, or hand delivery due to such temporary technical or access issues.

(f) A Notice of Appeal to the North Carolina Court of Appeals shall be accepted for filing by the Commission via EDPF or U.S. Mail.

History Note: Authority G.S. 143-291; 143-291.2; 143-297; 143-300;

Eff. May 1, 2000;

*Amended Eff. ***** **, *****, July 1, 2014.*

**Regulatory Impact Analysis
Codification of Contact Information Requirements**

Basic Information

Agency:	North Carolina Industrial Commission
Contact:	Ashley Snyder North Carolina Industrial Commission 1240 Mail Service Center Raleigh, NC 27699-1240 (919) 807-2524 ashley.snyder@ic.nc.gov
Rules Proposed for Adoption:	Rule 11 NCAC 23B .0105 Contact Information (See proposed rule text in Appendix 1)
Statutory Authority:	G.S. §§ 143-291; 143-300.

Impact Summary

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

Description of the Proposed Rule

Rule 11 NCAC 23B .0105 provides instructions to provide the Industrial Commission with current contact information. The rule sets out different methods for filing updated contact information based on the identity of the person or entity. While there is variation between how different entities provide the information to the Commission, the information required is consistent system-wide. This rule places the burden on any person, party, or entity with an active matter pending before the Commission to keep the Commission apprised of any change in contact information, including telephone number, facsimile number, email address, and mailing address.

Necessity for the Proposed Rule

The North Carolina Industrial Commission is a quasi-judicial agency tasked with administering and adjudicating claims arising under the State Tort Claims Act. In

that capacity, the Commission functions as a court system, hearing cases and issuing orders and decisions. In its role as an adjudicatory body, there are situations and circumstances when the Commission needs to contact or communicate with parties in pending matters. In order to efficiently and effectively reach parties, the Commission needs to have on hand the most current addresses by which to reach that person, party, or entity. Adopting this rule will ensure that the Commission is able to swiftly and effectively contact parties when necessary and appropriate.

Introduction and Background:

The North Carolina Industrial Commission is a statutory creation of the General Assembly tasked with determining claims brought pursuant to the State Tort Claims Act. Pursuant to N.C. Gen. Stat. § 143-300, the Commission is authorized to adopt rules to carry out the provisions of the Act. These rules should establish processes and procedures as necessary. In complying with this statutory requirement, the Commission evaluates process improvements for the workers' compensation system.

The current rules of the Industrial Commission give no specific directions requiring persons or entities with active matters before the Commission to provide notice of any change to their contact information. It is important for the Commission to be kept apprised of current contact information in order to notify persons or entities of hearings as well as filings of orders and decisions and orders. For purposes of this rule, contact information includes telephone number, facsimile number, email address and mailing address.

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

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

Impact of the Proposed New Rule:

Adoption of comprehensive contact information rule – Rule 11 NCAC 23B .0105

This rule mandates and describes the requirement for all persons or entities with active matters pending before the Commission to notify the Commission of all changes to their contact information. The term “contact information” includes telephone number, facsimile number, email address, and mailing address. Please note this rule allows persons or entities without legal representation to provide their updated contact information via a variety of different methods to ensure they are able to comply with the rule.

a. Description of baseline situation:

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

1. Persons or entities without legal representation baseline:

Persons or entities not represented by counsel are not currently required by rule to notify the Commission of changes to their contact information. However, any such updates are logged and updated by Clerk’s Office staff. The Commission has promulgated a number of forms that are used for various purposes in a tort claim. Each form requests contact information from the parties. It is through these forms that the Commission currently collects contact information. This is not efficient as Commission staff must review all filings to determine which is the most recent. There is significant risk as well because there is no guarantee that the address provided on the last filing is accurate.

2. Plaintiffs without legal representation who were inmates at the time of filing their tort claim:

Persons who were inmates at the time of filing their claim are not currently required by rule to notify the Commission of changes to their contact information. However, any such updates are logged and updated by Clerk’s Office staff. The Commission has promulgated a

number of forms that are used for various purposes in a tort claim. Each form requests contact information from the parties. It is through these forms that the Commission currently collects contact information. Additionally, the Clerk's office looks up the individual's OPUS number through DPS to ensure their mailing address has not changed. This is not efficient because the Clerk's Office has to look through filings and search the OPUS database to determine their most recent contact information.

3. Attorneys of record baseline:

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

b. Description of proposed changes:

The proposed Rule 11 NCAC 23B .0105 will require all persons or entities with active matters pending before the Commission to inform the Commission of any changes to their contact information. Contact information includes telephone number, facsimile number, email address, and mailing address. The proposed rule provides instructions for how to submit contact information updates. Attorneys and unrepresented parties each have specific instructions for how to notify the Commission of their updated contact information to ensure the information is directed to the correct Commission staff and to ensure that compliance with the rule will be easily accomplished for all individuals who must submit contact information.

c. Economic impact:

(1) Costs to the State through the Commission

- Opportunity Costs of Current Employees:
 - Opportunity cost of an Administrative Associate II in the Clerk's Office to log and update the contact information submissions from unrepresented persons or entities, including those with claims filed while they were inmates. Based on Administrative Associate II salary of \$28,913, compensation including benefits

equates to \$45,891.03, meaning an hourly rate of \$22.49. This estimate assumes employees work 2,040 hours per year. It takes an estimated 8 minutes to update the contact information in one tort claim for an unrepresented party. Thus, the cost of logging and updating the contact information for one individual or entity is \$3.00. The Commission cannot estimate how many submissions it will receive. However, 587 tort claims are filed each year.¹ Assuming all tort claims are filed by unrepresented parties and assuming all parties update their contact information once, it would cost \$1,761.00 per year. The cost is estimated to be lower because some parties are represented and not every party will need to update their contact information.

- Opportunity cost of an Administrative Assistant I in the Clerk's Office logging and updating the contact information submissions from attorneys of record. It takes the Administrative Assistant 5 minutes to log and update contact information in Rumba and Rightfax for an attorney of record. Based on Administrative Assistant salary of \$39,367, compensation including benefits equates to \$60,403.27, meaning an hourly rate of \$29.60. Thus, the cost of logging and updating the contact information for one individual or entity is \$2.46. This estimate assumes employees work 2,040 hours per year.
- Approximately 29% of plaintiffs in State Tort Claim filings are non-inmates.² Generally, inmate claims tend to not have legal representation while non-inmate claims generally have legal representation. Assuming attorneys updated their contact information for every non-inmate claim, the Commission would receive 170 contact information updates,³ totaling \$418.20 per year.
- IT costs:
The email account dockets@ic.nc.gov costs \$6.25 per month. This account already exists and therefore no additional expenditure will be necessary.

(2) Costs to the State as an employer:

- State employees such as attorneys and paralegals representing the State will file updated contact information as necessary via email.
- Costs associated with email filing of updated contact information: Attorneys of record, including attorneys employed by the State, must update their contact information by submitting any updates via email.

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

² In FY 2017-2018, the Commission received 678 tort claims: 481 were by inmates (71%) and 197 by non-inmates (29%).

³ Based on 587 tort claims filed in FY 2016-2017. See *supra* note 1.

Currently, attorneys submit changes to their contact information to dockets@ic.nc.gov, though not required by rule. Based on the above estimated 170 contact information updates per year from attorneys of record, and assuming the type of filer (public or private) follows the same breakdown as the type of employment in NC, about 11% of filings are from government-employed attorneys.⁴ Based on a test of submitting contact information via email, it is estimated it will take attorneys 3 minutes to file a contact information update.⁵ It is assumed paralegals or legal assistants will compose and send these emails. Based on an hourly total compensation rate of \$35.71,⁶ the annual cost to filers will be between approximately \$33.92.

