STATE OF NORTH CAROLINA

BEFORE THE NORTH CAROLINA INDUSTRIAL COMMISSION

SEPTEMBER 15, 2010

HEARING BEFORE THE FULL COMMISSION

ON

PROPOSED RULE REVISIONS

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Linda Cheatham

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Bernadine S. Ballance

Laura K. Mavretic

Christopher Scott

Staci Meyer

I N D E X

E X H I B I T S

P R O C E E D I N G S

CHAIR YOUNG: Good morning. Be seated, please. Thank you very much for coming this morning. All right. Good morning, everyone. Again, thank you for joining us this morning for our public hearing. My name is Pam Young and I'm Chair of the North Carolina Industrial Commission. We are sitting this morning pursuant to matters published in the Legal Notices section of the News and Observer Newspaper on August the 9th, 2010, and on the Industrial Commission's website since that date. We're here for a public hearing of rule-making to address amendments and additions to the workers' compensation, tort claim, and mediation rules of the Industrial Commission. The Commission is holding this hearing for the purpose of receiving comments from the public concerning these proposed rule changes. We've already received some written comments from the public and the record will be held open to receive additional written comments through the end of business - the close of business on September 29th, 2010. I'd like at this time to introduce the other Commissioners. Beginning on my far right, we have our newest Commissioner here, Linda Cheatham. Seated next to Linda - to Commissioner Cheatham is Danny McDonald. Next we have

Bernadine Ballance, Laura Mavretic, Stacy Meyer on the end. Commissioner Chris Scott is en route. At this time, the Commission wishes to thank the members of the public and Bar who submitted recommendations or input regarding the proposed rule changes considered by the Commissioners. This also includes a very long list of folks who assisted with the proposed mediation rules. I'd like to read their names at this time. Victor Farah, Roy Baroff, Buxton Copeland, Jacquelyn Clare, Lorrie Dollar, James Walker, Bobby Bollinger, Bruce Hamilton, LeAnn Nease Brown, Scott Fuller, Larry Hodges, Sherman Criner, Lynn Gullick, Scott Taylor, Jeri Whitfield, Harry Clendenin, Pam Foster, Stacy Miller, Amy Pfeiffer, Alan Pittman, Ellen Gelbin, Ashley Edwards, Randolph Sumner, Charles Hassell and Devin Thomas. The Commission appreciates all of their time and effort. Following the publication of the hearing notice, four members of the public timely notified the Commission of their interest and intent to speak at the public hearing this morning. Thereafter, we received requests from two additional speakers. These requests were granted as exceptions. No additional requests will be granted. The Commissioners may request that certain employees of

the Commission speak today as needed. The first speaker this morning will be our Executive Secretary, Tracey Weaver. Then she will be followed by members of the public in alphabetical order as follows: Gina Cammarano, Victor Farah, Bruce Hamilton, Lenny Jernigan, Jim Lore, and Jeff Misenheimer. At this time, I'd like to ask Ms. Weaver to come forward and to be sworn, please. Ms. Weaver, if you'd place your left hand on the Bible and raise your right hand?

TRACEY WEAVER

HAVING FIRST BEEN DULY SWORN, did present facts and remarks as follows:

CHAIR YOUNG: Thank you, Ms. Weaver. You may have a seat if you'd be more comfortable. If you'd go ahead and state for the record, please, your name, your position, and for whom you work?

MS. WEAVER: I'm Tracey Weaver and I work for the North Carolina Industrial Commission as the Executive Secretary.

CHAIR YOUNG: Ms. Weaver, thank you for joining us this morning and being here. Do you have any prepared exhibits that you would like to place into the record of proceedings this morning?

MS. WEAVER: Thank you. Yes, I do. And I have already given the clerk a copy of these exhibits.

They are a copy of the public notice of rule-making, published in the News and Observer and on the Commission's website, and a copy of the proposed rule changes posted on the Commission's website with the public hearing notice.

CHAIR YOUNG: Were they marked as an exhibit, Ms. Weaver?

MS. WEAVER: Yes.

CHAIR YOUNG: Is that Exhibit 1?

MS. WEAVER: Yes.

CHAIR YOUNG: Thank you. At this time, if you would just give us a list, please, of the rules that would be affected by the proposed rule changes and some brief background?

MS. WEAVER: Thank you. The Industrial Commission is authorized to promulgate rules and regulations pursuant to North Carolina General Statute 97-80 Subsection A and 143-300 for claims under the Workers' Compensation Act and Torts Claims Act. Notice of the proposed rules in this hearing was published pursuant to Workers' Compensation Rule 803 and Tort Claims Rule T502. The existing rules affected are as follows: Workers' Compensation Rules 101, 103, 104, 409, 502, 604, 605, 610, 613, 614, 616, 701, 702, 703; Tort Claims Rules T201, T205, T206,

T303; and Rules for Mediated Settlement and Neutral Evaluation Conferences 1, 2, 3, 4, 6, 7, 8, 11, Addendum A. New rules proposed are numbered as follows: Workers' Compensation Rules 105, 302, 609A, 617; Tort Claims Rule T503; Rules for Mediated Settlement and Neutral Evaluation Conferences, 4A.

CHAIR YOUNG: Does that conclude the list, Ms. Weaver?

MS. WEAVER: Yes.

CHAIR YOUNG: Thank you. Do the Commissioners have any questions for Ms. Weaver at this time? Thank you very much. You may step down.

MS. WEAVER: Thank you, Chair Young, Commissioners.

(WITNESS DISMISSED)

CHAIR YOUNG: At this time, I would like the record to reflect that Commissioner Chris Scott has joined us this morning and is present. I will call our first speaker this morning. Ms. Cammarano, would you come forward, please? I need to swear you in, Ms. Cammarano. Thank you very much.

GINA CAMMARANO

HAVING FIRST BEEN DULY SWORN, did present facts and remarks as follows:

CHAIR YOUNG: Thank you, ma'am. If you'd be seated, please?

MS. CAMMARANO: Thank you.

CHAIR YOUNG: If you'd state your name for the record, please?

MS. CAMMARANO: My name is Gina Cammarano.

CHAIR YOUNG: And do you represent any particular organization or group?

MS. CAMMARANO: Yes, Your Honor. I represent injured workers in Raleigh. I work for Farah and Cammarano. My law partner, Victor Farah, is here, today as well.

CHAIR YOUNG: And if you would identify any specific proposed rules that you'll be addressing for us?

MS. CAMMARANO: Yes, Your Honor. I just wanted to explain my role here today. I'm the Chair of the Workers' Comp Section of the North Carolina Advocates for Justice. And first of all, on behalf of the Section, we want to thank all of you for all of the work that you've done on these proposed rules. And as you may know, our Section has officers - a chair, a vice-chair, and secretary - as well as an executive committee. And after the Industrial Commission published the proposed rule changes for comments, I

solicited feedback from our Section members and from the executive committee and I reviewed the feedback, we had several discussions. And after reviewing the feedback and having these discussions, our executive committee reached what I believe is a general consensus on the proposed rule changes. And I believe this general consensus reflects the majority view of our Workers' Comp Section members. And that's my role here today, to convey to you the general consensus of our executive committee.

CHAIR YOUNG: Thank you.

