

## NORTH CAROLINA INDUSTRIAL COMMISSION

### IN RE: RULEMAKING BY THE NORTH CAROLINA INDUSTRIAL COMMISSION CONCERNING WORKERS' COMPENSATION RULES, TORT CLAIMS RULES, AND MEDIATION RULES.

ORDER by PAMELA T. YOUNG, Chair.

FILED: OCT 01 2010

This matter is before the undersigned on the Commission's Motion to add evidence *sua sponte* to the record of the September 15, 2010 Public Hearing held by the Commission in this matter. Following the September 15, 2010 Public Hearing, the record was held open for the submission of written comments through September 29, 2010. Written comments were received before, during, and after the public hearing from several organizations and individuals.

**IT IS HEREBY ORDERED** that the following written comments shall be included in the record of the September 15, 2010 Public Hearing concerning Rulemaking by the Industrial Commission for Proposed Amendments and New Rules for the Workers' Compensation Rules, Tort Claims Rules, and Rules for Mediated Settlement and Neutral Evaluation Conferences:

1. A one-page e-mail from Keischa Lovclacc, Director of Claims Administration of the North Carolina Industrial Commission, received August 14, 2010;
2. A two-page letter from Jolinda Babcock of Robinson & Lawing, LLP, received August 16, 2010;
3. A one-page letter from Harry H. Clendenin, III, of Clifford, Clendenin & O'Hale, LLP, received August 17, 2010;
4. A two-page letter from Bobby L. Bollinger, Jr., of The Bollinger Law Firm, PC, received August 27, 2010;
5. An e-mail with three-page letter attached from Trey Gillespie of Property Casualty Insurers Association of America, received September 14, 2010;

6. An e-mail with three-page memorandum attached from Jeffrey Misenheimer of Lewis & Roberts, PLLC, on behalf of the North Carolina Association of Defense Attorneys, received September 14, 2010;
7. A two-page letter from John Elvers of Lewis & Roberts, PLLC, received September 17, 2010;
8. A three-page summary of comments by Gina Cammarano of Farah & Cammarano, P.A., on behalf of the North Carolina Advocates for Justice, received September 15, 2010;
9. A one-page e-mail from Leonard T. Jernigan, Jr., of the Jernigan Law Firm, received September 15, 2010;
10. A one-page e-mail from Seth Bernanke of the Law Office of Seth M. Bernanke, PC, received September 24, 2010;
11. An e-mail with two-page letter attached from Trey Gillespie of Property Casualty Insurers Association of America, received September 28, 2010;
12. An e-mail with a ten-page memorandum and affidavit from R. James Lore, Attorney at Law, received September 29, 2010;
13. A two-page e-mail from W. Scott Fuller of Cranfill, Sumner & Hartzog, LLP, received September 29, 2010.

This the 1st day of October 2010.

  
\_\_\_\_\_  
PAMELA T. YOUNG  
CHAIR

**Henderson, Meredith**

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**From:** Lovelace, Keischa  
**Sent:** Saturday, August 14, 2010 12:12 PM  
**To:** Henderson, Meredith  
**Subject:** Comment re proposed Rule 101

Meredith,

The new portion of Rule 101 indicates a form may be filed through 11:59 on the day due. Can you please consider adding a section regarding documents submitted on weekends and holidays? We have several documents filed via the forms email account over the weekend and on holidays. In my opinion, forms and other documents emailed over the weekend or on holidays should be considered filed the next business day. I believe we also need to address this issue because with the electronic document portal, we will have form agreements and cinchers filed on the weekend and holidays, too.

Thanks,

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Chair's Office  
AUG 16 '10  
NC Industrial

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August 13, 2010

Pamela T. Young, Chair  
North Carolina Industrial Commission  
4336 Mail Service Center  
Raleigh, NC 27699-4336

Re: Proposed Changes to Rules for Mediated Settlement Conferences

Dear Chair Young:

I hope this letter finds you doing well. As you may know, I have been defending workers' compensation claims before the North Carolina Industrial Commission for eighteen years. Although I still handle some claims, the majority of my practice now involves mediating workers' compensation cases. I am also the former Chair of the Workers' Compensation Section of the North Carolina Bar Association and I am still involved in the Section Council.

I am writing to express my concerns regarding the proposed changes to the Rules for Mediated Settlement and Neutral Evaluation Conferences of the North Carolina Industrial Commission. I especially have serious concerns about the proposed change to Rule 2(a) of the Mediation Rules requiring completion of the mediation within 120 days of the mediation Order.

Over the years, I have participated as a defense attorney in hundreds of mediations. I have now also mediated approximately 1,200 workers' compensation claims. In my years of practice, I have heard little, if any, discontent expressed by parties or attorneys as to the speed in which mediation is completed. To the contrary, the attorneys and parties I deal with are much more concerned about making certain that a case is mediated at time which is most fruitful and with a mediator which the parties believe can be effective. By requiring parties to mediate too quickly or with a mediator who is less than optimal in a given case, I fear that mediations will be less effective.

In my experience, by the time an employer or carrier receives notice of hearing, assigns an attorney and has the file copied and transferred, several weeks from the hearing request have passed before the defense attorney receives the case. It takes days (if not weeks) to thereafter select a mediator and get the case scheduled for mediation. The parties then need to exchange discovery (which often involves necessary requests for extensions of time by both parties),

obtain employment records, a Form 22, medical records, medical bills and in many cases a Medicare Set-Aside proposal. It is very difficult for the parties to complete all of the above and to exchange necessary information within the 120 day timeframe now being proposed to complete mediation.

In addition, the structure of insurance companies is certainly more complex than when I began practicing years ago. Workers' compensation claims are also much more intricate and often involve significant amounts of money. Insurance companies routinely require 30 or more days to evaluate a case once all information is exchanged and to obtain the necessary authority to conduct a fruitful mediation. Given the complexity of workers' compensation claims, in most cases it is simply not feasible for either side to be properly prepared and ready to negotiate within a few months.

In the past few weeks, I have had the opportunity to speak with both defense and plaintiffs' attorneys regarding the mediation process, including the proposal that extensions of time to mediate would not be granted and that hearings would be held even in cases where the parties are still trying to gather information and want to mediate. Every attorney with whom I spoke was adamantly against a rule forcing parties to mediate before the case was ready.

All attorneys expressed concerns about being required to use certain mediators because the ones which they trust and have success with may not be able to mediate in the quick timeframe potentially required by the Commission. They agree that the new proposals would lead to less effective mediations and many, many more hearings in cases which would otherwise be resolved if the parties had adequate time to mediate. I share the concerns of these attorneys.

I hope that you will consider allowing parties to have the ability to obtain necessary extensions to mediate or, at the very least, to have a much greater time to complete mediation than 120 days from the mediation order. The parties and the attorneys involved in a specific case likely are in the best position to determine what is necessary to effectively mediate a case. The mediation program has been extremely successful in resolving Industrial Commission claims and thereby reducing the work of the Commission and the number of hearings held. The proposed Rule may make it less effective. Although I will not be able to attend the September 15, 2010 public hearing on the Rule changes (because I will be mediating that day) I hope that you will consider my comments in your deliberations. Thank you for your time.