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

(3) Costs to private sector filers:

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

⁴ Governing website. Governing Data. States with Most Government Employees: Per Capita Rates by Job Type. <http://www.governing.com/gov-data/public-workforce-salaries/states-most-government-workers-public-employees-by-job-type.html>

⁵ For the test, an attorney at the Commission simulated looking up the correct email address for submitting updated contact information. The attorney then typed and submitted 3 test emails including their name, telephone number, facsimile number, email address, and mailing address. The tests averaged 2 minutes and 43 seconds. To account for individuals who may need more time, the number was rounded up to 3 minutes.

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

- As explained above, the Commission expects to receive up to 170 contact information updates per year from attorneys of record. 89% of those attorneys are employed by the private sector.⁷ As explained above, it is estimated it will take attorneys 3 minutes to file a contact information update via email. If it is assumed the legal or administrative assistants doing the filing are paid an hourly total compensation rate of \$34.50,⁸ the cost of filing updated contact information for attorneys of record will be approximately \$260.47.
- Unrepresented persons or entities, including inmates post-release, will be required to file their updated contact information with the Commission via EDFP, email, facsimile, U.S. Mail, private courier service, or hand delivery. The Commission does not currently always receive this information and therefore cannot estimate how many filings will be received or which method of filing the unrepresented parties will use, though it is believed most will file using email or EDFP, making the cost minimal.

(4) Benefits to the State through the Commission:

- The proposed rule changes will greatly improve the efficiency of the Commission. Commission staff will spend less time searching for updated contact information when attempting to contact persons or entities with matters pending before the Commission in order to schedule hearings and file orders or Decisions and Orders. This includes reduced time on telephone calls and emails.
- Having all updated contact information on hand should result in a decreased number of continued hearings at the Full Commission Level. Some hearings are continued due to parties not receiving adequate notice of the hearing because their contact information changed and the Commission was not notified. With updated contact information, notices of hearings will go to the correct person from the beginning. Per unit at the Full Commission level, the cost of continuing a hearing includes approximately 30 minutes for an Agency Legal Consultant with an average compensation of \$47.73 per hour⁹ to

⁷ Supra note 1.

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

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

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

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

⁹ The Commission generally has 6 full-time permanent Agency Legal Consultants that serve as law clerks to the Commissioners. Currently, the Commission has 3 full-time permanent Agency Legal Consultants/law clerks. Their average annual compensation including benefits is \$99,278.40. Therefore, their average hourly compensation is \$47.73.

calendar the hearing, send notice to the parties, draft an order, and file the order. A Commissioner compensated at an average of \$88.50¹⁰ per hour spends approximately 5 minutes reviewing and signing the order. Combined, the total cost at the Full Commission level to continue a hearing amounts to \$31.25.

- Having all updated contact information on hand should result in a decreased number of continued hearings at the Deputy Commissioner level. Some hearings are continued due to parties not receiving adequate notice of the hearing because their contact information changed and the Commission was not notified. With updated contact information, notices of hearings will go to the correct person from the beginning. Per unit at the Deputy Commissioner level, the cost of continuing a hearing includes approximately 15 minutes for an Administrative Assistant with an average compensation of \$35.71¹¹ per hour to review and file a continuance order. A Deputy Commissioner compensated at an average of \$70.52¹² per hour spends approximately 30 minutes drafting the order. Combined, the total cost at the Deputy Commissioner level to continue a hearing amounts to \$44.19.
- In some instances, tort claims filed by an inmate in the North Carolina Division of Adult Correction may be heard by a Special Deputy Commissioner. Per unit at the Deputy Commissioner level, the cost of continuing a hearing assigned to a Special Deputy Commissioner includes approximately 15 minutes for an Administrative Assistant with an average compensation of \$35.71¹³ per hour to review and file a continuance order. A Special Deputy Commissioner compensated at an average of \$45.63¹⁴ per hour spends approximately 30 minutes drafting the order. Combined, the total cost at the Deputy Commissioner level to continue a hearing amounts to \$31.75.
- Additionally, if a continuance order is filed at either the Full Commission or Deputy Commissioner level and a party is unrepresented by legal counsel, the party will be served via U.S. Mail. The cost of sending one letter not exceeding 1 oz. via U.S. Mail is \$0.47 plus 10% for Mail Service Center rates, totaling \$0.52 per continuance involving an unrepresented party.

(5) Benefits to the public and private sector:

¹⁰ The Commission has 6 Commissioners whose salary is set by statute. The Chairman's annual compensation including benefits is \$185,824.36. The annual compensation for all other Commissioners is \$183,742.06. Therefore, the average annual compensation for a Commissioner is \$184,089.11, making a Commissioner's average hourly compensation \$88.50.

¹¹ Supra note 4.

¹² Deputy Commissioners' salaries are set by statute. See G.S. §§ 97-78(b2), (b3). The average annual compensation for a Deputy Commissioner, including benefits, is \$146,680.22. Therefore, the average Deputy Commissioner's hourly compensation is \$70.52.

¹³ Supra note 4.

¹⁴ The average annual compensation for a Special Deputy Commissioner, including benefits, is \$93,092.60. Therefore, the average Special Deputy Commissioner's hourly compensation is \$45.63.

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

Table 1. Summary of Costs and Benefits

	Impact
COSTS	
<i>State</i>	
Logging Information – Unrepresented	\$1,761.00/year
Logging Information – Attorney of Record	\$418.20/year
Submitting Updated Information	\$33.92/year
<i>Private</i>	
Attorneys submitting information	\$260.47/year
<i>Unquantified</i>	
Time for unrepresented parties to file information	
Total Costs	\$2,212.92/year
<u>BENEFITS</u>	
<i>State</i>	
Continuing a hearing – Full Commission	\$31.25/unit
Continuing a hearing – Deputy Commissioner	\$44.19/unit
Continuing a hearing – Special Deputy Commissioner	\$31.75/unit
Decreased mail costs	\$0.52/unit
<i>Private</i>	
<i>Unquantified</i>	
Reduction in communications sent to wrong address	
Increased efficiency	
Improved customer service	

APPENDIX 1

Rule 11 NCAC 23B .0105 is proposed for adoption as follows:

11 NCAC 23B .0105 CONTACT INFORMATION

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

(b) All persons or entities without legal representation with matters pending before the Commission shall advise the Commission upon any change in contact information by filing a written notice via the Commission's Electronic Document Filing Portal ("EDFP"), electronic mail, facsimile, U.S. Mail, private courier service, or hand delivery.

(c) Any plaintiff without legal representation who was an inmate in the North Carolina Division of Adult Corrections at the time of filing his or her tort claim, shall, within thirty (30) days of release, provide the Commission with written notice of his or her post-release contact information in any manner authorized in Paragraph (b) of this Rule. Following the initial written notice of post-release contact information, the previously incarcerated plaintiff shall continue to advise the Commission upon any change in contact information in accordance with Paragraph (b) of this Rule.

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

History Note: Authority G.S. §§ 143-291; 143-300.

Eff. _____

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

Agency: North Carolina Industrial Commission
 Contact: Ashley Snyder – (919) 807-2524
 Proposed New Rule Title:
 Rules proposed for amendment: Rule 11 NCAC 23B .0202
 Rule 11 NCAC 23B .0205
 (See proposed rule text in Appendix 1)

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

Statutory Authority: G.S. § 143-300

Introduction/Background:

Rule 11 NCAC 23B .0202 governs medical malpractice claims filed against the State under the Tort Claims Act by prison inmates. The North Carolina Rules of Civil Procedure, which apply to claims under the State Tort Claims Act, have special pleading requirements for medical malpractice claims. Rule 9(j) of the N.C. Rules of Civil Procedure describe these standards. Rule 11 NCAC 23B .0202 provides the procedure for evaluating whether a claim must comply with Rule 9(j). The rule also provides a procedure for the plaintiff to obtain medical records from the State which can be difficult logistically for prison inmates who do not have legal representation.

Many of the proposed amendments for Rule 11 NCAC 23B .0202 merely re-word the rule to provide greater clarity or remove unnecessary or confusing language. The substantive changes include a change to apply the rule only to those prison inmates without legal representation and a change in the time allowed for defendant to produce medical records to plaintiff from 45 days to the time period ordered by the Commission.