MS. CAMMARANO: And I'd like to start with Proposed Rule 502, Subsection 7. This is the proposed rule that states that Compromise Settlement Agreements and Mediated Settlement Agreements shall not contain provisions regarding extraneous issues unrelated to the workers' comp claim. And two major concerns about this proposed rule are raised. The first is the concern that it will negatively impact our ability to protect our clients' rights to collateral benefits because depending on how extraneous is defined, it could prevent us from including language in the clincher that's necessary to protect our clients' rights, including social security offset language, language required by CMS regarding an MSA, language to

protect our clients' rights to future group health insurance benefits, or language to minimize the settlement's effects on other benefits, such as long-term disability and other benefit programs. So at the very least, we would ask that the Commission make it clear that extraneous issues would not include issues about collateral benefits such as social security disability, Medicare, health insurance, long-term disability or other benefit programs. And the second concern with this proposed rule arises out of an assumption on the part of some of our Section members that this proposed rule would forbid the parties from negotiating any side agreements at mediation, such as a resignation from employment or a release of other potential claims. And many of us believe that a rule that would prohibit side agreements about other matters would prevent the parties from reaching settlements in many workers' comp claims because the reality is that in some cases, the employers are paying an awful lot of money to the injured worker and after paying that much money, they can't also accept the risk that the worker is going to turn around and reapply for work. Granted, on its face, this proposed rule doesn't say in so many words that side agreements are disallowed, but some members

of our Section believe that that's what the Commission's intent is. Now, if the Commission's intent is just to keep language waiving rights that arise outside of the Act out of Compromise Settlement Agreements and Mediated Settlement Agreements, then it seems like we may not need a new rule because Rule 502-2(e) already states that the clincher can't contain language compromising or releasing any rights that arise outside of the Act. And I realize that the Kee case presented a problem because in that case, there was not a clincher agreement, there was a Mediated Settlement Agreement and that Mediated Settlement Agreement did make a reference to a Release and Resignation. But I think since that case, the mediators have universally been using the Form MSC8, which contains the language of Rule 502-2(e) in it, saying that no other rights are released. And the mediators have also been using completely separate side agreements for - for contracting away other rights that arise outside of the Act, such as resignations and releases. So hopefully as long as we've got mediators who are aware of the problem in Kee and who are using the Form MSC8 and making sure that side agreements really are separate side agreements, then that situation won't happen again.

So it seems like Rule 502-2(e) is adequate to do the job. And, again, if we're misunderstanding what the intent of the Commission is, then maybe it's not a problem, but we think that that may need to be clarified because there's a belief out there that this is an attempt to prevent any kind of side agreements. The next rule I'd like to talk about, it's actually the additional language proposed to Rule 502-2(b), which would give the parties in denied cases the choice of having the plaintiff's attorney pay the unpaid doctor bills out of the settlement money rather than having the defendants pay the doctors directly. And our Section members are very concerned about this proposed additional language. We believe the defendants are in a far superior position to make sure the doctors are paid what they're owed, and we're afraid that if this language makes it into the rule, the defendants will always want to default to this option. And as plaintiffs' attorneys, we're not accustomed to paying medical bills. We're certainly not familiar with billing codes, customary charges, or even the workers' comp fee schedule. And in denied cases, since the doctors probably really aren't required to take the workers' comp fee schedule amounts, we won't even know how much they're going to

be willing to take to consider the bills paid when we're negotiating these settlements. And how can we negotiate a settlement for our clients when we don't know how much of that settlement money is going to have to go toward these unpaid medical bills. And while the doctors probably aren't required to accept the fee schedule amounts in denied cases, chances are that they're certainly more likely to accept that amount from the workers' comp insurance carriers. And - and I would think that probably in many cases, the workers' comp carriers are paying the - the fee schedule amount to the doctors and they're accepting that because it's coming from the workers' comp carrier. So it seems like there's much more certainty as to how much it's going to take to pay the medical bills if you let that responsibility lie with the insurance company instead of putting the responsibility on the plaintiff's attorney. Another concern many of our members had is the fact that we would be required to place non-client money into our trust accounts. And, you know there are strict State Bar rules regarding accounting of the money going into and out of our trust accounts so there's also a concern about that. You know, again, in summary, the workers' comp carrier is in a much better position to

pay the doctors. You know, that's what they do all the time. They pay doctors' bills. As a plaintiff's attorney, I've made a few attempts to get doctors' offices to, you know, talk to me about my client's unpaid bills to - to try to negotiate. I can't even get calls back from them. You know, a lot of doctors' offices don't want to talk to plaintiffs' attorneys. And we really feel like the best way to make sure that the doctors get paid, and that they get paid their correct amounts, is to not include this new option in the rule, which, again, we're afraid is then going to become the default option and the defendants are going to routinely insist that the burden is shifted to the plaintiff's attorney to pay the doctor bills. The next proposed rule I'd like to address is Rule 614, Subsection 4. Many of our Section members are concerned with the requirement that a withdrawing attorney file a Form 44 on behalf of their client. First, our members are concerned about the ethical implications of this rule. You know, what if the attorney is withdrawing because he or she feels there are no good grounds for an appeal to the Full Commission, that the deputy commissioner's O&A does not contain error. You know, the Form 44 requires assignments of error. The other problem is with the

timing of it all. As you all know, the Form 44 is not filed until after you receive the transcript. You have twenty-five days to do that. And then, also, if the appellate wants to argue before the Full Commission, they have to file a brief along with the Form 44. So that seems like - it seems like the filing of the Form 44 and the filing of the Full Commission brief is something that would be better suited to the new attorney who is taking the appeal to the Full Commission versus the withdrawing attorney. Now, if the Commission is concerned about the injured worker preserving their rights to appeal to the Full Commission, we would suggest that instead of requiring the withdrawing attorney to file a Form 44, that the Commission could require the withdrawing attorney to file, or help the injured worker file, a Notice of Appeal to the Full Commission pursuant to 97-85 and Rule 701. That would achieve the purpose of protecting that person's appeal rights so that they could then find an attorney to take up the appeal and - and do the Form 44 and write the brief. And then it would be much less of a burden on the withdrawing attorney and it wouldn't pose such an ethical problem to the withdrawing attorney. My next comment applies to both Rule 609A---

CHAIR YOUNG: Ms. Cammarano, let me interrupt you for one minute.

MS. CAMMARANO: Yes.

CHAIR YOUNG: You're at eight minutes so you have two minutes remaining.

MS. CAMMARANO: Thank you. Rule 609A and Proposed Rule 703-4, this comment or suggestion was - was suggested by several members in response to the Court of Appeals decision in Berardi which says that a Full Commission order pursuant to the expedited medical motions procedure or emergency medical motions procedure is interlocutory. And our members just suggest that the Commission make that clear in both Rule 609A, which deals with that process, as well as Rule 703 Subsection 4. Rule 703 Subsection 4 talks about an order entered by a single Commissioner being interlocutory but it doesn't mention the orders pursuant to the expedited medical motions procedure so we just think that in order to help with the administration of the Act and to make sure the parties aren't appealing when they shouldn't be appealing, it may be a good idea to put that right in the order to - to clarify that it's interlocutory. And my last comment is about proposed mediation Rule 4A. Many of our Section members, especially those attorneys who

are bilingual or multi-lingual, are concerned that this proposed rule would make a foreign language interpreter mandatory. And most of these attorneys speak their clients' language and so they may not need an interpreter there. So we believe that this proposed rule 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. And the Section members also have concerns about interpreters potentially sharing confidential communications between the injured worker, and the attorney, and the mediator with the employer or carrier, if the employer or carrier retains the interpreter. And this concern was recently acknowledged by the Commission in its June 30th minutes where it noted that some interpreters who are hired or retained by the defendants were making observational summary reports for the defendants that included information about the private communications between the injured worker and the doctor, and also included information about the injured worker's appearance. So our Section members would suggest that proposed mediation Rule 4A be amended in Section D to state, "Upon giving notice of the need for an interpreter, the requesting party," not the employer

or insurer, “shall retain a disinterested - a qualified, disinterested interpreter”. And then to be consistent with this change, we suggest that Section “e” be amended to remove the language, quote, “that retain the interpreter” from the second sentence. Thank you.