Sincerely,



Jolinda J. Babcock  
N.C. Bar No. 19287

cc: Commissioners Bernadine S. Ballance, Linda Cheatham, Laura K. Mavretic,  
Danny Lee McDonald, Staci Meyer and Christopher Scott

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August 12, 2010

**Chair's Office**

**AUG 17 '10**

**NC Industrial**

Ms. Pamela T. Young, Chairman  
North Carolina Industrial Commission  
4340 Mail Service Center  
Raleigh, NC 27699

Re: Proposed Rule Changes

Dear Ms. Young:

I am an experienced workers' compensation practitioner representing injured workers and also an experienced mediator, and former Chair of the North Carolina Bar Association's Workers' Compensation Section.

I think the proposed 120-day cap to complete mediations is too short and will be counter-productive both to the Industrial Commission and to those who practice before it and, more importantly, to injured workers/employers/carriers.

Frequently – probably most of the time – defense counsel will not even get a file until about 30 days after the 33 is filed. The claim may call for a Medicare set-aside and that takes additional time for defense counsel to get. There may be necessary discovery. With the schedules of busy lawyers and busy mediators, it may be impossible to even have a mediation, or at least an effective mediation, within 120 days. I firmly believe the cap should be 180 days. That additional 60 days recognizes these concerns and will most of the time allow for an effective mediation.

I don't hear complaints about taking too long to get a hearing, and certainly that is not my experience. I think the mediation process has been overwhelmingly successful, both in getting claims settled that should be settled, and in speeding up the hearing process for those which cannot be settled.

A 120 day cap is going to force parties to go to a hearing in cases that may not need to be heard and foul up the process, causing needless delays in cases that need to be heard.

I will be glad to answer any questions.

Very truly yours,



Harry H. Clendenin, III  
NCSB No. 000843

HHC/elp

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August 25, 2010

AUG 27 '10

NC Industrial

The Honorable Pamela T. Young  
Chair, North Carolina Industrial Commission  
4340 Mail Service Center  
Raleigh, NC 27699-4340

**Re: Proposed Rule Changes**

Dear Chair Young:

As you know, I have represented injured workers for nearly twenty (20) years here in North Carolina. I also mediate workers' compensation cases approximately thirty (30) times per year.

The rule changes include a proposal to limit the time to complete mediation to 120 days. I believe this time period is too short and would recommend a period of 180 days to complete mediations.

I know that across the board, close to 80% of disputed workers' compensation claims are settled at mediation. In my own plaintiff's practice, approximately 75 to 80% of my cases are settled at mediation as well. I do know that it is difficult sometimes to schedule a mediation with busy lawyers on both sides and the better mediators scheduling several months into the future. For instance, here in Charlotte, popular mediator Joey Barnes is currently scheduling almost out to the end of 2010, even though it is currently mid-August.

Defense counsel frequently does not get a case file from the insurance company until weeks after a Form 33 is filed. The plaintiff does not know who defense counsel will be until the file is assigned to an attorney and we get a representation notice. At that point, we typically try to go ahead and set up mediation on litigated cases, but if we are trying to get one of the busier mediators, it is easy to go beyond the 120 day limit in that situation.

The Honorable Pamela Young  
August 25, 2010  
Page 2

As a practical matter, I think a 180 day period in which to complete mediation would be better and would make it possible for us to mediate every case, rather than having to go to hearing on some due to the difficulty of getting mediation completed during the 120 day proposed limit.

Yours very truly,

A handwritten signature in black ink that reads "Bob Bollinger". The signature is written in a cursive, slightly slanted style.

Bobby L. Bollinger, Jr.  
N.C. State Bar No. 15784

BLB/jc

**Henderson, Meredith**

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**From:** trey.gillespie@pciaa.net  
**Sent:** Tuesday, September 14, 2010 9:59 AM  
**To:** Henderson, Meredith  
**Cc:** micaela.isler@pciaa.net  
**Subject:** Public Hearing September 15 Proposed NCIC Rule Changes  
**Attachments:** PCI Comments to Proposed NCIC Rule Changes.pdf

Dear Ms. Henderson,

Attached are the PCI written comments to the proposed rule changes set for hearing tomorrow.

Thank you for your consideration.

Trey Gillespie  
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Trey Gillespie  
Senior Workers Compensation Director

September 14, 2010

Pamela T. Young  
Chair  
North Carolina Industrial Commission  
4336 Mail Service Center  
Raleigh, NC 27699-4336  
[meredith.henderson@ic.nc.gov](mailto:meredith.henderson@ic.nc.gov)

**Re: Proposed New Rules and Amendments to Rules of the Commission  
Public Hearing September 15, 2010**

Dear Ms. Young,

Thank you for setting this matter for rulemaking hearing on September 15, 2010 and allowing PCI and its member companies to participate the hearing.

Property Casualty Insurers Association of America (PCI) is an insurer trade association that represents over 1,000 insurance companies that write approximately 37% of the national property casualty market including 41.7% of the national workers compensation market. The PCI comments do not necessarily represent the opinions of all member companies.

PCI submits the following comments.

**1. Proposed New Rule 105 Electronic Payment of Costs**

**Comment:** It appears that the proposed new rule permits electronic payment of fees and costs owed to the Commission and does not mandate that the payments be made electronically. PCI supports giving payors this new option. The rule may need clarification that this method of payment is optional and not mandatory.

**2. Proposed New Rule 302 Required Contact Information**

**Comment:** The proposed new rule fails to identify how insurance carriers, third party administrators, and self-insured employers are expected to comply with the rule. The rule, if adopted, should identify not only what information is to be maintained and provided to the Commission but also how that information is to be provided and to whom. The sanctions specified in Rule 802 do not appear to be appropriate for a violation of this proposed new rule. Rule 802 references the sanctions found in Rule 37 of the North Carolina Rules of Civil Procedure for possible sanctions that can be levied by the Commission. Yet those sanctions apply to discovery abuse in litigation. Appropriate carrier contact information for discussing individual claims can be easily ascertained through various claim forms listed in Rule 103. Consequently, Rule 37 sanctions do not appear to be appropriate for violations of proposed Rule 302.

**3. Proposed Amendments to Rule 502 Compromise Settlement Agreements**

**Comment:** PCI recommends that the proposed new language not be adopted. There is no statutory authority in the North Carolina Workers Compensation Act for the payment of medical bills by the employee's attorney. NC Statute §97-17(b)(2) requires that the settlement agreement contain a list of all known medical expenses related to the injury, including disputed medical expenses, and a list of all medical expenses, if any, that will be paid by the employer as part of the settlement agreement. In addition, other statutes contemplate only the employer, insurer, or managed care organization paying medical bills, if any, including §97-18 and §97-59. It does not appear that the General Assembly has ever authorized payment of medical

bills by the employee's attorney as part of a settlement agreement or otherwise except in third party actions as provided in §97-10.2 and §97-90(d).

The proposed rule creates opportunities for the employee's attorney to negotiate reduced medical fees and take an attorney fee out of sums owed to the medical providers that are deposited into the attorney's trust account. Such a practice would undermine the duty of the Commission to regulate and approve attorney fees and charges of health care providers pursuant to §97-90.