Rule 11 NCAC 23B .0205 governs mediation in state tort claims, indicating what rules apply and who must attend the mediation. The proposed amendment to Rule .0205 updates the rule to reflect that most tort claims are not mediated and are not required by the Commission to be mediated.

Proposed Rule Changes and Their Estimated Impact:

1. *Amendment of Rule 11 NCAC 23B .0202*

- a. Several of the proposed changes to Rule 11 NCAC 23B .0202(a) are intended to re-word the rule or provide clarification to improve understanding and compliance and should not have any fiscal impact. This includes the changes to Rule .0202(a)(1)(B) and (C), which may appear significant, but the new language in proposed (a) and (b) conveys essentially the same thing using direct references to Rule 9(j) and language from Rule 9(j).
- b. The proposed amendment to .0202(a) to apply the rule only to claims filed by prison inmates without legal representation is likely to have minimal impact. Most prison inmates who file claims with the Commission do not have legal representation. For those who have legal representation, Rule .0202 is unnecessary as their attorneys will be responsible for properly stating a claim for medical malpractice and obtaining the needed medical records.
- c. There are several proposed changes to Rule .0202(a) that address the references in the rule to Motions to Dismiss. In .0202(a), the word “and” is changed to “or” to make clear that a Motion to Dismiss does not have to be made for the Commission to consider whether the claim complies with Rule 9(j). This brings the rule in line with the Commission’s current practice and with Rule 9(j), which does not require a motion to dismiss. Along the same lines, the deletion of current .0202(a)(2), (b), and the first sentence of (c) remove unnecessary language from the rule. The Tort Claims Act and other Industrial Commission rules provide the procedure for filing motions. Therefore, there is no need to set out the procedure for filing a motion to dismiss, setting a hearing, and appealing to the Full Commission in Rule .0202. The presence of these provisions in the rule, as well as the wording of Rule .0202(c), may give the impression that a Motion to Dismiss must be filed and denied before the defendant shall produce medical records to plaintiff. Although in most cases the State does move to dismiss medical malpractice claims by prison inmates for failure to comply with Rule 9(j), the Commission will proceed with a determination regarding Rule 9(j) if necessary in the absence of a motion to dismiss. Rule 9(j) is not a waivable defense, but rather an independent requirement for a medical malpractice claim. In terms of behavioral impact, it is unlikely that the State as defendant will choose to file more or fewer motions to dismiss based on the proposed changes. It is not anticipated that any of these changes will result in a fiscal impact.
- d. The second sentence of current Rule .0202(c) is repeated in the proposed last paragraph of the rule without significant changes. The only change is that the defendant shall produce the medical records within the time period ordered by the Commission, as opposed to the 45 days currently in the rule. This change may have an impact on the State and private parties. In FY 2018-19, 678 state torts were filed. Of these, 481 were filed by prison inmates. The Commission does not separately track the number of medical malpractice claims filed by prison inmates, but it is the Commission’s experience that about 10% of the torts filed by prison inmates are medical malpractice claims affected by Rule .0202, or 48 claims per year.

It is difficult to estimate the impact of the rule change because it is unknown whether the Commission will order a time period of more or less than 45 days in any given case. A primary potential benefit of the rule change to the State as the Commission, the State as the defendant, and the plaintiff is flexibility. The State or plaintiff may be able to request a number of days that is more advantageous than 45 days and the Commission will have more discretion. However, there may be a cost to either the State or the plaintiff, as well. The Commission has no information regarding the State's cost of obtaining medical records and providing them to plaintiff, but it stands to reason that there may be some slight increase in opportunity cost if it must be done in less than 45 days. Likewise, there would be a savings if the State is allowed more than 45 days. The opposite effect is expected for the plaintiff, who presumably wants the claim to proceed as quickly as possible. The State as the Commission may experience some costs if it has to review and decide more requests related to the time period in the absence of the current 45-day standard. It is not feasible to quantify these costs or savings. Because this rule change is expected to affect approximately 48 cases filed per year, any fiscal effect of this rule change will be minimal.

2. *Amendment of Rule 11 NCAC 23B .0205*

The only change to Rule 11 NCAC 23B .0205 is the deletion of the first sentence which states, "The parties to tort claims, by agreement or Order of the commission, shall participate in mediation."¹ This deletion is intended to update the rule to current practice. It has been many years since the Commission required mediation in tort claims. Currently, there are typically no more than 10 mediations in tort claims a year reported to the Commission, though there are around 650 tort claims filed per year. It is possible that these 10 or fewer mediations per year might decline if the rule no longer requires mediation, but the Commission has no information on whether these mediations were voluntary and by agreement. Deletion of the requirement does not mean that the parties cannot agree to mediate if they want to. It would be speculative to estimate the effect of the rule change on such a small number of mediations without more data. The rule change also does not prevent the Commission from being able to order mediation in a claim as there is direct authority to do so in G.S. 143-296. On the whole, the rule change is expected to have little to no impact on the State and private parties in state tort claims.

Summary of impact:

Benefits and costs related to the changes to 11 NCAC 23B .0202 and .0205 are not quantified in this analysis due to lack of data.

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

¹ There is also a deletion of an unnecessary date from the title of the rule.

APPENDIX 1

Proposed Rule Text

11 NCAC 23B .0202 MEDICAL MALPRACTICE CLAIMS BY UNREPRESENTED PRISON INMATES

(a) In any tort claim ~~medical malpractice cases~~ filed by ~~or on behalf of~~ an unrepresented prison inmates inmate where ~~the plaintiff is alleging in which the Commission determines that the plaintiff is alleging~~ that a health care ~~provider~~ provider, as defined in G.S. ~~90-21.11~~ 90-21.11, failed to comply with the applicable standard of care under G.S. ~~90-21.12~~ 90-21.12, ~~and or the defendant has filed a Motion to Dismiss moved to dismiss the claim; claim for failure to~~ comply with Rule 9(j) of the North Rules of Civil Procedure, all discovery is stayed until ~~the following occur; a~~ recorded non-evidentiary hearing before the Commission is held for the purpose of determining whether a claim for medical malpractice has been stated and, if so, whether:

- (1) ~~— A recorded hearing in which no evidence is taken is held before a Deputy Commissioner or a Special Deputy Commissioner for the purpose of determining:~~
 - (A) ~~whether a claim for medical malpractice has been stated;~~
 - (B)(a) whether expert testimony is necessary for the plaintiff to prevail; and plaintiff must meet the requirements of Rule 9(j)(1) or (2) of the North Carolina Rules of Civil Procedure to proceed with the claim; and or
 - (b) ~~whether~~ plaintiff has alleged facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.
 - (C) ~~— if expert testimony is deemed necessary, whether the plaintiff will be able to produce such testimony on the applicable standard of care.~~
- (2) ~~— Upon receipt of a Motion to Dismiss and Request for Hearing from the defendant, the Commission issues an order setting the motion on a hearing docket and the case is assigned to a Deputy Commissioner or a Special Deputy Commissioner.~~

If the Commission determines that a claim for medical malpractice has been stated, and plaintiff must meet the requirements of Rule 9(j)(1) or (2) of the North Carolina Rules of Civil Procedure, the defendant shall produce medical records to the plaintiff within the time period prescribed by the Commission. Upon receipt of the medical records, the plaintiff shall then have one hundred and twenty (120) days to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure.

~~(b) If the defendant's Motion to Dismiss is granted, an appeal lies to the Full Commission.~~

~~(c) If defendant's Motion to Dismiss is denied, the case shall proceed as any other tort claims case. Defendant shall produce medical records to plaintiff within 45 days of the Order of the Commission denying defendant's Motion to Dismiss. Plaintiff shall then have 120 days to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure.~~

History Note: Authority G.S. 143-300;

Eff. January 1, 1989;

Recodified from 04 NCAC 10B .0206 Eff. April 17, 2000;

Amended Eff. _____; July 1, 2014; May 1, 2000.