CHAIR YOUNG: Ms. Cammarano, did you - do you have a summary of your comments there with you today?

MS. CAMMARANO: I do and I’ve given it to Ms. Henderson and to the court reporter.

CHAIR YOUNG: Thank you very much. And it’s marked as an exhibit at this time. Has it been marked?

MS. CAMMARANO: I have not marked it. I’m not sure---

MS. HENDERSON: We will gather all the comments and present them at the end.

CHAIR YOUNG: At the end, all right. Thank you. Thank you, ma’am. Appreciate it.

MS. CAMMARANO: Thank you.

COMMISSIONER MAVRETIC: Do we get to ask her questions?

CHAIR YOUNG: Hold on, Ms. Cammarano. Do you have any questions for Ms. Cammarano? Any Commissioners?

COMMISSIONER MAVRETIC: I do have a question. We appreciate your comments and they're very thought provoking, I think. Rule 502(b), about trying to insure that the doctors are paid, which is what we - that was our goal clearly.

MS. CAMMARANO: Right.

COMMISSIONER MAVRETIC: What would be your suggestion of a better way to insure that the medical providers get paid because that - that was what we were trying to cure? And, also, it was my understanding that the Plaintiff's Bar - maybe not everybody, but the Plaintiff's Bar asked us for this rule change because they - they were doing this anyway and they wanted to know clearly that it was authorized.

MS. CAMMARANO: Well, that's not consistent with the feedback that I got from the Plaintiff's Bar. Maybe it was certain members. You know, we still feel like because the insurance companies know how to submit these bills - you know, they know the codes, they are familiar with the customary charges, the fee schedule, that they are in a better position to make sure these doctors get paid. You know, I can foresee a situation where maybe a plaintiff's attorney has already talked to the doctors and - and says to their

client, “Look, I know your doctor will take fifty percent of what they’re billing so let’s go ahead and let the defendants pay us the money and let us take care of this”. And - and they’re still free to do that if - the rule doesn’t need to add that as an option in order for them to be able to do that. But based on the feedback I got - and, again, I’m just here to express what the majority view is in our Section. Our Section members are just concerned that this is, like - you know, that we’re going to get stuck now with making sure the doctors get paid when we’re not in the business of - of paying medical bills, and the insurance company is in a much better position to do that. You know, I don’t know the statistics on how many doctors remain unpaid and how long it’s taking for these doctors to get paid, but certainly, you know, I would think that insurance carriers who pay doctors in - in accepted claims, at least, you know, would be able to hopefully do it fairly expeditiously in these denied claims.

CHAIR YOUNG: Any other questions, Commissioners?

COMMISSIONER MEYER: I have one.

CHAIR YOUNG: Yes, ma’am.

COMMISSIONER MEYER: Ms. Cammarano, with regard to the rule regarding extraneous language---

MS. CAMMARANO: 502-7?

COMMISSIONER MEYER: Right. You had spoken about separate side agreements and - and some fear. Did you - have you proposed language or did you all discuss - are you proposing that we change the rule to say that separate side agreements are allowed or you're just concerned that that may have been the thought? I don't - I never thought that to be - certainly not from my perspective and I'm not going to speak for everybody. But that really wasn't what was being contemplated.

MS. CAMMARANO: I guess then if it's just to make sure that you don't have a situation like in Kee where the Mediated Settlement Agreement had this offending language. We think that 502-2(e) takes care of that problem. And maybe you could add to Rule 502-2(e) that, you know, Compromise Settlement Agreements and Mediated Settlement Agreements cannot contain this language. I guess we just felt like it may be superfluous because we already have a rule to take care of it. But if the Commission for some reason feels like 502-2(e) can't be tweaked and - and you do need this new rule, then we would just ask the Commission to do two things. One is to define that extraneous wouldn't include language that would help

our clients' rights to future, you know, collateral benefits. And then also that it doesn't prohibit side agreements.

COMMISSIONER MEYER: Right. I'm more focused on the latter in terms of preventing side agreements.

MS. CAMMARANO: Right. And so I guess some language clarifying, you know, that this has no effect on the party's ability to contract, you know, away other rights.

COMMISSIONER MEYER: Negotiate separate parts?

MS. CAMMARANO: Separate - right. As long as they're separate from the - the Compromise Settlement Agreement and the Mediated Settlement Agreement. And that's my understanding as to what the mediators are doing now.

COMMISSIONER MEYER: And it would. And I think any - any rule that prohibited that - personally, that would be sort of a chilling effect---

MS. CAMMARANO: Exactly.

COMMISSIONER MEYER: ---on your ability to resolve issues.

MS. CAMMARANO: And that was our concern.

COMMISSIONER MEYER: From - from both perspectives, from employer and employee.

MS. CAMMARANO: Right.

COMMISSIONER MEYER: Thank you.

MS. CAMMARANO: Thank you.

CHAIR YOUNG: Anything else? Go ahead, Commissioner Scott.

COMMISSIONER SCOTT: On that same point, you have said that the employers may put a lot of money in and then face the problem of somebody reapplying for work and I wanted you to elaborate on what that problem is. Somebody has a workers' compensation injury and they're faced with a big pot of money here, and the loss of some rights, whatever they may be, over here. And since you partly represent the advocates for justice, do you think that's justice?

MS. CAMMARANO: Well, you know, in some cases, it - it's the best outcome for the injured worker. I mean, they probably don't want to return to this place and if they did return - I mean, say, the Commission disallowed, you know, resignations and the person returned. There's - there's a chance that they're going to end up not being successful in the job, not being able to do it, and probably not getting as much compensation for their - their case. And I don't know if that's what you're asking but is it fair?

COMMISSIONER SCOTT: It is. And your answer had to do with probably and possibly and I'm worried that

they'll give up their seniority rights, they'll give up all sorts of collateral issues that really have nothing to do with their workers' compensation claim.

MS. CAMMARANO: And that's - you know, the role of the attorney is to help the injured worker evaluate what is being asked to be released. You know, I'll tell you in a lot of cases, there really isn't any employment claim there - any, you know, (unintelligible) claim and so a person is really not giving up that much. But I think it is incumbent on the attorney to very carefully evaluate what the worker is being asked to give up. And so certainly in cases of unrepresented plaintiffs, the Commission may feel it's appropriate, you know, to - to not allow these kind of side agreements. But, you know, if the employer allowed the - did not require the person to resign or not reapply for employment, then the person could reapply and then the employer could be faced with, you know, a discrimination suit if they didn't hire---

COMMISSIONER SCOTT: A what?