There is some confusion within the insurance industry as to whether or not Rule 502 mandates that employer or carrier pay all unpaid medical expenses when settling disputed liability claims. The rule does not mandate such payments when read in conjunction with §97-17(b)(2). Nevertheless, should be rewritten to make that option clearer.

**Recommended wording:** *Where liability is denied, that the employer or carrier/administrator may undertake to pay all unpaid medical expenses incurred up to the date of the agreement.*

#### **4. Proposed New Rule 609A Medical Motions and Emergency Medical Motions**

**Comment:** The proposed new rule should be struck and practice should continue under Rule 609. Proposed new Rule 609A creates a very formal litigation process for medical motions and emergency medical motions including mandatory pre-trial conference, possible depositions, and written arguments and briefs. This will add considerable litigation expense to the delivery of medical benefits and potentially delays approval of medical care. This is bad for injured workers and employers/carriers.

#### **5. Proposed Amendments to Rule 703 Review of Administrative Decisions**

**Comment:** PCI agrees that clarification is needed on the legal effect of administrative orders filed by a single Commissioner and the remedies available to parties to appeal that order. However, there are a couple of practical problems associated with the 15 day deadline to file a Motion for Reconsideration or request for hearing. If a party is not represented by legal counsel at the time the order is issued, then it will be very difficult for the party to pursue either legal remedy. In addition, it is not unusual for a party to receive a copy of the order 15 days or more after the order is issued. Although the time deadline is tied to the "receipt" of the order and not the date of issuance, an unrepresented party may incorrectly believe that the appeal deadline has already passed.

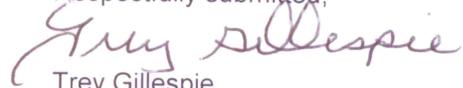
#### **6. Proposed Amendments to Rules for Mediated Settlement and Neutral Evaluation Conferences**

**Comment:** PCI recognizes that the §97-80(c) gives the Commission authority to order parties to participate in mediation under rules substantially similar to those approved by the Supreme Court. However, mediation has not proven to be effective in resolving disputes and consequently imposes unnecessary litigation expense and delay in dispute resolution in many cases. PCI recommends that the Rule 1(c) be amended to allow for Commission ordered mediation only when all parties agree to mediation or when a party files a meritorious motion for mediation.

**Recommended wording:** *(c) By order of the Commission. Commissioners, Deputy Commissioners, the Commission's Dispute Resolution Coordinator, and such other employees as the Commission Chair may designate from time to time may, by written order, require the parties and their representatives to attend a mediated settlement conference concerning a dispute within the tort and workers compensation jurisdiction of the Commission. The order for mediation will only be issued if all parties agree to mediation pursuant to Rule 1(a) or if a party files a meritorious motion for mediation pursuant to Rule 1(d). Requests to dispense with or defer a mediation conference shall be addressed to the Dispute Resolution Coordinator. Unless the context otherwise requires, references to the "Commission" in these rules shall mean the Dispute Resolution Coordinator.*

Thank you for considering these comments.

Respectfully submitted,

A handwritten signature in cursive script that reads "Trey Gillespie".

Trey Gillespie

PCI

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# North Carolina Association of Defense Attorneys

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

## **WRITTEN SUMMARY OF COMMENTS BY NCADA AT PUBLIC HEARING REGARDING INDUSTRIAL COMMISSION RULES**

The North Carolina Association of Defense Attorneys (NCADA) hereby submits this written summary of the remarks presented to the Industrial Commission at the September 15, 2010 public hearing regarding proposed new rules and amendments to the existing rules of the Industrial Commission. The NCADA will be submitting further written comments for consideration by September 29, 2010.

Regarding proposed changes to Rule 502, Compromise Settlement Agreements, the North Carolina Association of Defense Attorneys (NCADA) objects to proposed change to Rule 502(2)(b) preventing waiver of the requirements of this rule in matters involving pro se claimants. Elimination of this rule will significantly prohibit the ability of the parties to resolve cases before the Industrial Commission. Plaintiffs who are unrepresented often times are unrepresented because their case is so questionable that a Plaintiff's attorney is often unwilling to accept the case. Requiring Employers and Carriers to pay all unpaid medical expenses often times would render it cost prohibitive to resolve these questionable cases. Because of this, the North Carolina Association of Defense Attorneys suggests that the Industrial Commission continue to be allowed to waive this requirement in their discretion. There is a real likelihood that these cases will, instead, go on to hearings where the claimant will either fail to show and the case will eventually be dismissed with prejudice, or the hearing results in denial of the claim. This would be a waste of Commission resources.

The NCADA also objects to changes to Rule 502 (7) as proposed, which prevents extraneous language being included in settlement agreements to the extent this rule keeps out Medicare or SSDI language. The NCADA does not believe this suggested rule change adequately addresses what is intended by the Commission and is overly vague. Use of the term "extraneous issues unrelated to the workers' compensation claim" is not specific enough guidance for matters that should be included in a settlement agreement. Furthermore, to the extent such rule could be interpreted to prohibit parties from negotiating matters other than those under the Workers' Compensation Act, the NCADA believes that this rule would violate contract principals which allow parties to make contractual agreements at any time. To the extent the parties may reach any agreements other than those covered by the workers' compensation claim, the parties should be free to enter into such agreements but such agreements should not be part of the Compromise Settlement Agreement submitted to and considered by the Commission. If the parties desire to reach such other agreements, they must execute separate documents and consideration for such agreements. Most standard Orders approving settlement contain language stating "It is also to be noted, however, that this Order does not purport to approve, resolve or address any issue of matter over which the Industrial Commission has no jurisdiction, whether or not such issue or matter is referred to in the compromise settlement agreement executed by the parties in this action." The parties should be able to include language as they see fit.

The NCADA objects to changes to Rule 604(2) requiring Defendants to pay fees to the attorney appointed as the guardian *ad litem*. These fees are more fairly recouped from any recovery the claimant receives, just as standard attorney's fees are recouped. Furthermore, to the extent that a fee is to be assessed for an attorney acting as a Guardian Ad Litem, such fees should be based on a flat amount and not based on actual time spent as this would often encourage unnecessary inflation of the activities performed by the Guardian Ad Litem. If the rule is to be enacted as written, the NCADA would request that the term "in the discretion of the Commission" be added regarding the amount to be assessed.

The other fee increase suggested by these proposed rule changes includes assessing a fee to Defendants for providing an interpreter at mediation by adding proposed Rules 4(a) to the Rules for MSC. This unnecessary increase cost being passed along to Defendants is unnecessary and should not be the responsibility of Defendants. The NCADA believes that the general practice is for most attorneys representing individuals unable to speak English to have ways to communicate with their clients internally in their offices. If an attorney cannot adequately communicate with their client at mediation, the NCADA believes that it is likely he or she is unable to adequately communicate with the client at other times during the representation and, therefore, are not effectively representing the client in the first place. Therefore, to require the Defendants to pay a cost at a mediation where the parties must voluntarily enter into an agreement for the matter to be resolved and there are not records to be kept is an unnecessary cost that should not be born by Defendants.