11 NCAC 23B .0205 MEDIATION (EFFECTIVE JULY 1, 2014)

(a) ~~The parties to tort claims, by agreement or Order of the Commission, shall participate in mediation.~~ Any party participating in mediation is bound by the Rules for Mediated Settlement and Neutral Evaluation Conferences of the Commission found in 11 NCAC 23G, except to the extent the same conflict with the Tort Claims Act or the rules in this Subchapter, in which case the Tort Claims Act and the rules in this Subchapter apply.

(b) An employee or agent of the named governmental entity or agency shall be available via telecommunication. Mediation shall not be delayed due to the absence or unavailability of the employee or agent of the named governmental entity or agency.

History Note: Authority G.S. 143-295; 143-296; 143-300;

Eff. January 1, 1989;

Amended Eff. _____; July 1, 2014; January 1, 2011; May 1, 2000.

Regulatory Impact Analysis Motions in Tort Claims

Basic Information

Agency: North Carolina Industrial Commission

Contact: Ashley Snyder
North Carolina Industrial Commission
1240 Mail Service Center
Raleigh, NC 27699-1240
(919) 807-2524
ashley.snyder@ic.nc.gov

Rules Proposed for Adoption: Rule 11 NCAC 23B .0204
Motions
(See proposed rule text in Appendix 1)

Statutory Authority: G.S. §§ 143-296; 143-300

Impact Summary

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

Impact of the Proposed Amendments:

- a. The proposed amendments to 11 NCAC 23B .0204(a) require all motions to be filed in accordance with Rule 11 NCAC 23B .0104. The fiscal impacts of this proposed amendment are encompassed in the Fiscal Note for Rule 11 NCAC 23B .0104.
- b. The proposed amendments to Paragraph (b) of 11 NCAC 23B .0204 are intended to encourage parties to communicate and resolve disputes prior to the filing of a motion.
 - i. Description of baseline situation:
Currently, the rule only requires that the moving party include a statement of the opposing party's position on the motion, if known. The Commission receives thousands of motions of different kinds each year. The Commission received 1,314 motions in tort claims via electronic means in Fiscal Year

2017-18. The Commission has no way to track the number of motions filed by other means.

However, the number of motions filed in tort claims may be estimated. In total, 678 tort cases were filed in Fiscal Year 2017-18. Of those, 197 were non-inmate tort claims and 481 were inmate tort claims. Approximately 553 of the tort claims filed were by unrepresented parties, and 125 by parties who were represented.¹ Most non-represented parties file motions via U.S. Mail, and most represented parties file motions via electronic means. If all 125 represented parties filed all motions via electronic means, then the 1,314 tort motions filed via electronic means in Fiscal Year 2017-18 equates to approximately 10.5 motions per case. Assuming unrepresented parties file the same number of motions per case, then an estimated 5,807 motions are filed in tort claims per year.

Some of these motions already contain an indication of the opposing party's position or that an attempt was made to contact the opposing party about the issue before filing the motion, generally those filed by parties represented by counsel. Therefore, an estimated 77% of motions, or 4,493 motions, do not include this information and would not comply with the rule as amended. The percentage is higher than the percentage in Workers' Compensation Claims due to the high number of unrepresented parties in tort claims.

ii. Description of proposed changes:

The proposed amendments remove the phrase "if known" and requires a party filing a motion to provide the opposing party's position or to indicate in the motion that a reasonable attempt was made to ascertain the position of the opposing party to the motion. If the moving party does not do so, the motion may be denied on that basis alone, though it could be re-filed with proper documentation.

iii. Economic impact:

As stated above, this rule change will affect an estimated 77% of motions filed, or 4,493 motions. It is likely that in some percentage of these cases the moving parties know the opposing party's position or have contacted them about the issue, but have not included the information in the motion. It is not possible to estimate this proportion with any accuracy.

Costs to the State through the Commission:

¹ 481 inmate tort claims were filed in Fiscal Year 2017-18. Nearly all of these were filed by unrepresented parties. Out of the 197 non-inmate tort claims, 125 were filed by represented parties.

- It is likely that the Commission will experience a slight increase in the number of motions filed initially because there will be motion filers who do not comply with the rule for a brief period of time after the rule goes into effect. Their initial motions may be denied depending on the circumstances of the case for failure to comply and they will have to file a new motion.² Some portion of the denied motions will not be re-filed because circumstances will change in the case, such as the dispute being resolved between the parties. The only potential temporary cost to the Commission from an increase is the opportunity cost of current employees who handle the increased motions.
 - Processing a motion requires an estimated average of 15 minutes of processing assistant time, starting with intake and finishing with filing an order. The processing assistants who work with motions at the Commission earn between \$30,000 and \$36,000 per year, with an average of \$33,000, or \$51,155 in total compensation.³
 - The time required to review and rule on a motion can range from 5 minutes to over an hour, depending on the complexity of the motion. However, a majority of motions require 30 minutes or less. Therefore, an estimated average of 20 minutes is required for the review of a motion and any response, as well as the drafting of an order. The employees who review and rule on motions at the Commission have salaries ranging from \$62,000 to \$128,000, with an average of \$95,000, or about \$147,264 in total compensation.⁴
 - Assuming 2,080 work hours a year, the average opportunity cost of a re-filed motion would be \$6.15 in processing time and \$23.60 in attorney review time, for a total of \$29.75 per motion.
 - The number of motions that may have to be re-filed due to non-compliance with the rule is difficult to determine with any accuracy. Based on the Commission's experience, the rate of non-compliance in the first few months after the rule changes is expected to be relatively low. As demonstrated above, the cost to the Commission to process each motion is also low. Therefore, the Commission expects this change to create only a minor impact.

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

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

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

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

Total compensation adjusted for recent 2% legislative increase.

⁴ Id.

Costs to the State as an employer:

- While it is unlikely that the State as an employer will have to expend additional funds to be able to comply with the proposed rule change, state employees such as attorneys and paralegals representing the State will have to spend additional time and effort to make a reasonable attempt to contact the opposing party regarding its position on the motion before filing a certain number of motions. Similarly, local government units who represent themselves before the Commission may experience a similar loss in opportunity cost. Local government may also be required to expend additional funds if represented by private law firms who charge them for additional time spent complying with the rule as amended. Local government is included in the public-sector cost analysis in this section.
- For the motions in which the filer does not know the opposing party's position, the cost imposed by the proposed rule change is the time and effort to type the information into the motion. If it is assumed that typing the required information in a motion could take 2-3 minutes and the average state legal or administrative assistant who would be drafting the motion is paid on average \$35.71 in total hourly compensation,⁵ the total cost of added time to state and local governments as filers would be \$1.50 per motion⁶, plus the time to make reasonable contact with the opposing party to ascertain its position.
- Because each case will be different, it is difficult to estimate the amount of time it would take to make a reasonable attempt to contact the opposing party about a motion. What is reasonable may differ between cases. An attorney may choose to spend an hour drafting a letter to the opposing party or may have a paralegal make a quick telephone call or send a two-sentence e-mail. For purposes of this analysis, it is assumed that an average of 10 minutes will be spent making a reasonable attempt to ascertain the opposing party's position. This work may be done by legal assistants earning \$35.71 in total hourly compensation or attorneys

⁵ 2017 average wage estimates for paralegals and legal assistants in North Carolina reported by NC Department of Commerce, Occupational Employment and Wages in North Carolina (OES).

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

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

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

Total compensation adjusted for recent 2% legislative increase.

⁶ This amount may be an actual cost in funds and may be higher for local government entities if they hire private legal counsel for workers' compensation claims as the local government entity will likely pay at a contracted rate per hour for attorney and paralegal time. Because there is no reliable way of determining how many motions are filed on behalf of local government, a separate analysis will not be conducted here.

earning \$84.50 in total hourly compensation.⁷ Therefore, the average cost to make the required attempt to contact the opposing party would cost between \$6.00 and \$14.10 per motion.