MS. CAMMARANO: ---the employee because they were injured.

COMMISSIONER SCOTT: They could be faced with a what?

MS. CAMMARANO: Some sort of discrimination suit if - if they didn't hire the injured worker because they were - you know, because they - they're disabled. So and then we just---

COMMISSIONER SCOTT: Well, they kind of ought to. They ought to live up to the laws of the United States. And as far as the comment that that's the role of the attorneys, the - the Act was put together to have a very minimal involvement with attorneys and for workers to prosecute their own claims on their own. And I'm very enamored of attorneys but not everybody is so that I think it's - it's a difficult proposition to say that for some pieces of gold, you're going to give away your rights.

MS. CAMMARANO: You know, again, it's - it's really a case by case decision and we just feel that for the Commission to completely prohibit the parties from being able to contract outside of the Workers' Compensation Act and - and waive rights, if they're compensated for those rights, would really go beyond the jurisdiction of the Commission.

COMMISSIONER SCOTT: One last question. Was this an anonymous proposal by the Section?

MS. CAMMARANO: No, it's not anonymous, it's a general consensus. But there are Section members who

disagree and Jim Lore is one of them. He's going to be speaking today on behalf of those members who have a different position.

COMMISSIONER SCOTT: Thank you.

CHAIR YOUNG: Thank you, Ms. Cammarano. You may step down.

MS. CAMMARANO: Thank you.

(WITNESS DISMISSED)

THE COURT: Mr. Victor Farah, if you'd come forward, please? Sir, if you'd place your left hand on the Bible and raise your right hand?

VICTOR FARAH

HAVING FIRST BEEN DULY SWORN, did present facts and remarks as follows:

CHAIR YOUNG: Have a seat, please, sir. If you'd state your name for the record and the organizations or groups that you represent today?

MR. FARAH: I'm Victor Farah. I'm an attorney in private practice representing injured workers at the firm of Farah and Cammarano in Raleigh, and most likely the less articulate half of that group.

CHAIR YOUNG: And would you identify any the specific proposed rules that you will discuss with us this morning?

MR. FARAH: Yes. The - the Rule 502 issue about

the medical bills and about the issue that Commissioner Scott has raised, the interpreter rule, and the mediation rule.

CHAIR YOUNG: Thank you. You may proceed, sir.

MR. FARAH: And first I want to make clear that these are my personal remarks that - none of us do speak for the Section other than Ms. Cammarano. So please hear these just as my personal remarks. The first one is a fairly simple one and that's on the interpreter rule. I remember Commissioner Scott at some point was very good about listing - or giving links to the rehab provider's ethical rules. And now since the rehab rules say that they have to comply with their own ethical rules, a practitioner can pretty easily find what those rules are. I tried to do the same with interpreters. Sorry for popping in the mic. And at first, I couldn't find what the sort of major interpreter professional organizations actually are. Now, I - maybe interpreters know what the lead organizations are but I certainly didn't find them by a sort of a simple Google search. The couple that I did find, that appeared to be the larger organizations, did not seem to have very well developed ethics and professional standards so I would just encourage that if we're going to have provisions

about interpreters that say they have to comply, that we make sure that there really are standards with which they're supposed to be complying. The medical bills rule, you know, I share the concern about how do we make sure that - that doctors get paid. And I think that, you know, over the course of my twenty or so years doing this, in a handful of cases, I have taken that responsibility and it usually is a situation where there is some negotiating to be done and I have some idea. But, you know, I - I do do this for a living. It's exclusively what I do. I'm board-certified and all that so I have a decent grasp as to how much extra money I need to get for the client to deal with the medical - the unpaid medical bills under certain situations. But it – it is fairly rare. I've never felt that the existing law or rules prohibited me from doing that and I think that it's probably best just to leave that as – as an option without so stating, just so we don't have that situation where people end up being negotiated into doing that when really they're not very capable of doing it. The issue that Commissioner Scott raised, I'm not sure what the intent was on the part about whether the – what the intention is about additional benefits. I would like just to address that a little

more generally and say that I'm concerned, surprised, maybe a little troubled about the - the clincher bias in our system. We have evolved a system which – which clinchers a very high number, a very high percentage of fairly serious cases. So I think you have to step back a little bit and say, "Is that what we really want"? You know, do we want to be looking at – this is supposed to be a paternalistic system that to some extent protects workers from theirselves so they don't give up rights that they shouldn't, but also that the way the law has evolved can include a lifetime of workers' compensation benefits. And since we have a culture out here in practice that is very – that very much leans toward clinchering cases, that's why I think we run into this issue that if we're going to be clinchering cases, then we do need to look at what are those other issues that arise. I mean, let's – because remember, nobody has to clincher a case. The benefits under the Act should never require the concerns that Commissioner Scott raises. If you enter into a form agreement, you litigate your case and win, you're entitled to whatever benefits and medical care – disability benefits and medical care that the Act provides. But unfortunately, that's not what has evolved. So I think that what you have to

look at is we're going to have this system of clinchers, which we do – and I'll address that and the mediation issue as well. I think we have to be realistic about what really goes on out there in the negotiation of clinchers. I went and – just tried to go back through and look at a sample of the cases that I've settled over the last few years. And, you know, this is not – certainly not scientific but a significant number of those clinchers did waive additional extraneous side agreement sorts of benefits. And in most of those cases, it wasn't like I was sitting there volunteering to do it. It became – and I think Jim maybe can discuss this. It becomes the bargaining chip for the – for the employer's side. They're not going to clincher the case unless you also give up these other benefits. Now, how do y'all make sure that the lawyers who are negotiating these have the requisite skill, I don't really think you can. So I'm not sure what the answer to that is, but I think it's an issue that we're sort of stuck with in our clincher world. And the mediation rule and we're going from a hundred and twenty days to ninety days, you know, I think some people may have concerns about that, and I've expressed this to John Schafer a lot. In – I can't

think of more than maybe five or ten percent of my cases where when you come to mediation, the employer or carrier is willing to do anything but clincher the case. And the message that – that I get as a plaintiff's lawyer is, "Well, they're not interested in accepting the case, they're not interested in just compromising some issue about the benefits and moving on, they're here to clincher the case". So I think that's something that I think really needs – needs attention. On the one hand, the significant success of the mediation system in closing cases, and therefore utilizing resources better, is – is a wonderful thing that nobody wants to give up, but is it pushing cases toward inappropriate clinchering or settling of – of cases. There are a number of possible solutions to – to that part about the mediation encouraging settlements when it might not be appropriate for the worker to be settling them, and I'd be happy to just quickly address those if you'd like. The final issue I wanted to raise was about all of these things. There are – there is the necessity to adopt – draft and adopt forms that go with a lot of these things and I would just hope that in the drafting of forms that – and maybe y'all just don't ask me to do anything, I don't know, and maybe you're

getting input from people. But there have been forms that have come out and then concerns get raised at the practitioner level that the forms are actually a little bit more than forms and actually invoke some substantive changes. With the last batch of forms, Hank Patterson, I and Jim actually commented on some of the concerns about some of the forms and some of the rules so I would just ask that – that the – that more people be brought into the loop on the – on the form design. And that's all I have. Thank you.