Furthermore, proposed changes to Rule 7(c) of the Rules for MSC further improperly reallocate costs that would normally borne by the parties equally to defendants alone. If the postponement of mediation is due to the fault (such as failure to timely respond to discovery, thereby preventing Defendants from properly evaluating the claim in enough time to secure authority) or request of the Plaintiff, Defendants should not be levied with any associated fees.

The NCADA also objects to proposed changes to Rule 2(a) and (c) of the Rules for MSC. Language requiring certified mediators disenfranchises many of the most talented mediators the parties currently use in workers' compensation matters. While not certified, these mediators have numerous years of experience in handling workers' compensation matters and have actually mediated hundreds of cases. If the parties desire to use an effective mediator, who may not be certified by the Dispute Resolution Committee, the NCADA believes those parties should be allowed to do so without the additional requirement imposed by this requirement.

Furthermore, the NCADA also objects to language limiting the timeframe for mediation to 120 days. This prevents the opportunity to extend the mediation deadline even when legitimately necessary, such as when the Plaintiff's attorney files a 33 and 18 simultaneously. The claim may not be ripe for mediation, let alone hearing. Such a change does not allow the parties to adequately engage in meaningful settlement discussions. This is particularly the case where there may be more than one Defendant to an action.

Regarding proposed changes to Rule 701(4), the NCADA opposes language reducing the extension of time from 30 to 15 days. Often, the extension is necessary and usually requested before the matter is scheduled for oral argument. Currently the rules provide that the extension

may only be filed by agreement if the matter is not scheduled for hearing. The NCADA believes the current rule provides enough protection to avoid unnecessary delay.

The North Carolina Association of Defense Attorneys appreciates the Industrial Commission allowing us to present our position in these matters.

Chair's Office

SEP 17 '10

## LEWIS & ROBERTS

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September 14, 2010

### VIA EMAIL AND U.S. MAIL

Special Deputy Commissioner Meredith Henderson  
North Carolina Industrial Commission  
4336 Mail Service Center  
Raleigh, North Carolina 27699-4336

Re: Proposed Rule Changes

Dear Special Deputy Commissioner Henderson:

The purpose of this correspondence is to offer my comments regarding the proposed rule changes and upcoming public hearing. In particular, I am writing to comment on the proposed Rules for Mediated Settlement Conferences, Rule 2, Selection of Mediator.

The rule as currently written allows for the selection of a mediator... "who, in the opinion of the parties, is otherwise qualified by training or experience to mediate all or some of the issues in the action..." This rule pertaining to the selection of the mediator in Industrial Commission cases has allowed the parties to mutually agree upon a mediator based on training or experience as long as the mediation process has been formally in existence at the Industrial Commission.

I have personally been selected by agreement of the parties as mediator in more than 225 cases. I currently spend approximately 50% of my practice time as an active mediator in Industrial Commission cases. I have also participated in more than 750 mediations as counsel of record for one of the participating parties, normally as defense counsel.

My suggestions and comments are simply that the proposed rule changes regarding the selection of a mediator allow for mediators such as myself to be grandfathered and obtain mediator certification with the Dispute Resolution Commission by proving adequate training or experience to conduct mediation of Industrial Commission claims.

Special Deputy Commissioner Meredith Henderson  
September 14, 2010  
Page 2

The last time proposed rule changes regarding the selection of a mediator were discussed the ability to obtain certification with the Dispute Resolution Commission through a grandfathering process was included. The requirement to quickly complete the certification process required by the Dispute Resolution Commission for Superior Court Mediators would require a significant investment of time and create a hardship for those with an active mediation practice and/or full case load.

In the alternative, I would request that the Commission allow a reasonable period of time for Dispute Resolution Commission certification to be obtained, particularly for those individuals who have been allowed to conduct mediations by virtue of their experience and upon mutual agreement of the parties for years. I will be glad to discuss these comments further with you at your convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "John D. Elvers". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

John D. Elvers

JDE/sc

**Summary of Comments by Gina Cammarano (Workers' Comp Section Chair, NCAJ)**

**A. Proposed Rule 502(7)**

There are two major concerns about this proposed Rule:

(1) First is the concern that it will negatively impact our ability to protect our clients' rights to collateral benefits in the clincher agreement. Our concern stems from the proposed Rule's bar on including "provisions regarding extraneous issues unrelated to the workers' compensation claim" in the clincher agreement. This could prevent us from including language in the clincher that is necessary to protect our clients' rights, including:

(A) Social Security offset language

(B) Language required by CMS regarding an MSA

(C) Language to protect our clients' rights to future group health insurance benefits

(D) Language to minimize the settlement's effect on other benefits programs, such as Long-Term Disability benefits

(2) Second is the concern that this proposed Rule will forbid the parties from negotiating any "side agreements" at mediation (such as an agreement for the injured worker to resign from employment and/or release other potential claims) along with the workers' compensation settlement. Prohibiting these side agreements would prevent the parties from reaching a settlement in many workers' compensation claims. The vast majority of our Section members believe that an injured worker who is represented by counsel should be allowed to enter into a "side agreement" along with the workers' compensation settlement.

Furthermore, because Rule 502(2)(e) *already* states that the Compromise Settlement Agreement cannot contain language compromising or releasing any rights other than those rights arising under the provisions of the Workers' Compensation Act, proposed Rule 502(7) appears to be superfluous.

If the Commission's intent is to avoid a situation like that in Kee, where the mediated settlement agreement referred to a resignation and release, the solution is to include the language of Rule 502(2)(e) on the mediated settlement agreement (which has been accomplished by Form MSC 8) and to make sure that all resignations, releases and other side agreements are documented on forms that are *completely separate* from the mediated settlement agreement.

**B. Proposed Rewritten Rule 502(2)(b)**

Many of our Section members are concerned about the proposed change to this Rule that allows the defendant to pay money for the unpaid medical bills to the injured worker's attorney instead of directly to the medical providers. The injured worker's attorney then would be required to place this money in his or her trust account and take care of paying all the medical providers.

We believe that the defendant is in a much better position to see to it that the medical providers are paid the full amounts that they are owed. As plaintiff's attorneys, we are not accustomed to paying medical bills and we are not familiar with the billing codes, customary charges, or even the Workers' Comp Fee Schedule.

Since the medical providers are not required to accept the Workers' Comp Fee Schedule amounts from plaintiff's attorneys in denied cases, we will be left not knowing how much money will be needed to pay the unpaid medical bills in full. It is difficult to negotiate a settlement for our clients without knowing how much of the settlement money will need to go to the unpaid medical bills. A workers' comp carrier is in a much better position to get the medical providers to accept the Workers' Comp Fee Schedule amounts as full payment for unpaid bills.

We are concerned that if Rule 502(2)(b) gives the parties the option of having the plaintiff's attorney take care of the unpaid medical bills, this will become the default option and the defendants will try to insist on this option in all cases.

We also are concerned about placing non-client money into our trust accounts because of the strict accounting requirements that the State Bar places on us with regard to the money going into and out of our trust accounts.