Costs to private sector filers (including private employers/carriers and employees):

- Parties with legal counsel generally pay a legal fee on a contingency basis. Therefore, the proposed changes will have no or minimal impact on the legal fees paid by employees. However, there is a potential opportunity cost for the law firms representing employees to comply with the rule.
- Parties without legal counsel may have to expend additional time and effort in certain cases to comply with the proposed rule, but there are too many uncontrolled variables to estimate this potential cost with any accuracy.
- As stated above, approximately 1,314 tort motions are filed electronically per fiscal year, most of which are filed by private counsel in non-inmate tort claims.
- In such cases, the only cost imposed by the proposed rule change is the time and effort to type the information into the motion. If it is assumed that typing the required information in a motion could take an average of 2-3 minutes to draft and review and a law firm charges between \$90 (paralegal estimate) and \$150 (attorney estimate), or an average of \$120, per hour,⁸ the total annual cost of added time to private-sector motion filers would be \$5 per motion, or \$6,570.
- If the filer does not know the opposing party's position, the cost will be the time to make reasonable contact with the opposing party to ascertain its position, plus the \$5 per motion to draft and review the required information.
- Because each case will be different, it is difficult to estimate the amount of time it would take to make a reasonable attempt to contact the opposing party about a motion. What is reasonable may differ between cases. An attorney may spend an hour drafting a letter to the opposing party or may have a paralegal make a quick telephone call or send a two-sentence e-mail. For purposes of this analysis, it is assumed that an average of 10 minutes will be spent making a reasonable attempt to ascertain the opposing party's position. Using the estimated legal fee rates above, the average

⁷ 2017 median wage estimates for attorneys in North Carolina reported by NC Department of Commerce, Occupational Employment and Wages in North Carolina (OES). <https://d4.nccommerce.com/OESSelection.aspx> Benefits as a percent of total compensation reported by NC OSHR. 2016 Compensation and Benefits Report. https://files.nc.gov/ncoshr/documents/files/2016%20Comp%20and%20Benefits%20Report_FINAL.pdf Total compensation adjusted for recent 2% legislative increase.

⁸ These hourly rates are estimates based on an informal survey of law firms. They reflect hourly costs billed to clients, not employee compensation costs.

cost to make the required attempt to contact the opposing party would cost an estimated \$20 per motion. For 1,314 motions, this would amount to \$26,280. The impact will not be that high because some of these motions already contain the required information, though the percentage or number of motions already containing that information cannot be estimated.

Benefits to the State through the Commission:

- The proposed rule change is expected to benefit the Commission by reducing the number of unnecessary motions and by providing additional information in motions that will assist the deciding officer in ruling on the motion.
- Now, the Commission will have additional information to consider in ruling on the motion. This additional information may result in a decision that is more appropriate for the circumstances of the case and may result in fewer appeals or other motions. It is not feasible to estimate a fiscal impact for this benefit.
- In cases where the moving party has not made contact with the opposing party and does not know its position on the motion, it is possible fewer motions will be filed if contact between the parties resolves the issue in the motion.
- For any motion not filed due to the amended rule, the Commission would save an estimated opportunity cost in staff time of \$29.75 per motion. It is unknown how many motions might be resolved due to the rule change.

Benefits to the State as an employer:

- The proposed rule change is expected to benefit the State and local government as employers by reducing the number of unnecessary motions and by providing additional information in motions that will assist the deciding officer in ruling on the motion.
- As discussed above, the additional information may result in a decision that is more appropriate for the circumstances of the case and may result in fewer appeals or other motions. It is difficult to estimate the fiscal impact of this benefit.
- The amount of time required to draft and file a motion or a response to a motion varies widely on a case-by-case basis. It is estimated that an average of 1.25 hours of attorney and paralegal time is required to file a motion or a response. This work is likely a combination of attorney and paralegal time, with State employee legal assistants earning \$35.71 in total hourly compensation and State attorneys earning \$84.50 in total hourly compensation, for an average of \$60.11 per hour.

Benefits to private sector (including private employers/carriers and employees):

- The proposed rule change is expected to benefit private sector parties by reducing the number of unnecessary motions and by providing additional information in motions that will assist the deciding officer in ruling on the motion.
 - As discussed above, the additional information may result in a decision that is more appropriate for the circumstances of the case and may result in fewer appeals or other motions.
 - The amount of time required to draft and file a motion or a response to a motion varies widely on a case-by-case basis. It is estimated that an average of 1.25 hours of attorney and paralegal time is required to file a motion or a response at an average of \$120 per hour.
- c. The proposed amendments to 11 NCAC 23B .0204(c) require the filing party provide a copy of the motion to all opposing attorneys of record or all opposing parties, if not represented. This sentence was previously contained in subsection (b) and there is therefore no fiscal impact.
- d. The proposed amendments to 11 NCAC 23B .0204(d) require motions filed electronically to include a proposed order in Microsoft Word format.

Description of baseline situation:

The Rule currently requires all motions to include a proposed Order for consideration by the Commission. The current rule does not require the proposed Order to be in Word format, though most if not all proposed orders currently come in Word format.

Description of proposed changes:

The proposed rule limits the requirement to file a proposed Order to those motions and responses filed electronically. Most represented parties file motions electronically and are already required by the rule to file a proposed Order. The proposed Order must be filed in Microsoft Word format. The rule will eliminate the requirement for parties who do not file motions electronically to file a proposed order. Unrepresented parties generally do not file motions electronically.

Economic impact:

The impact of this change is expected to be minimal, if any. There is no expected cost to the Commission. There is no expected cost to the State because any attorney employed by the State must already file a proposed order under the current rule and the State already uses Microsoft Word. For the private sector, attorneys must already file a proposed order under the current rule and most, if not all, already send the proposed orders in Microsoft Word format.

The proposed rule does have potential savings. Unrepresented parties, who typically do not file motions via electronic means will now not be required by rule to provide a proposed Order. The vast majority of unrepresented parties do not currently comply with this requirement, but there will be an opportunity cost savings for those who will no longer draft proposed Orders.

- e. The proposed amendments to 11 NCAC 23B .0204(h) remove an unnecessary and potentially confusing provision from the rule. The rule as currently written may give parties the impression that they can only request reconsideration if they did not receive actual notice of a motion or file a response, when, in fact, any party in a case who receives an unfavorable ruling on a motion may request that the ruling be reconsidered, modified, or vacated. There is no to little fiscal impact anticipated from this proposed rule change.

The proposed amendments also remove the old subsection (h) because the amendment of pleadings is governed by Rule 15 of the North Carolina Rules of Civil Procedure. This language is therefore unnecessary. There is little to no fiscal impact from this proposed change.

- f. The proposed amendments to 11 NCAC 23B .0204(k) delete a sentence because it is unnecessary. The requirements for hearings or oral arguments are covered by language already existing in subsection (h). Therefore, there is no fiscal impact.

Summary of Economic Impact:

Overall, the State's costs associated with the proposed amendments to Rule 11 NCAC 23B .0204 include \$29.75 Industrial Commission staff time to review and rule on any re-filed motion, State or local government time to make a reasonable attempt to contact the opposing party, and \$1.50 per motion for State or local governments to type the additional required information into a motion.

Private costs include the opportunity cost to comply with the rule, approximately \$6,570 to type the information into motions, and an estimated \$26,280 to contact the opposing party.

The benefits of the proposed amendments to the State include a reduction in the number of unnecessary motions, with each motion not filed saving the commission \$29.75 in opportunity cost; an increase in helpful information provided to the Commission; and a savings of \$60.11 per hour for State attorneys and paralegals per motion that does not have to be filed due to the amendments.

The Benefits of the proposed amendments to the private sector include reducing the number of unnecessary motions at a savings of \$120 per hour and additional information provided to the Commission which may result in more appropriate decisions. Additionally, unrepresented parties will no longer be required by rule to draft proposed Orders.