CHAIR YOUNG: Any questions for Mr. Farah? No questions? Thank you, sir. You may step down.

(WITNESS DISMISSED)

CHAIR YOUNG: All right. At this time, Mr. Bruce Hamilton, if you'd come forward? Sir, if place your left hand on the Bible and raise your right hand?

BRUCE HAMILTON

HAVING FIRST BEEN DULY SWORN, did present facts and remarks as follows:

CHAIR YOUNG: Thank you, sir. If you'd be seated, please? If you would state your name for the record?

MR. HAMILTON: May it please the Commission, I'm Bruce Hamilton. I'm with the law firm of Teague,

Campbell, Dennis and Gorham in Raleigh. I primarily or exclusively represent defendants in workers' compensation matters, primarily with a lot of emphasis on self-insured employers. I'm not here on behalf of any formal organization. I am involved with the Workers' Comp Section Committee and the Defense Attorneys Association, but Mr. Misenheimer will be formally presenting on behalf of them. So I'm here more on personal comments from my perspective on some of the little changes. Specifically the three – or the four rules that I wanted to address deal with three rules and they've already been talked about a little bit. It was Mediation Rule 2A, Rule 502-2(b), and 502-7, the proposed rule. The theme that I wanted to present today to y'all was that my interpretation of the rule changes eliminates – potentially eliminates what I think is – is - what's best about the system is the flexibility in the system in allowing the parties flexibility when it becomes – with respect to settlements in particular and in some of the other issues. And if the rule changes – at least my interpretation is that if the rule changes go through as proposed, it's going to eliminate the flexibility that the parties have currently with, I think, no counterbalancing positive

effect and at least from my perspective, a potential negative effect on the ability to resolve cases. One of the things that I wanted to mention is that we – we – whenever I go to a conference or a seminar and I see Chair Young or any of the other Commissioners give a presentation about the Industrial Commission and the system in general, one of the areas that gets touted as being very successful is the mediation process. The numbers that come back have consistently been over the years that seventy percent of the cases settle at mediation or shortly after mediation and the number goes up to eighty percent sometimes before hearing or shortly after hearing. Directly as a result of the mediation process is what we assume. I think that's always been presented as a very positive part of the Commission and a necessary part. When the mediation practice was initially put in fifteen or so years ago, I think the Defense Bar, in particular, was worried about it but has come to embrace it over the years and realizes, and my clients realize, there is – there is a – to reiterate what Victor said, an encouragement of clinchering cases from both sides of the perspective. Not every case can settle, not every case should settle. But from an efficiency standpoint, from the

Commission's perspective, and also from defense costs on our side, settling a case earlier rather than later has been beneficial. I'm old enough to know that the days before mediation and the number of cases that settled when we showed up on the hearing – on the courtroom steps and we finally looked at each other and said, "Oh, that's all you're looking for". "Okay, let me make a phone call and we'll settle it." Well, that's after we've been put on a hearing docket, had all the parties and witnesses appear at the courthouse and realize for the first time that it's a settleable (phonetic) case. So I think the mediation process in general has been incredibly successful and I'd view some of the rules as tinkering with that with a negative impact. The first one that I was looking at was basically the elimination of the flexibility to – is the way I interpret the rule – about the hundred and twenty day deadline. As I interpret the rule, right now Deputy Commissioner Schafer has the ability to extend the deadline on mediations if necessary. The new proposed rule puts in a hard one hundred and twenty day deadline that simultaneously requires the parties to have that – that mediation date set at the date they file the stipulation of who they're designating as the mediator. Most of my

cases, the vast majority do get mediated within a hundred and twenty days. In fact, I think that I've had a record. I just had a case come in this summer where I was able to mediate it within two weeks of getting the file because there was a need to expedite the mediation that everybody recognized and we got it done quickly and we found the mediator. I don't see – I'm not aware on the defense side, and have not – have not heard any complaints on the plaintiff's side, with a problem with the flexibility of extending the deadline when necessary. And given the complexities these days with Medicare set-asides, some other issues with collateral benefits – and I'll get to some of those issues later with respect to the 502 issue – sometimes we need to mediate a case two, sometimes three times because we get to a mediation the first time and realize, "Yes, we can probably settle this case," but we need more information or we need to resolve the Medicare issue, we need to resolve some extraneous issue before we can finalize it. Well, as I see the proposed rule when you combine what I've understood recently as the Industrial Commission's reluctance to continue cases once they've been put on a hearing docket is – what I fear is going to happen is that without the flexibility of getting

extensions when necessary, we're going to have cases that could easily settle if we're given a little bit of extra time to either reconvene the mediation or get additional information. Because we're going to be – we're not going to be able to meet the hundred and twenty deadline, we're going to be put on a hearing docket, and once we start trying the case, sometimes my client's incentive for settling the case now goes away. If we've incurred all the expense of preparing for trial, getting our witnesses at trial, going forward to hearing, well, now we might as well find out what the decision is from the deputy. Whereas the current system allows us to be more efficient, to save some costs, and settle a case earlier before we incur all the expense. The reverse of this is I am not aware – I can't unilaterally extend a mediation beyond a hundred and twenty day deadline. If I have a case with Lenny and Lenny says, "I'll mediate but I need to mediate this quickly," we find a mediator and we get it scheduled quickly. Simultaneously, I've also had the experience with if I petition for mediation, or there's a mediation that I want to mediate, and the other side doesn't, Deputy Commissioner Schafer already has the ability to reduce a deadline and make it a hard deadline if he wants. He has that

flexibility already. So if there is a party that wants to mediate quickly, we already have that ability in place and I don't think you need to institute in the rule a hard deadline on the hundred and twenty days. Give the parties, and give Deputy Commissioner Schafer, the flexibility to extend the deadline when necessary. Similarly with that, there appears to be now a move to only allow certified mediators. And I have to admit frankly, I never check. I know which mediators I like to use. Some of them are probably not certified but I can't – again, I cannot pick unilaterally a mediator. If Jim Lore and I decide to pick a non-certified mediator, I think we should have that ability to do so. And similarly, on the other hand, there are some certified mediators I know that just frankly aren't – there's no guarantee that they're – they're the right person for the job. So, again, I think the flexibility of being able to pick a non-certified mediator enhances mediations and the settlement of cases in the long run. And my prediction is that if we don't change the – if those rules go into effect and we're not given the flexibility, we're actually going to see at the next seminar we have – or probably two years from now – where those numbers where we – we report seventy

percent settlements, those numbers are going to come down and you're going – you're going to see fewer settlements and more hearings. The next rule has been discussed a little bit. It's 502-2(b). In this, I'm focusing more on the situation of unpaid medical bills and what I view as the change that no longer allows the Industrial Commission to waive the requirement that unpaid medical bills be paid in a denied case with an unrepresented plaintiff. The way I interpret the rule now is there's flexibility. The defendants are required to pay unpaid medical bills in the denied case with the exception of the Industrial Commission can waive that rule in appropriate circumstances. The new proposed rule still allows us that flexibility but only with a represented claimant, not with an unrepresented claimant. My concern with that is a lot of times the reason that a party is unrepresented is because they don't have a very good claim or don't have any claim at all. And a lot of times, the cases that I'm settling with an unrepresented claimant are precisely because it's a very weak claim but, again, my client would rather spend a small amount of money to resolve the case, rather than going through a whole full-blown hearing. If this rule is in place, we're going to see a decrease in the number of settlements