**C. Proposed Rule 614(4)**

Many of our Section members are concerned with the requirement that a withdrawing attorney file a Form 44 on behalf of the injured worker. The main concern is that this requirement may pose an ethical dilemma for the withdrawing attorney if that attorney does not, in good faith, believe that there is error to be assigned to the Deputy Commissioner's Opinion & Award. Also, because a Form 44 must be accompanied by an Appellant's Brief to the Full Commission if the appellant wants the opportunity to be heard at oral argument, this places a heavy burden on a withdrawing attorney.

We believe that a better alternative is to require the withdrawing attorney to file (or assist the injured worker with filing) a timely Notice of Appeal pursuant to N.C. Gen. Stat. §97-85 and Rule 701, if the injured worker wishes to appeal to the Full Commission. This would serve the purpose of preserving the injured worker's appeal rights, but it would not place an undue burden on the withdrawing attorney.

**D. Proposed Rule 609A**

In light of the Court of Appeals' ruling in the Berardi case, we suggest that Rule 609A contain a provision stating that an Order entered by the Full Commission pursuant to the Expedited and Emergency Medical Motions Procedures is interlocutory.

**E. Proposed Rule 703(4)**

Again, in light of the Court of Appeals' ruling in Berardi, we suggest that the proposed new section of Rule 703 also state that an Order entered by the Full Commission pursuant to the Expedited and Emergency Medical Motions Procedures is interlocutory.

**F. Proposed Mediation Rule 4A**

Many of our Section members, especially those attorneys who are bilingual or multi-lingual, are concerned that this proposed Mediation Rule would make a foreign language interpreter *mandatory*. When the attorney can communicate directly with his or her client in the client's language of choice, there is no need for the injured worker to be assisted by an interpreter. Therefore, we believe that proposed Mediation Rule 4A(a) should be amended to state that a person shall be assisted by a foreign language interpreter, if he or she (or, if represented by counsel, his or her attorney) requests.

Our Section members also are concerned that an interpreter who is retained by the employer or insurer may disclose confidential communications between the injured worker, attorney and mediator to the employer or insurer. Therefore, we believe a better practice is for the requesting party (not the employer or insurer) to retain the interpreter.

So we would suggest the following additional revisions to the language of this proposed Rule:

(1) Amend section (d) to state: "Upon giving notice of the need for an interpreter, the requesting party (not the employer or insurer) shall retain a qualified, disinterested interpreter, either agreed upon by the parties or approved by the Industrial Commission, to assist at the mediation conference."

(2) Amend section (e) to remove the language "that retained the interpreter" from the second sentence.

(3) Amend section (e) to substitute the term "requesting party" for the term "movant" in the last sentence.

## Henderson, Meredith

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**From:** Leonard Jernigan [ltj@jernlaw.com]  
**Sent:** Wednesday, September 15, 2010 12:48 PM  
**To:** Henderson, Meredith  
**Subject:** Proposed Rule Changes

Ms. Henderson:

This morning I addressed two rule changes ( in red below) and I wanted to follow up my comments in writing.

1. (page 1) Rule 101. I believe the rule should be modified as follows:

Documents permitted to be filed electronically may be filed until 11:59 p.m. on the day due, except documents required by a Deputy Commissioner to be filed simultaneously. These documents must be filed no later than 5:00 p.m. on the day due.

12. (page 9) Section 3 of Rule 610. I would change the last line of the first full paragraph to read:

Failure to make prompt payment (no later than 30 days following the receipt of the filed fee Order ) to an expert witness shall result in the assessment of a 10% penalty.

If you have any questions, please advise. Best regards.

Leonard T. Jernigan, Jr.  
Bd. Certified Specialist - Workers' Compensation Law  
Author - N.C. Workers' Compensation: Law and Practice  
The Jernigan Law Firm  
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## Henderson, Meredith

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**From:** Seth Bernanke [SBernanke@compensation.net]  
**Sent:** Friday, September 24, 2010 11:10 AM  
**To:** Henderson, Meredith  
**Subject:** Comments on amendments to IC Rules

Meredith:

I hope you're doing well. Below are my comments on the IC Rule amendments. Hope you have a good weekend.

Seth

Seth Bernanke  
Law Office of Seth M. Bernanke, P.C.  
1307 W. Morehead St., Suite 202  
Charlotte, NC 28208  
SBernanke@compensation.net  
704-376-1578  
State Bar No. 12867

Rule 502: In general, I like the reiteration that extraneous issues shouldn't be included in the clincher. It helps argue against closing of any and all claims that may or may not exist, etc., but I am worried that it may be applied to MSA and SSDI language, which needs to be part of the clincher.

Rule 609A: The medical motions Rules are much more confusing than the IC paper on this. There is no definition of a standard medical motion versus "expedited" medical motion and it's not clear if the procedures are the same or different. At least "emergency" is treated separately and better defined.

Rule 610: It's unclear why provisions for payment of expert witnesses is in the "pre-trial" rule, but there is a clause there that payment should be made "promptly" or 10% penalty. If penalties may be imposed, all parties need to have a date certain, like 30 days.

Rule 614: I am opposed to requiring withdrawing attorneys to file a F44, as the attorney may be withdrawing due to some adversarial relationship, including disagreements with the client about what issues are appropriate. Maybe if it is further amended to say that the issues presented in the Form 44 by the withdrawing attorney are considered "notice only" to the other party and will not be binding on the party who will be without representation. A subsequent attorney (or the client) should not be bound by a pleading drafted by a withdrawing attorney.

Rule 701: The 30 days stipulated extension does not need changing, as it only applies when the matter hasn't been docketed on the IC argument calendar. Reducing the time frame of extension will just mean additional requests for extension and will not speed up the decisions any.

Mediator Rule 7, Compensation: I would think the carriers would be squawking about these increased fees, as they usually end up paying them. However, if the carriers begin refusing, it would be a significant burden on our clients.

## Henderson, Meredith

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**From:** trey.gillespie@pciaa.net  
**Sent:** Tuesday, September 28, 2010 10:36 AM  
**To:** Henderson, Meredith  
**Cc:** micaela.isler@pciaa.net  
**Subject:** Supplemental Comments to Proposed Industrial Commission Rule Amendments  
**Attachments:** PCI Supplemental Comments to NCIC rule amendments.pdf

Meredith,

Attached are supplemental written comments from PCI for the proposed NC Industrial Commission rule amendments.

Thanks

Trey Gillespie  
PCI  
Senior Workers Compensation Director  
700 Lavaca St. Suite 1454  
Austin, TX 78701  
512.334.6636  
512.517.2680 cell  
888.499.0484 fax  
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Property Casualty Insurers  
Association of America  
Shaping the Future of American Insurance

Trey Gillespie  
Senior Workers Compensation Director

September 28, 2010

Pamela T. Young  
Chair  
North Carolina Industrial Commission  
4336 Mail Service Center  
Raleigh, NC 27699-4336  
[meredith.henderson@ic.nc.gov](mailto:meredith.henderson@ic.nc.gov)

Re: **Proposed New Rules and Amendments to Rules of the Commission  
Public Hearing September 15, 2010**

Dear Ms. Young,

Thank you for setting this matter for rulemaking hearing on September 15, 2010 and allowing PCI and its member companies to participate the hearing.