APPENDIX 1

Rule 11 NCAC 23B .0204 is proposed for amendment as follows:

11 NCAC 23B .0204 MOTIONS

(a) All motions regarding tort claims shall be filed pursuant to Rule .0104 of this Subchapter. ~~with the Docket Section, unless the case is currently calendared before a Commissioner or Deputy Commissioner. All motions in calendared cases shall be filed with the Commissioner or Deputy Commissioner.~~

(b) A motion shall state ~~with particularity~~ based with particularity the grounds on which it is based, the relief sought, and ~~a statement of the opposing party's position, if known, or that the opposing party's position could not be ascertained after a good faith effort.~~ Service shall be made on all opposing attorneys of record, or on all opposing parties, if not represented.

(c) At the same time a motion is filed, the party filing the motion shall provide a copy of the motion to all opposing attorneys of record, or on all opposing parties, if not represented.

(~~e~~) (d) All motions and responses thereto filed electronically shall include a proposed Order in Microsoft Word format to be considered by the Commission.

(~~d~~) (e) By motion of the parties, or on its own motion, the Commission may enlarge the time for an act required or allowed to be done under the Rules in this Subchapter in the interests of justice or to promote judicial economy. An enlargement of time may be granted either before or after the relevant time requirement has elapsed.

(~~e~~) (f) Motions to continue or remove a case from the hearing docket shall be made as much in advance ~~as possible~~ as possible of the scheduled hearing and shall be made in writing. The moving party shall state that the other parties have been advised of the motion and relate the position of the other parties regarding the motion. Oral motions are permitted in emergency situations.

(~~f~~) (g) The responding party to a motion, with the exception of motions to continue or to remove a case from a hearing docket, has 10 days after a motion is served during which to file and serve copies of a response in opposition to the motion. The Commission may shorten or extend the time for responding to any motion in the interests of justice or to promote judicial economy.

(~~g~~) (h) Notwithstanding Paragraph (~~f~~) (g) of this Rule, a motion may be acted upon at any time by the Commission, despite the absence of notice to all parties and without awaiting a response. ~~A party who has not received actual notice of the motion or who has not filed a response at the time such action is taken and who is adversely affected by the ruling may request that it be reconsidered, vacated, or modified.~~ Motions shall be determined without oral argument, unless the Commission orders otherwise in the interests of justice.

(h) ~~When a Motion to Amend Pleadings has been filed, served upon opposing parties, and not previously ruled upon, the Commissioner or Deputy Commissioner may permit amendment of pleadings at the time of the hearing and then proceed to a determination of the case based on the evidence presented at the time of the hearing without requiring additional pleadings.~~

(i) Motions to dismiss or for summary judgment filed by the defendant on the ground that plaintiff has failed to name the individual officer, agent, employee or involuntary servant whose alleged negligence gave rise to the claim, or has failed to properly name the department or agency of the State with whom such person was employed, shall be ruled upon following the completion of discovery.

(j) Motions to reconsider or amend an ~~order, opinion and award~~, Order or ~~decision and order~~, Decision and Order, made prior to giving notice of appeal to the Full Commission, shall be ~~directed~~ addressed to the Deputy Commissioner who authored the ~~Opinion and Award~~. Order or Decision and Order.

(k) ~~Upon request of either party, or upon motion of the Commission, motions shall be set for hearing before a Commissioner or Deputy Commissioner.~~

History Note: Authority G.S. 143-296; 143-300;

Eff. January 1, 1989;

Recodified from 04 NCAC 10B .0203 Eff. April 17, 2000;

*Amended Eff. ***** **, ****; July 1, 2014; May 1, 2000.*

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

Agency: North Carolina Industrial Commission
 Contact: Ashley Snyder – (919) 807-2524
 Proposed New Rule Title:
 Rules proposed for amendment: Rule 11 NCAC 23B .0302
 Rule 11 NCAC 23B .0310
 Rule 11 NCAC 23B .0501
 (See proposed rule text in Appendix 1)

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

Statutory Authority: G.S. §§ 143-292, 143-296, 143-300.

Introduction/Background:

Rule 11 NCAC 23B .0302 governs appeals of trial-level decisions to the Full Commission of the Industrial Commission. The proposed rule amendments for Rule 11 NCAC 23B .0302 are intended to reorganize and update the provisions contained in 11 NCAC 23B .0302, .0303, and .0305, including merging them all into 11 NCAC 23B .0302 and repealing 11 NCAC 23B .0303 and .0305. The amendments also re-word some provisions, provide some clarifications, and add new provisions codifying common practices related to appeals.

Rule 11 NCAC 23B .0310 governs oral argument in a case on appeal before the Full Commission. The current rule addresses only waiver of oral argument. The proposed amendments for Rule 11 NCAC 23B .0310 are intended to provide guidance for oral argument by codifying several current practices of the Full Commission and providing specific procedures for requesting additional time for oral argument.

Rule 11 NCAC 23B .0501 addresses the procedure for a waiver of the rules. The proposed amendments remove the requirement that a request be submitted in writing and correct the rule by replacing “employee” with “plaintiff.”

Proposed Rule Changes and Their Estimated Impact:

1. *Amendment of Rule 11 NCAC 23B .0302*
 - a. The proposed changes to Rule 11 NCAC 23B .0302(a) other than the new last sentence added to the Paragraph are all intended to re-word the rule or provide clarification to improve compliance and should not have any fiscal impact. The

new last sentence is intended to require that the party filing the notice of appeal include in the notice a statement that it has been copied to the opposing party. The effect of this requirement is also to require that the filing party actually provide a copy to the opposing party. This requirement is extremely common for court filings in most venues. There is no data on this point, but, in the experience of the Commission, most appellants do copy the opposing party on notices of appeal to the Commission. The rule is intended to improve compliance for the small number of appellants who fail to do so. By including this requirement in the rule, it will improve the Commission's ability to enforce the requirement.

The time and expense of copying the other side and providing the written statement required by the proposed rule amendment is approximately 15 minutes of a paralegal or attorney's time. In FY 2016-17, there were 119 appeals of tort claims to the Full Commission. The rule change is expected to have an effect in only a very small number of the 119 cases. Therefore, any fiscal effect of this rule change will be very minimal.

- b. The proposed Paragraph (b) for Rule 11 NCAC 23B .0302 is a new provision which addresses the Commission's acknowledgement of a notice of appeal and the Commission's procedure for sending the Form T-44 *Application for Review* and official transcript and exhibits to the parties. While the provision is new to the tort claim rules, it is essentially a codification of the current practice. The primary effect of the rule is to require the Commission to use the same procedure in every case, which it already does, and to provide information to the parties about what to expect.

The acknowledgement and provision of the transcript and exhibits to the parties in a case takes approximately 30-45 minutes for Commission staff. Some postage may be required in a few cases where the plaintiff is not represented by counsel. The Commission has a contract for court reporting services, which includes the preparation of the transcript and exhibits. These modest costs will apply in about 119 cases a year. This number may be lower as some portion of the appeals will be interlocutory appeals which may or may not be allowed to proceed.¹ The Commission expects no to minimal impact from this rule change.

- c. The proposed Paragraph (c) for Rule 11 NCAC 23B .0302 is the current Rule 11 NCAC 23B .0303 with some amendments. Rule 11 NCAC 23B .0303 is proposed for repeal. This rule addresses the submission by the appellant of the Form T-44 *Application for Review* or a written statement stating the assignments of error and grounds for review that are the basis of the appeal. The rule provides the timeframe for submission and the potential consequences for failure to file the Form T-44 *Application for Review* or a written statement. The differences between the new Rule 11 NCAC 23B .0302(c) and the similar provisions of the current Rule 11 NCAC 23B .0303 and their fiscal impact are outlined below:

¹ For example, in FY 2016-17, 31 of the 119 cases appealed were appeals of Orders that may not have been allowed to proceed if they were interlocutory and there was no right of immediate appeal.