in those cases, an increase in hearings precisely in cases where I think my interpretation is the claimant in going to be worse off in the long run because now not only will they expend the time and effort for a hearing, are not going to have any settlement or any income coming in and they're still going to be responsible for those unpaid medical bills. I think the appropriate response to this situation – I appreciate the concern about unrepresented plaintiffs not having their rights fully adjudicated or – or represented but the Industrial Commission still has the authority – and as I've seen happen with me – to refuse to approve clincher agreements, where I've settled a case with an unrepresented claimant and either the consideration is – they – the deputy that reviews it says, "I don't think the consideration is enough," or "You should be paying some or all of these unpaid medical bills". Again, back to my theme, right now we have the flexibility to settle those cases and the Industrial Commission has the flexibility to approve or disapprove those clincher agreements. The proposed rule eliminates that flexibility. And in a lot of cases, we will eliminate the ability to settle with an unrepresented claimant if we're forced to pay unpaid medical bills in what is generally deemed – or

occasionally deemed a very weak case. So I have a concern about that.

CHAIR YOUNG: Mr. Hamilton, you're at two minutes, sir.

MR. HAMILTON: Thank you. The last issue was the interpretation - again, I'll reiterate a little bit – is the 402 – or 502-7 issue and the extraneous issues. And I can give some perspective on this from experiences. I represent a lot of self-insured employers and many times when I'm going into a mediation, the mediation is not so much about the workers' compensation claim, it's a coordination of benefits case. And it's not – and to address Commissioner Scott, it's not always an elimination or a waiver of benefits. I have many clients who have tremendous benefit programs, either through short-term disability, long-term disability, retirement plans. And a lot of times, it is not a relinquishment of those rights. What is – what we're doing at the mediation is we're settling the workers' comp case but simultaneously setting up an agreement where you'll maybe no longer acquire longevity on your retirement but, in effect, you're not giving up your retirement rights. We can sit down with the HR person from the company, explain what they will be receiving in

retirement, and those things get documented either in the clincher agreement or sometimes in a separate agreement. And to reiterate what was said earlier, I think we need to, again, have the flexibility to address these extraneous issues, sometimes employment issues. Sometimes there are resignations of employment, sometimes there's waiver of employment rights, but those are negotiated transactions ninety-nine percent of the time with a represented plaintiff. And – and it really is an arm's length transaction in a negotiated settlement, which I think would be beyond the jurisdiction of the Commission to prevent those agreements and from a policy perspective is not warranted because, again, flexibility will allow the parties to settle the case. On a good note, if the proposed changes do pass, I'll probably have a lot more work to do because I think it will increase the number of hearings. But as I've tried to explain to my teenage son, it's not always about me.

CHAIR YOUNG: Any questions for Mr. Hamilton? Commissioners, any questions? Thank you, sir, for your time.

MR. HAMILTON: Thank you.

(WITNESS DISMISSED)

CHAIR YOUNG: Mr. Lenny Jernigan, if you'd come

forward? Sir, if you'd place your left hand on the Bible and raise right hand?

LEONARD JERNIGAN

HAVING FIRST BEEN DULY SWORN, did present facts and remarks as follows:

CHAIR YOUNG: Thank you, sir. Would you state your name and tell us who you are here representing this morning?

MR. JERNIGAN: My name is Lenny Jernigan. I'm an Attorney at Law firm in Raleigh. I represent injured workers primarily and also teach workers' compensation law at North Carolina Central University School of Law. I'm not representing any particular group, it's my personal opinions here today.

CHAIR YOUNG: All right.

MR. JERNIGAN: I'm going to address just two sort of technical matters, Rule 101 and Rule – Section 3 of Rule 610. Rule 101 talks about filing electronically until 11:59PM. As written, that is very consistent with the appellate court system and also the eastern and western and middle district of the federal court system so I have no problems with that. But the Industrial Commission as far as contentions go, it's a lot different from those other courts. So when you're at the deputy commissioner level and you have to file

contentions, unlike any other court system that I'm aware of, they have to be filed simultaneously. And what has happened occasionally is that – and I speak from the plaintiff's perspective. Some defense counsel are putting in a lot of time on these documents but we do, too. They don't quite have them ready by 5:00 and so they've gone ahead and filed these electronically later. Now, if I've done my homework, I don't want to be staying up until 11:59 so that I file mine at the exact same time. And what - I feel like we potentially are allowing a competitive advantage to be given to the other side. If I file mine at five, they can look at those documents for several hours, modify their document, and respond to certain arguments that we make. So all I'm suggesting is that you make an exception here and say that as to contentions that are filed with the deputy commissioner, that those must be filed on or before 5:00PM on the day that they're due. So it's just an amendment to the rule. And really I'd also prefer that you eliminate that problem all together by simply allowing plaintiffs to file their contentions, if they have the burden of proof - or whoever had the burden of proof - allow the other side to respond and then allow rebuttal to that, but that's not the way the

system works at the moment. That's just a minor issue. On Section 3 of 610 - that's about payment of expert witnesses - the last sentence says, "The failure to make prompt payment to an expert witness following the entry of a fee order will result in the assessment of a ten percent penalty". Two problems with that. I don't know what the word "prompt" really means here. Some could interpret that to mean thirty days, some could think five days, some could say sixty days. I don't know exactly what you mean. I know what I think it means but I think it needs to - it needs to be more specific. I would suggest thirty days. And I think from the entry of the order, it probably needs to be changed to the service of the order because sometimes people don't get the order. That has happened to me a couple of times. So I don't think I should be penalized ten percent if I didn't actually get a copy of the order. So those are my only two comments. I have made comments about other things but those are the only two issues I want to bring to your attention.

CHAIR YOUNG: Any questions for Mr. Jernigan? Any questions? Thank you, Mr. Jernigan.

MR. JERNIGAN: Thank you.

(WITNESS DISMISSED)

CHAIR YOUNG: Mr. Lore - Jim Lore - come forward, please.

JIM LORE

HAVING FIRST BEEN DULY SWORN, did present facts and remarks as follows:

CHAIR YOUNG: Thank you, sir. Be seated, please. State your name and whom you represent?

MR. LORE: My name is Jim Lore. I'm an attorney in Cary, North Carolina. I've practiced before the Industrial Commission for over thirty years. My first case I went to with the late great Howard Twiggs was not even in this building. It was in the old Wake Forest Road location going - going way back. I think probably here the only people I'm not pre are pre-Patterson and pre-Cranfill.

CHAIR YOUNG: If you'd state for us, Mr. Lore, the rules that you plan to talk to us about today?

MR. LORE: Just 502. I guess I would be taking the position of the minority report among the executive committee in the State Bar. The difference between my position and their position is that mine is right and their's is wrong. Their's is actually in conflict with prior litigation that we've had here before the Commission. I'm going to take you back thirty years and I was a practicing young lawyer and

it reminds me of what Yogi Berra said about *deja vue* all over again. We were clinchering a case, I think the biggest case that I ever saw at that time. I thought maybe one day I would see one for thirty thousand dollars and had not seen one at that time. To give you an idea of the kind of money we were dealing with, most - a lot of the cases were twelve thousand dollars maximum cases, which is what the law was at that time for cases from ’63. We, for the first time, started seeing what’s called a side agreement. They came in at that time on legal size paper and certain companies - I’ll mention just two of them that are gone, that don’t exist, Wiscasset Mills and Cannon Mills. And at that time, the rule was Roman Numeral XI in the Commission rules. That really had been recodified as 502 today. Substantially it reads basically the same in the respect that I’m talking about. We felt that that was a violation of Rule XI, at that time, that they would ask us to sign the side agreement. The side agreement really was a release for everything under the sun. Anything that didn’t have to do with workers' comp, any potential claim you have against this particular company, you’ve got to sign it and it’s a condition of being able to settle the workers' compensation case.