Property Casualty Insurers Association of America (PCI) is an insurer trade association that represents over 1,000 insurance companies that write approximately 37% of the national property casualty market including 41.7% of the national workers compensation market. The PCI comments do not necessarily represent the opinions of all member companies.

PCI submits the following comments to supplement the comments previously filed on September 14, 2010.

**7. Proposed New Rule 502 Section 2.b.7 Compromise settlement agreements and mediated settlement agreements shall not contain provisions regarding extraneous issues unrelated to the workers compensation claim which is the subject of the settlement agreement.**

**Comment:** North Carolina Statute §97-17 governs workers compensation settlements. That statute does not restrict the subject matter that may be included in the settlement agreement. Likewise, the statute does not give the Industrial Commission authority to restrict the subject matter that may be included in the settlement agreement. Instead, the first sentence of subsection (a) of the statute makes it clear that the workers compensation act does not impose any such restrictions by stating, "*This Article does not prevent settlements made by and between the employee and the employer so long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this Article.*" Commission review of the "*amount of compensation and the time and manner of payment*" is governed by subsections (b) and (c) of that statute. There is nothing in any of those subsections that can be reasonably construed to give the Commission authority to not approve a settlement for any reasons not expressly contained in the statute. Likewise, there is no verbiage anywhere in the statute that gives the Commission authority to not approve a settlement agreement on the basis that the agreement contains "*provisions regarding extraneous issues*" between the employee and employer.

**Comment:** This subsection should be struck.

**8. General Comment**

Appalachian State University Brantley Risk and Insurance Center is about to issue a very important study on the North Carolina workers compensation system. The Industrial Commission should delay this far reaching rule amendment initiative until after the study is released so that the Commission can consider issues addressed in the study before deciding the scope and content of the rule initiative. In the alternative, the

Commission should at least delay rule adoption until after the study has been carefully reviewed and considered.

Thank you for taking and considering these supplemental comments.

Respectfully submitted,

Trey Gillespie  
PCI  
700 Lavaca Suite 1454  
Austin, TX 78701  
512-334-6636  
trey.gillespie@pciaa.net

## Henderson, Meredith

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**From:** Velda Wall [velda.wall@raleigh.twcbc.com]  
**Sent:** Wednesday, September 29, 2010 4:56 PM  
**To:** Henderson, Meredith  
**Cc:** jim@jimlorelaw.com  
**Subject:** IC Rule 502 Memoranda of Law  
**Attachments:** Rule 502 Memoranda.pdf

Meredith R. Henderson  
Law Clerk to Chair Pamela T. Young  
North Carolina Industrial Commission

Re: Proposed IC Rule Change / Rule 502

Attached please find a Memoranda of Law regarding the proposed IC Rule 502 change.

R. James Lore

Velda Wall  
Asst. to Jim Lore  
R. James Lore Attorney at Law  
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## NORTH CAROLINA INDUSTRIAL COMMISSION

### **In Re Proposed Changes to the North Carolina Industrial Commission Rules**

Notice of Proposed Rule Changes: August 9, 2010

Public Hearing: September 15, 2010

Written Comment Period open through September 29, 2010

### **PROPOSED RULE CHANGE**

#### **8. Rule 502 is amended by adding a new section to read:**

7. Compromise settlement agreements and mediated settlement agreements shall not contain provisions regarding extraneous issues unrelated to the workers' compensation claim which is the subject of the settlement agreement.

### **APPLICABLE STATUTE**

**§ 97-82 Memorandum of agreement between employer and employee to be submitted to Commission on prescribed forms for approval; direct payment as award.**

(a) If the employer and the injured employee or his dependents reach an agreement in regard to compensation under this Article, they may enter into a memorandum of the agreement in the form prescribed by the Commission.

An agreement, however, shall be incorporated into a memorandum of agreement in regard to compensation: (i) for loss or permanent injury, disfigurement, or permanent and total disability under G.S. 97-31, (ii) for death from a compensable injury or occupational disease under G.S. 97-38, or (iii) when compensation under this Article is paid or payable to an employee who is incompetent or under 18 years of age.

The memorandum of agreement, accompanied by the material medical and vocational records, shall be filed with and approved by the Commission; otherwise such agreement shall be voidable by the employee or his dependents.

### **APPLICABLE CASE LAW REGARDING THE PURPOSE OF N.C.G.S. § 97-82(a)**

Over forty years ago, interpreting sections 97-17 and -82, this Court stated: . . . The Industrial Commission stands by to assure fair dealing in any voluntary settlement . . . [Section 97-82] was inserted in the statute to protect the employees of the State against the disadvantages arising out of their economic status and give assurance that the settlement is in accord with the intent and purpose of the Act. Therefore, in approving the settlement in which compensation is awarded,

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the Commission acts in a judicial capacity. The voluntary settlement as approved becomes an award enforceable by a court decree.

Biddex, 237 N.C. at 663, 75 S.E.2d at 780 (emphasis added). Later, this Court stated that it presumed the Commission approves voluntary settlements "only after a full investigation and a determination that the settlement is fair and just." Caudill v. Manufacturing Co., 258 N.C. 99, 106, 128 S.E.2d 128, 133 (1962) (considering a compromise agreement)." The law thus undertakes to protect the rights of the employee in contracting with respect to his injuries." Id.

Vernon v. Steven L. Mabe Builders, 336 N.C. 425, 431, 444 S.E.2d 191, 194 (1994)

#### ISSUE #1

**Does the IC have jurisdiction to prohibit parties from hiding some essential terms of a settlement agreement involving rights not arising under the NC Workers' Compensation Act in side agreements not submitted in clinchers for review and approval under N.C.G.S. § 97-82.**

**ANSWER: Yes, for more than 30 years the IC has exercised this jurisdiction, enabled under N.C.G.S. § 97-82, former IC Rule XI and current Rule 502.**

#### ISSUE #2

**Does the IC have jurisdiction to approve and regulate side agreements involving rights not arising under the NC Workers' Compensation Act?**

**ANSWER: Yes, in the sense that the IC does have the authority to prohibit a "tie" between the settlement document releasing rights arising under the NC Workers' Compensation Act and any other settlement document releasing rights not arising under the Workers' Compensation Act, even when they are contained in separate documents—one submitted to the IC and the other withheld from the IC.**

#### ISSUE #3

**Does the IC have the discretion to not take the necessary steps to insure that all of the terms of settlement relate solely to the release of rights that arise under the NC Workers' Compensation Act?**

**ANSWER: No – N.C.G.S. § 97-82, as construed, makes this a mandatory responsibility of the IC, not permissive. It requires the IC to insure that the overall proposed settlement, whether submitted to or withheld from the IC, does not contain terms of release of rights outside of the Workers' Compensation Act.**

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### **BACKGROUND OF AFFIANT**

I graduated with a B.S. in Electrical Engineering from N.C. State University in 1973. I received my J.D. degree from N.C. Central University in 1976 *magna cum laude*. I am licensed to practice law in the State of North Carolina and have practiced since 1976. For 31 years my practice has been focused on the field of workers' compensation law. In the late 1970s and early 1980s, I and a few others, formed the group of workers' compensation lawyers who ultimately became the Workers' Compensation Section of the North Carolina Academy of Trial Lawyers. Thereafter, I was the Chair of either the Workers' Compensation Section or the Workers' Compensation Committee or both for many years. I still hold the position of Legislative Chair. During this time I also served on the Workers' Compensation Committee of the North Carolina Bar Association and on the Litigation Council for that organization.