- i. The current Rule 11 NCAC 23B .0303 required that an appellant file a “written statement of the proposed issues on appeal that the appellant intends to present on appeal.” The new Rule 11 NCAC 23B .0302(c) requires “a Form T-44 *Application for Review* or written statement stating with particularity all assignments of error and grounds for review, including, where applicable, the pages in the transcript or the record on which the alleged errors are recorded.”
 - o The Form T-44 *Application for Review* is a form that already exists and is generally used by appellants to provide the written statement currently required by Rule 11 NCAC 23B .0303. Because the rule still allows a written statement and the Form T-44 *Application for Review* is essentially a written statement, this change has no fiscal impact.
 - o Proposed issues on appeal are essentially the same as assignments of error or grounds for review. However, the proposed rule seeks to require additional particularity or specificity in the description of the basis of the appeal, including corresponding page numbers in the record. The benefit of the rule is that the parties and the Commission will have a better understanding of the grounds for review. It will make it easier for the appellee to address the issues raised and easier for the Commission to review and analyze the appeal. There will be a cost to appellants if compliance with the rule requires additional drafting time. It is difficult to know how much additional time might be required or saved, as each case is different. Some have one assignment of error, while others may have 20. In addition, many appellants already state their grounds with particularity and provide page numbers. The rule change is aimed at the few appellants who do not, which is likely to be a very small portion of approximately 119 appeals per year. Therefore, the Commission expects minimal impact from this rule change.
 - o The remaining changes to the language moved from the current 11 NCAC 23B .0303 are re-wordings or clarifications of the rule language that do not change meaning and will have no fiscal impact.
- d. The proposed new Paragraphs (d), (e), and (f) for Rule 11 NCAC 23B .0302 are taken from the current Rule 11 NCAC 23B .0305 with some small amendments. Rule 11 NCAC 23B .0305 is proposed for repeal. Most of the changes to the relocated rule language are matters of rewording or clarification that do not change meaning or have a fiscal impact. The change stating that an appellant “may” file a brief instead of the former “shall” may have an impact on party behavior. The intent of this change is not to encourage fewer briefs, but rather to make the rule consistent. Current Rule 11 NCAC 23B .0305 and the new Rule 11 NCAC 23B .0302(d) indicate that failure to file a brief will result in not being

allowed to present oral argument to the Full Commission. The former rule was inconsistent because it implied that a brief was required but that the consequence of noncompliance was a loss of the right to oral argument. However, it also created an opportunity for the appellee to move for dismissal of the appeal for failure to file a brief.

Most appeals to the Full Commission involve attorneys and it is highly unlikely that any of them would not file a brief as a result of the proposed rule change. The real effect of the rule is likely to be incrementally fewer motions to dismiss for failure to file a brief in cases where the appellant is not represented by counsel. It is not possible to know whether unrepresented litigants who would have complied with the former rule and filed a brief would choose not to do so when the rule becomes permissive. In any case, the number of cases affected out of 119 a year is likely to be very low. Therefore, the Commission expects no to minimal impact from this rule change.

- e. The proposed new Paragraph (g) for Rule 11 NCAC 23B .0302 is a new provision to the tort claim rules which addresses the review of orders made during the pendency of a case.

New paragraph (g) first states orders made during the pendency of a case may be reviewed by the Full Commission. The concept of interlocutory decisions or orders is established and familiar to attorneys and utilized by a variety of tribunals. Next, the provision states that request for review of such orders will be reviewed by the Chair of the Commission to determine whether there is a right of immediate review. The parties are to address the grounds for immediate review in the request for review for the Chair's consideration. The practice of reviewing and analyzing appeals of interlocutory decisions to determine whether they should proceed or wait until the entire matter is decided is common to many tribunals, with a primary goal of judicial efficiency. The grounds presented are analyzed according to the existing body of case law addressing interlocutory orders. The first and last sentences of the rule reflect the current practice of the Commission. They are included in the new provision to codify the current practice, but also to provide context for the second sentence of the paragraph, which involves a procedural change.

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

The fiscal impact of the proposed subsection (g) is described below:

- In Fiscal Year 2016-17, the Full Commission received 31 requests for review in tort claims. In 2017-18, the number increased to 169. The large increase is due to a specific legal issue currently being regularly appealed. Once that legal issue is settled, it is estimated the number of annual requests for review will decrease to a number near the 31 requests for Fiscal Year 2016-17. However, the Commission does not know how long that will continue to be an issue. For the purpose of this analysis, the average number of interlocutory requests for review over the past two fiscal years is 100.
- For those requests for review where there is no certification, the rule does not contemplate a change in procedure. There may be a small benefit to the Commission and litigants from having a rule on the subject that outlines the procedure.
- For those cases in which the second sentence of the rule applies, the commission will have a cost savings of approximately three hours of law clerk time and 30 minutes of the Chairman's time which would have been spent reviewing the request for review. Because the certification option is a new procedure, the Commission cannot estimate with accuracy how often a request for review will be certified. However, it is believed less than 25% of requests will be certified. If that is the case, 25 or fewer requests for review will go directly to the Full Commission. Based on the average law clerk salary² of \$47.73 per hour, one certification saves \$143.19 in opportunity cost for a law clerk. Based on the Chairman's salary of \$91.07 per hour,³ one certification saves \$45.54 in opportunity cost. Therefore, the savings for one certification would be \$188.73 and the savings for 25 certifications would be \$4,718.25.
- There is unlikely to be a corresponding savings to the litigants in not having to draft arguments for the Chair's review because they will most likely include them in their briefs and arguments before the Full Commission panel. It is anticipated the Full Commission panel will review the issue of whether the decision should be immediately reviewed as well as the merits of the request for review.
- When an administrative decision is reviewed pursuant to this procedure, the case before the Deputy Commissioner is placed on hold. If the administrative decision is not a final judgment and the request for review is reviewed by the Chair, there can be a delay of up to 45 days before it is known whether the appeal will be referred to a Full Commission panel. There is a chance in such cases that a Full Commission panel may find that the request for review is not proper and should not be allowed, in which case the matter will have been delayed an extra 4-6 months, but this

² The Commission generally has 6 full-time permanent Agency Legal Consultants that serve as law clerks to the Commissioners. Currently, the Commission has 3 full-time permanent Agency Legal Consultants/law clerks. Their average annual compensation including benefits is \$99,278.40. Therefore, their average hourly compensation is \$47.73.

³ The Chairman's annual compensation including benefits is \$189,425.35. Therefore, his hourly compensation rate is \$91.07.

situation is equivalent to situations that already occur if the Chair allows a request for review to go forward and the Full Commission later disagrees or the Chair disallows a request for review and it is reviewed by the Full Commission.

f. Summary of Rule 11 NCAC 23B .0302 Impact:

Overall, the proposed amendments to 11 NCAC 23B .0302 will require the time and expense of copying the opposing party and providing the written statement, 30 to 45 minutes for Commission staff to acknowledge each notice of appeal, and additional time for appellants to draft all assignments of error with particularity. The proposed amendments will result in a savings to the Commission of \$188.73 per certified request for review as well as the potential for fewer delays for requests for review.