And this is the most important point. You had to sign the side agreement and it would not be disclosed to the Industrial Commission. It would not be disclosed to the Industrial Commission. And so we complained to the Commission. The Commission was comprised of three members at that time, not seven. They've all passed away now but the Chair at they time was the late William Stevenson. And I disagreed with Bill on a whole lot of things and litigated a lot of cases and proved him wrong on many things, but one thing we did agree about is this was illegal and it was prohibited. He started entering orders. In fact, he got so agitated about the fact that somebody would ask us to do that, that he directed us to simply call the Chair of the Commission, which was him at the time, and he would call up the defense lawyer or the company and tell them that he was going to sanction them if they didn't quit the practice of making a condition of settling the workers' comp case signing a general release. And these things were multi pages that they would send. I did not see this happening. Fast forward now twenty-five years from that point to about five years ago. About five or ten years ago as the - one of the late Chairs used to say, Howard Bunn, it started creeping back like topsy (phonetic). And

almost every case you see now, you will have an attempt on the part of the carrier and the employer to make you sign a side agreement that they do not want the Commission to see, and it will have a general release of anything under the sun that this person might have as a claim against them - the employer. Now, I'm living proof that you don't have to do it and you can still practice law and do it fine. I've never done it. I tell them, "Hell, no, it's a violation of 502". And it was construed that way by the Commission in many cases and the Commission was very active and it went away for all those years. The problem is a lot of my colleagues are interested in getting themselves on TV every morning and taking cases. And it's what I call case collectors. They're not interested so much in looking after the rights of the individual worker, they are interested in just going on and getting that case settled. They'll sign anything. And they actually come to us, who are being true to the rule and the construction the Commission has always given it. The defendants will come to us and say, "Almost everybody else is doing it, why don't you do it". And I always say, "Because it's illegal, it's inappropriate". And not only that, as the attorney retained, I was not retained to represent the

people in evaluating the release of all these other rights. In fact, I'm not qualified to do it. And I can tell you, ladies and gentlemen of the Commission, if I'm not qualified to do it, there's a whole lot of people below me on the chain that are not qualified to do it. But they'll sign anything, they'll let their clients sign anything. If you went down today and looked at the clinchers that are waiting in Tracey Weaver's office, way over fifty percent of them have a comprehensive side agreement that you don't see, that they do not want you to see. And that's all right if it's independently negotiated. But it's conditioned on their execution of the workers' comp case. Now, what does the Commission do? The Commission puts in the agreement - they say, "Well, we'll put right here in the agreement" - or the parties will put in the agreement, "We'll say no rights outside of this agreement are released". And then the Commission order says, "We're not approving the release of any rights," but, in fact, that's exactly what's happening every day in most of the agreements that you deal with. And it needs to be stopped. It - it is illegal, it's been illegal, it's been construed to be illegal. And for those that tell you, "Oh, gee, whiz, if we - if we didn't get that, there's going to be so

many cases that are going to be litigated". They said that thirty years ago. It never happened. What would happen is they would settle a workers' comp case and it will finally be compliant. They will not have to give up these other rights, and then they will have to come and negotiate on the other piece. Now, for me, I'd send them somewhere else to negotiate on the other piece because I'm going to admit that I'm not qualified to adjudicate an ADA claim. I guarantee you they never look to see whether there's a pending class action claim. Not a single one of them have ever done it. They let them sign the release every day because they want to go on to the other case. So what I'm asking you to do is be true to what the Commission has already held going back thirty years. And how you could stop it and make sure that you're getting what you're supposed to be getting is you could simply require the parties to put a provision in the clincher agreement that says the plaintiff has been advised that for any side agreement executed, the claimant is not required to do it as a condition of having the workers' compensation settle. And have - have the attorney sign it. It would probably be better to have them sign it and verify it because they'd have something (unintelligible) about if they did it.

Right now, the charade goes on every day down here with you. And the Commission, I know, would like to think, “We’re not involved at that”, but you are involved with it every day knowingly or unknowingly because these agreements are approved. And they use the word “agreement” in the language. It (unintelligible) agreement. The truth is, part of that agreement is in another document if it - if it’s a condition of the settlement of the workers' comp case, it’s part of the agreement. They just choose to put the terms in another document. The Commission needs to put a stop to it and what will - what will happen at that point will be just what happened thirty years ago. Life will go on, they’ll settle the cases they want to settle and they’ll come back and negotiate these other points. I’m going to go back to something Commissioner Scott said. You can imagine the leverage that they’ve got on jobs that do have issues of seniority when they demand resignations and all this as a condition of the - of the workers' comp case. The worker is giving up so much more than you see and meanwhile, you think that the Commission is not involved simply because you executed that order that said it did not approve the other items that are not arising under the Workers’ Compensation Act. But

that's not what happens in practice.

CHAIR YOUNG: Mr. Lore, you're at two minutes, sir.

MR. LORE: I'll reserve just the rest of my two minutes to answer any questions that anybody has about what really goes on because I'm here to tell you about what really goes on.

CHAIR YOUNG: Are there questions for Mr. Lore? Commissioners?

COMMISSIONER SCOTT: I want to ask you whether you see a parallel here. I've fortunately not been much involved with criminal law - one or two brushes but nothing that would send any of my predecessors over to the AFL-CIO for long jail sentences. And it's my understanding that an awful lot of business happens in the judicial system by getting plea bargains and that at least if you read the newspapers, not all the plea bargains are people who are agreeing that they're part - they're not all based on people who are, in fact, guilty. They are people who don't want to sit in the jail house for the next three years waiting for their trial to come up, they don't want to take the risk that they'll - their court-appointed lawyer won't do a good job and so on. And on the other hand, you hear that without a plea bargain system, the whole

thing will collapse of its own weight. Now, I don't believe that the plea bargain system is just. It sends people to jail who ought not to be there and may keep people out, or give them very short sentences, if they're guilty of serious crimes. So I think that's where we are with this issue. We are afraid that the system will collapse if we don't shut our eyes and allow this practice of side agreements to go on.

MR. LORE: Well, there is some parallel. In the case you're talking about, you have a judge. He's supposed to approve the agreements. In this case, we've got 97-82. The Commission is supposed to be looking after the best interests of the workers. My colleagues in the Plaintiff's Bar are having - are supposedly doing that but I would say the majority of them do not do that in my experience. And I'm particularly concerned about all the people who are unrepresented. Typically more people are unrepresented historically than are represented so you've got all these unrepresented workers who are having this same leverage put on them. They're making them sign these agreements under the threat that we're not going to settle with you unless you sign this other agreement. It's never been true. That's what they always say. I'm living proof that it's not true

because I've never done it. Thirty years ago, I heard the same thing so I think there is some parallel there. And at some time, as the judge - like the judge that sits in Superior Court, it's got to come from the judge where they put their foot down. I mean, this - you've got the leverage, you make the rules, you approve the agreements. It's the judge who has got to do something about it.