I have litigated hundreds of workers' compensation cases before the North Carolina Industrial Commission and counting ghost written briefs for the other counsel and Amicus briefs have handled more than 100 involving workers' compensation laws before the North Carolina Court of Appeals and the Supreme Court of North Carolina. Many of these decisions are considered significant cases in this field of jurisprudence.

I still serve as one of the original members of the Advisory Council to the North Carolina Industrial Commission as set forth in Chapter 97 of the Act. I am a plaintiffs' counsel representative to the Advisory Council. The Advisory Council gives input to the Industrial Commission with respect to planning, policy, and resolutions of issues.

I was selected by the North Carolina State Bar as the original Chair of the Legal Specialization Sub-Committee for Workers' Compensation. Along with a few others, we set the standards necessary to become an attorney Board Certified in Workers' Compensation, prepared

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the examination and tested other counsel seeking to become a board certified specialist in the field. As the Chair, I was deemed in as a specialist in the field of workers' compensation law.

I have lectured and written on the topic more times than I care to remember including before the Industrial Commission itself, the North Carolina Academy of Trial Lawyers, (now the North Carolina Advocates for Justice) and the North Carolina Bar Association. I co-chair the annual Workplace Torts and Workers' Compensation Seminar of the North Carolina Advocates for Justice which is the most widely attended seminar of any type given year-in and year-out. Each summer I, along with Hank Patterson, conduct a practical skills course of sorts on the topic of workers' compensation at the NCAJ annual meeting and have done so for many years. In 2007 I was among the first group of attorneys nationally to be inducted as a fellow into the National College of Workers' Compensation Lawyers. In 1993-1994 I was a member of a small group that drafted what was later enacted verbatim by the Legislature as the 1994 revisions to the Workers' Compensation Act.

#### **FAMILIARITY WITH IC RULE 502**

Based on my education and professional experience in the field of workers' compensation law in North Carolina, I am familiar with the history of Industrial Commission Rule 502 and the Industrial Commission's application of the Rule. It is my expert opinion that Industrial Commission Rule 502(1)(e) has been historically construed to preclude employers from conditioning execution of a workers' compromise settlement agreement on the release of rights arising outside the provisions of the Workers' Compensation Act. One of the major purposes of Industrial Commission Rule 502 is to prevent employees from releasing their rights arising outside the Workers' Compensation Act. In fact, Rule 502 and N.C.G.S. § 97-82 are the very reasons that the Industrial Commission's form "Order Approving Compromise Settlement

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Agreement” states that it does not cover the release of rights arising outside of the Workers’ Compensation Act.

I was personally involved with cases against Cannon and Wiscasset Mills dating back to the time frame 1979-1981 in which the IC specifically prohibited defendants from attempting to extract omnibus side releases based on the language now found in IC Rule 502. At that time the rule was designated as Rule XI 2.f. These historical rulings prohibiting the use of general releases were made by the then Chairman of the Industrial Commission at that time, William H. Stephenson. In fact, if then Chairman Stephenson ever got wind of defendants attempting to condition settlement on the execution of these types of general releases he would actually call any defense counsel involved on the telephone and threaten sanctions against their client if they did not immediately cease and desist.

Notwithstanding that IC Rule 502(1)(e) and former Rule XI 2.f have historically prohibited the conditioning of settlement of workers’ compensation cases on the release of rights arising outside of the Act, in recent years some defendants have resumed this prohibited practice behind the scenes by attempting to extract general releases in side agreements while not disclosing the existence of these conditional general releases to the Industrial Commission during the settlement process. Since such general releases/side agreements are in violation of Industrial Commission Rule 502 and N.C.G.S. § 97-82 the execution of such a general release cannot constitute a material term of the settlement and is not enforceable by the Industrial Commission.

The key to understanding why IC Rule 502, both today and historically, prohibits side agreements containing terms of release of non-workers’ compensation rights that are dependent upon the execution of a workers’ compensation clincher agreement can be found in N.C.G.S. § 97-82. This statute requires the Industrial Commission to protect workers’ compensation

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claimants by reviewing proposed Workers' Compensation agreements for fairness and the determination of whether it is in the best interests of claimant that any proposed agreements be approved.

The crux of the current controversy is caused by practices that are routinely placing essential terms of the overall proposed settlement in a separate document commonly known as a "side agreement". This is not a situation in which the side agreement can be taken or not, independent of the execution of the proposed clincher agreement regarding workers' compensation rights. If a side agreement contains terms that can be taken or left, it is not the type of agreement prohibited by IC Rule 502 and N.C.G.S. § 97-82.

But these are not the agreements at issue and prohibited. What is prohibited by Rule 502 is hiding essential and dependent terms of an overall settlement agreement, meaning a general release of every non-Workers' Compensation employment right known to mankind, in a dependent side agreement not submitted to the Industrial Commission for review and approval. If the release of non-Workers' Compensation rights are dependent and part of the overall settlement, simply putting these terms in a separate document does not protect it from the purview of Rule 502 and N.C.G.S. § 97-82. If these side terms of settlement are part and parcel of the overall settlement agreement the Industrial commission *must consider and exclude* those terms under N.C.G.S. § 97-82 in the approval process deliberations.

Regarding these side agreement terms, even the employer/ insurance community concedes that the Industrial Commission has no jurisdiction to judge and approve the appropriateness of these side terms. I agree, and this is the very reason IC Rule 502, former Rule XI and N.C.G.S. § 97-82 exist to protect workers. In addition, like most plaintiffs' counsel practicing in the field, the Industrial Commission does not have the expertise required to make

the judgment required under N.C.G.S. § 97-82 in order to approve any agreement in which the release of these non-Workers' Compensation rights are actually part and parcel of the overall settlement agreement. In legal jargon these are called illegal tying ("side") agreements. For this reason, the Industrial Commission has held more than 30 years that such agreements are prohibited by former Rule XI, current Rule 502 and N.C.G.S. § 97-82.

The Industrial Commission's current firewalls against dependent side agreements have not worked. Currently, the IC relies on language within a settlement agreement to the effect that the clincher agreement contains all of the terms of settlement and only affects settlements rights under the NC Workers' Compensation Act. The IC also attempts to memorialize that it has in fact fulfilled its duty under N.C.G.S. § 97-82 and Rule 502 by using stock language in its approval order that says:

It is to be noted, however, that this Order does not purport to approve, resolve or address any issue or matter over which the Industrial Commission has no jurisdiction, whether or not such issue or matter is referred to in the compromise settlement agreement executed by the parties in this action.