2. *Amendment of Rule 11 NCAC 23B .0310*

- a. The new Paragraph (a) of Rule 11 NCAC 23B .0310 is a re-wording of the current rule without any significant change in meaning. This rule is not expected to have any fiscal impact.
- b. The new Paragraph (b) allows 20 minutes for each party for oral argument and describes when time may be reserved for rebuttal. It is very common in most courts for oral argument to have time limits. The rule codifies the time limits and rebuttal procedure the Commission has used for many years. The Commission does not expect to incur any costs or benefits on behalf of the State based on the rule. Litigating parties could experience a cost in that their time is now limited through regulation. They may also experience a benefit from the certainty provided by having a rule.
- c. The new Paragraph (c) provides a procedure for requesting additional time for oral argument beyond that allowed in Paragraph (b). There is no data on the number of requests for additional time. Based on the Commission's experience, they are known to be rare.
 - i. The Commission expects to experience a small cost from receiving written requests that must be processed and reviewed. However, the Commission also expects a small benefit from no longer receiving such requests in various forms or at the last minute prior to hearing.
 - ii. Litigating parties may experience a cost from the regulation because it imposes limits on how and when they can request additional time. There is likely to be a small cost in staff and attorney time to prepare and file written requests, as opposed to oral requests. Parties may receive a benefit from the existence of a rule allowing them to request additional time if they believe they need it. Parties may also benefit from not being surprised close to the hearing with a request from the other party for more time.
 - iii. As stated above, additional time for oral argument is not a common request, usually reserved only for cases involving multiple parties, very

complicated facts or arguments, or cases involving more than one injury claim. Therefore, the impact of this rule provision is expected to be minimal.

- d. The new Paragraph (d) addresses what happens if a party or parties do not appear for scheduled oral argument. If one party fails to appear at the call of the case, the Full Commission may disallow their right to present oral argument. If both parties fail to appear, the matter may be decided on the record and briefs alone. There is nothing unusual about this rule provision in terms of how most courts operate. The Commission will benefit from having this rule in the Code so that a decision to disallow oral argument for failure to appear at the call of the case may not be challenged. Litigating parties may incur a corresponding cost if they lose the right to argue because they are late or fail to appear and want to appeal the decision to disallow their arguments. It is very rare that attorneys do not appear on time for oral argument without reasonable excuse, such that their arguments would be disallowed. This may occur slightly more frequently with unrepresented parties, but is still rare. The fiscal impact of this rule is expected to be minimal.
- e. New Paragraph (e) indicates that parties may not discuss matters outside the record, use personal opinions or experiences, or make negative statements about opposing counsel or members of the Commission during oral argument. This rule reflects and allows enforcement of a best practice. It is rare that litigants try to go outside the record, mention personal opinions, or make disparaging comments during oral argument, so the impact will be minimal. However, the Commission and other parties will benefit from being able to point to the rule if a party does behave in such a manner. A party restrained by the rule may experience a cost due to limitations placed on its oral argument. These costs and benefits are relatively intangible and cannot be monetized with any accuracy.

3. *Amendment of Rule 11 NCAC 23B .0501*

The amendment proposed in Rule 11 NCAC 23B .0501 is intended to clarify the existing language and encourage compliance with the requirements of the rule. Under the current baseline rule, the Commission may waive or vary the requirements or provisions of any of the 23B Rules upon written application of a party. The proposed rule amendment removes the requirement that the request for waiver be made in writing. There may be a minor savings to the system because it could result in less paper being submitted to the Commission. However, most requests will still be communicated to the Commission in writing despite the rule change. The rule change is intended to address waivers requested where all parties are present before the Commission for a hearing. The Commission does not expect oral waivers at hearing to happen very often. The change may result in a savings, but it would be minor and unquantifiable. No fiscal impact to state or local government and no substantial economic impact to the overall workers' compensation system is anticipated.

APPENDIX 1

Proposed Rule Text

11 NCAC 23B .0302 NOTICE OF APPEAL APPEALS TO THE FULL COMMISSION

(a) A letter expressing an intent to Notice of appeal shall be considered notice of appeal to the Full made to the Commission within the meaning of G.S. 143-292, 15 days from the date when notice of the Deputy Commissioner's Order or Decision and Order has been received. The notice of appeal shall specify, provided that the letter specifies by tort claim number and filing date, the Order, Opinion and Award, Order or Decision and Order from which appeal is taken. The notice of appeal shall include a written statement confirming that a copy of the notice of appeal has been sent to the opposing party or parties.

(b) After receipt of the notice of appeal, the Commission shall acknowledge the notice of appeal in writing. Within 30 days of the acknowledgement, the Commission shall prepare and provide, at no charge to the parties, electronic copies of any official transcript and exhibits, along with a Form T-44 *Application for Review*. 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 T-44 *Application for Review* via any class of U.S. mail that is fully prepaid.

(c) Within 25 days of receipt of the official transcript and exhibits, or receipt of notice that there will be no official transcript and exhibits, the appellant shall submit a Form T-44 *Application for Review* or written statement stating with particularity all assignments of error and grounds for review, including, where applicable, the pages in the transcript or the record on which the alleged errors are recorded. The Form T-44 *Application for Review* or the written statement shall include confirmation that a copy of the document has been sent to the opposing party or parties. Failure to file the proposed issues on appeal, either by Form T-44 *Application for Review* or by written statement, may result in the dismissal of the appeal either upon the motion of the non-appealing party or upon the Full Commission's own motion.

(d) An appellant may file a brief in support of the grounds for appeal with the Commission, with a written statement confirming that a copy of the brief has been sent to the opposing party or parties, within 25 days after receipt of the official transcript and exhibits or receipt of notice that there will be no official transcript and exhibits. The appellee shall have 25 days from service of the appellant's brief to file a reply brief with the Commission, with a written statement confirming that a copy of the brief has been sent to the opposing party or parties. When the appellant fails to file a brief, the appellee shall file a brief within 25 days after the appellant's time for filing a brief has expired. If multiple parties appeal, each party may file an appellant's brief and appellee's brief on the schedule set forth in this Rule. If the matter has not been calendared for hearing, any party may file a written stipulation to a single extension of time not to exceed 15 days with the Office of the Clerk. In no event shall the cumulative extensions of time exceed 30 days. A party who fails to file a brief shall not be allowed oral argument before the Full Commission.

(e) 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 South Eastern Reporter. 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.

(f) Briefs to the Full Commission shall not exceed 35 pages, excluding attachments. No page limit applies to the length of attachments. Typed briefs shall be prepared using 12-point proportional 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 right of the page. When a party quotes or paraphrases testimony or evidence from the official transcript or exhibits in a brief, the party shall include, at the end of the sentence, a parenthetical entry that designates the source and page number of the quoted or paraphrased material. The party shall use "T" for transcript and "Ex" for exhibit. For example, (1) if a party quotes or paraphrases material located in the transcript on page 11, the party shall use the following format "(T 11)" and (2) if a party quotes or paraphrases material located in an exhibit on page 12, the party shall use the following format "(Ex 12)". When a party quotes or paraphrases testimony or other evidence in the transcript of a deposition, the party shall include, at the end of the sentence, a parenthetical entry that contains the name of the person deposed and the page number location within the transcript of the deposition. For example, if a party quotes or paraphrases the testimony of John Smith, located on page 11 of the transcript of the deposition, the party shall use the following format "(Smith 11)".

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

History Note: Authority G.S. 143-292; 143-300;
Eff. January 1, 1989;
*Amended Eff. *** **, ****; July 1, 2014; May 1, 2000.*

11 NCAC 23B .0310 ~~WAIVER OF ORAL ARGUMENT~~

~~Upon the request of a party or 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.~~

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

(b) When presenting oral argument, each appellant(s) shall have twenty minutes to present oral argument and may reserve any amount of the twenty-minute total allotment for rebuttal, unless otherwise specified by Order of the

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

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

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

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

*History Note: Authority G.S. 143-292; 143-296; 143-300;
Eff. January 1, 1989;
Recodified from 04 NCAC 10B .0311 Eff. April 17, 2000;
Amended Eff. July 1, 2014; May 1, 2000.*

11 NCAC 23B .0501 WAIVER OF RULES

In the interests of justice or to promote judicial economy, the Commission may, except as otherwise provided by the rules in this Subchapter, waive or vary the requirements or provisions of any of the rules in this Subchapter in a case pending before the Commission upon ~~written application~~ request of a party or upon its own initiative only if the ~~employee~~ plaintiff 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.

*History Note: Authority G.S. 143-291; 143-300;
Eff. January 1, 1989;
Amended Eff. **** *, ****; July 1, 2014; May 1, 2000.*