This has failed to protect workers from illegal side agreement releases as the IC is required to do under N.C.G.S. § 97-82. Defendants and weak plaintiff's counsel know full well that essential terms for the overall settlement agreement are routinely placed in side agreements hidden from the IC and that you cannot get WC clincher agreements executed by the defense without first executing an onerous side agreement with a general release of all rights to any cause of action and/or a resignation of employment. What the typical clincher agreement submitted to the IC really means is that only the workers' compensation rights are released within *the four corners of the paper document actually submitted to the IC*. The non-Workers' Compensation rights are being released concurrently and dependently in a separate document.

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More claimants submitting proposed settlement agreements to the IC are unrepresented by legal counsel than are represented. Although the IC has the statutory duty to determine whether a proposed clincher agreement is in the best interests of either a represented or an unrepresented worker, the unrepresented worker illustrates perhaps the most compelling case for reform of the IC's application of IC Rule 502.

### **THE REQUIRED REMEDY**

The remedy really does not require a rewrite of Rule 502. Instead, all that is required is that *all clincher agreements* be ordered to contain the following language:

“We the undersigned parties and respective legal counsel affirm under oath that any side agreements among the parties not submitted to the IC for review are not directly or indirectly dependent upon the execution of any proposed workers' compensation settlement agreement or vice versa. The claimant and his legal counsel, if any, have been notified and agree that the proposed settlement of workers' compensation rights may go forward independent of the execution of any side settle agreement containing the release of any rights not arising under the Workers' Compensation Act.”

The foregoing language will insure that all proposed clincher terms that are truly not part and parcel of the overall settlement can go forward while side agreements hiding essential terms of the WC clineher are ferreted out and prohibited.

No doubt some in the business and insurance community will say that protecting workers from prohibited side agreements will chill settlements, increase the work load of the IC, etc. History has shown this is not the case. The same arguments were made 30 years ago when the IC ferreted out the same prohibited conduct and essentially eradicated it for more than 20 years, only to have it creep back into the practice of Workers' Compensation during the last 10 years. What will happen is that defendants will have to go back to separately negotiating the release of non-Workers' Compensation rights as was done from around 1980 to 2000. That practice

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appropriately bifurcated the release of these non- Workers' Compensation rights from the IC. Currently because the IC is not asking the questions essential to ferret out prohibited side agreements and is not requiring the key assurances from the parties, it is really subsidizing the generation of general releases used against workers at a later date notwithstanding the language placed in the standard order of approval of clinchers.

This the 29<sup>th</sup> day of September, 2010.

  
\_\_\_\_\_  
R. James Lore  
R. JAMES LORE, ATTORNEY AT LAW  
State Bar No. 7209  
102-I Commonwealth Court  
Cary, North Carolina 27511  
(919) 469-9103

**NORTH CAROLINA  
COUNTY OF WAKE**

**SWORN TO AND SUBSCRIBED BEFORE ME THIS**

29<sup>th</sup> DAY OF September, 2010.

Velda B Wall  
\_\_\_\_\_  
NOTARY PUBLIC

**MY COMMISSION EXPIRES:** 6-16-2014



**Henderson, Meredith**

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**From:** W. Scott Fuller [wsf@cshlaw.com]  
**Sent:** Wednesday, September 29, 2010 11:20 PM  
**To:** Henderson, Meredith  
**Cc:** Fuller, Scott W.  
**Subject:** Proposed Rule Changes

Meredith:

I understand that you are the primary contact person for the submission of comments on the proposed rule changes.

I was at the public hearing earlier this month, and I thought that the most critical points were touched upon by other members of the bar. I wish to comment upon several of the proposed rules that got little or no attention at the public hearing. The comments that I make are my own, and do not necessarily reflect the concerns of my firm or my clients.

Proposed Rule 302: As it is currently drafted, I am concerned that this proposed rule creates more problems than it solves. Larger insurance companies may be handling hundreds of NC workers' compensation claims simultaneously, and out of different offices located around the country. In addition, an insurance company is like any other business, and different tasks are handled by different people, depending the issues involved and the skills needed to address those issues. Designating an individual as a "primary contact person for workers' compensation issues in North Carolina" creates a logistical nightmare for these companies. As a practical matter, it probably means that the NCIC will serve all kinds of notices upon that individual, even though that person may have absolutely no knowledge of what is going on in connection with any given claim, and even though the claim may be handled by an individual that is three time zones away. Just as problematic, the rule speaks in terms of "issues," and not just workers' compensation "claims," which means that an insurance company may not actually be able to task an individual with handling these duties, because the training and experience needed to handle different kinds of issues simply cannot be left to one person.

Proposed Rule 605: I would suggest that this proposed rule be broadened slightly in the first sentence and the next-to-last sentence to include matters that a party reasonably believes "may later be RELEVANT AND/OR DISPUTED." In my experience, discovery is often used as a means of narrowing issues by trying to verify facts. It is not unusual for one party to believe that facts are relevant, even though the facts may not be truly disputed

Proposed Rule 610: As I represent defendants, if the NCIC's intention is to have defendants handle those issues associated with a medical expert's deposition, then I would request that defendants be specifically authorized by rule to have whatever reasonable and necessary contacts with the medical experts as are necessary in order to comply with their obligations under this rule, without the fear that opposing counsel will cry "Salaam." I would further suggest that the rule make it clear that defendants are not responsible for paying the expert for any time where the plaintiff's attorney meets privately with the medical expert ... which is a more frequent point of contention than than the NCIC may realize. Finally, I would suggest that the time limits for payment of an expert witness fee be measured in some way that is relatively definite, and that the time limits run from some event that is within the defendants' control. For example, I would suggest that, instead of "prompt," and instead of "following the entry of a fee order," the proposed rule might say that payment of the expert witness fee is due "within 30 days of a defendant's receipt of a fee order."

Proposed Rule 701: Attorneys that handle a significant volume of cases before the Industrial Commission, whether they represent plaintiffs or defendants, are pressed for time. If the parties agree upon an extension of time, then I would like to see the NCIC leave the present rule alone, rather than imposing tighter deadlines on counsel.

Proposed Rule 3 for MSCs: To the extent that someone is being subjected to sanctions for things that are alleged to have occurred at a mediation, then I believe that person and/or entity should be able to put on a defense. The current rule seems to provide for that, and the proposed rule does not.

9/30/2010

Proposed Rule 7 for MSCs: In subsection (c), I would propose that all defendants be allowed the same option afforded to the state, regardless of written procedures. This would comport with common practice. Also, I am opposed to the proposed language that indicates that "fees may be taxed as other costs by the Commission." A standard Opinion & Award will tax the NCIC's "costs" to defendants. I believe that case law is to the effect that mediation expenses are a cost of the parties, and not a cost of the Industrial Commission. I am concerned that this proposed will be interpreted by some members of the bar to re-allocate the parties' costs, such that defendants are always responsible for all mediation costs in any case that is decided by an Opinion & Award, and I do not believe that this is equitable or good policy.

Thanks so much for your kind consideration of these comments.

Regards.

wsf



CRAWFILL SUMNER  
& HARTZOG LLP

**W. Scott Fuller**  
*Attorney at Law*  
mail

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