CHAIR YOUNG: Mr. Lore, your time has expired. Let me just ask the other Commissioners if they have any questions, please. Any additional questions? Thank you, sir, for coming this morning.

(WITNESS DISMISSED)

THE COURT: Jeff Misenheimer, if you would come forward? I understand that you may want to split your time with Ms. Ruiz, is that correct?

MR. MISENHEIMER: Yes, ma'am. I was going to give some brief comments and then Ms. Ruiz is going to give a more substantive presentation.

CHAIR YOUNG: All right. Well, what I'll - I'll swear you in at this time and give you five minutes and, Ms. Ruiz, you may have five minutes as well.

JEFF MISENHEIMER

HAVING FIRST BEEN DULY SWORN, did present facts and remarks as follows:

CHAIR YOUNG: If you'd state your name, please, and the parties whom you represent this morning?

MS. MISENHEIMER: My name is Jeff Misenheimer. I practice with Lewis and Roberts here in Raleigh. I am a member of the Workers' Comp Section of the North Carolina Bar Association as well as the current Chair of the Workers' Comp Practice Group for the North Carolina Association of Defense Attorneys. And, as you mentioned, Jennifer Ruiz with Hedrick Gardner is going to actually do a presentation on the rules that we'd like you to address. But just by way of summary, we're going to be, time permitting, addressing Rule 502(b), Rule 604-2, Rule 4A of the rules for Mediated Settlement Conferences and Rule 7 of the rules for Mediated Settlement Conferences. If it is acceptable with the Commission, I'd like for Ms. Ruiz to have the remainder of the time for the presentation.

CHAIR YOUNG: That's certainly fine.

MR. MISENHEIMER: Thank you.

(WITNESS DISMISSED)

CHAIR YOUNG: If you'd come forward, Ms. Ruiz?

MS. RUIZ: Good morning.

CHAIR YOUNG: Place your left hand on the Bible. Thank you.

JENNIFER RUIZ

HAVING FIRST BEEN DULY SWORN, did present facts and remarks as follows:

CHAIR YOUNG: If you'd state your name for the record and the parties whom you represent?

MS. RUIZ: Thank you. Jennifer Ruiz. I am with Hedrick, Gardner, Kincheloe and Garafalo. I am a committee member on the North Carolina Bar Association's Workers' Compensation Committee and here today on behalf of the North Carolina Association of Defense Attorneys. As Mr. Misenheimer stated, we'd like to address several of the rules that - the theme for our rules that we are primarily addressing today really have to do with additional fees.

Rule 502-2(b), the NCADA would object to the language preventing the waiver of the requirement of this rule in cases that are settled with *pro se* claimants. And this has been presented to you this morning earlier as well by my colleague, Bruce Hamilton, indicating how this might interfere with settlements of these cases. Our fear really is that a lot of times when somebody is *pro se*, certainly there are exceptions to every general rule, but a lot of times, there is a reason that they are *pro se*. And when you have a claimant that has an - obviously I'm a defense attorney so I'm

going to sound biased - but a properly denied claim and they have, for whatever reason, received extensive treatment - for example, a lot of times, surprisingly, hernia claims - those expenses can become greater than you would expect. When those expenses are great, that's obviously going to become cost prohibitive to a settlement. The fear is that what's going to happen is obviously the cases will not settle. They will have to proceed onto a hearing and there are a number of potential outcomes. Two primary outcomes that could happen is, A, a hearing is set, they're properly notified and do not appear. And at some point, whether it's the first hearing or the second, their case is eventually dismissed with prejudice and we're in the situation where you still have medical providers who have not been paid.

COMMISSIONER SCOTT: Counselor, could you pull the microphone closer to you?

MS. RUIZ: Sure. This might be the first time I've been told I'm not loud enough. You can also have where we actually go forward to a hearing and they appear and when the decision comes down, their case is denied and yet again you've got a situation where the medical bills have not been paid and you've got a claimant who, at some point, could have had a

settlement of some amount in their pocket. So we're really worried about we're going to get to a point where we're wasting the court's time. The time and the cost and the money and we're still in a situation where it's not paid. We really think the outcome of this is going to be that it's going to prevent settlements. Rule 604-2, the NCADA objects to language requiring employers and carriers to pay *Guardian Ad Litem* fees. We believe that these fees would more fairly be recouped the way that standard attorney fees are recouped and that would be out of any general recovery received. We also believe that these fees should be on a flat-fee basis and not for the actual time spent as proposed, the fear being that this could lead many attorneys serving as *Guardian Ad Litem* to inflate the actual activities that they've performed. If the rule is however enacted, we would request that the term, in the discretion of the Commission, be added so that this is not across the board applied. Rule 4A of the Rules for the Mediated Settlement Conferences, the NCADA would object to the language requiring that carrier and employer be responsible for the interpreter fees at mediation. The argument here is that obviously at that level, the claimant has found an attorney to represent them.

Obviously if there's a language barrier, that has been overcome so that they could agree that that attorney is qualified and that claimant is comfortable with that attorney representing them at the mediation. We believe that whatever means they have found to overcome that language barrier should be sufficient for the purposes of a mediation. We do acknowledge that once you get to a hearing and there is testimony under oath, that might be a different situation but certainly for the purposes of mediation, we would argue that that's not necessary and should not be borne by the defendants. Rule 7C for the Rules of Mediated Settlement Conferences, this regards the postponement fees. The NCADA would object to any language which would require that defendants in all situations be responsible for any postponement fees that are necessary. Certainly there will be situations where the postponement is at the request or potentially at the fault of the - of the plaintiff, if they request it because they're not prepared. Or a lot of times, the defendants have not been able to properly prepare if the plaintiff's attorney has not timely provided discovery responses. That is something that defense counsel for their - their clients need in order to properly provide settlement

evaluation and secure authority. It does nobody good to go to a mediation where authority is not in place because we didn't have the timely responses from discovery. So in the situations where it is at the request or the fault of the plaintiff or plaintiff's counsel that the mediation be postponed, we would object to language outright requesting or requiring that defendants be responsible for that. Those were the rules that were outlined by Mr. Misenheimer. However, there are a few other rules that are outlined in a written summary which has been provided to each of you and I'm happy to submit as a separate exhibit. The first rule is one that's been discussed quite a bit today, Rule 502 Subsection 7 regarding extraneous language. To the extent that that addresses any Medicare or social security disability language, we would obviously request that it not apply to that. That isn't information that needs to be included in there and that was briefly discussed at the beginning of today's hearing. Obviously the hot button regarding that particular proposed rule is the Release and Resignation. And the NCADA takes the position that first of all, the parties have the right under general contract law to address any additional side agreements that they would like to address when they

come together at a mediation. I think it's been stated more than once today that neither party is required to settle if they choose not to do so. There's also been some concern about, you know, what the claimant is being asked to give up should they choose to settle and enter into a Release and Resignation. And rest assured, these do not affect vested rights, which are the retirement rights we're talking about when you're considering long-term employ or seniority, long-term disability benefits, anything that is a vested right is not released within those Release and Resignations. But at the end of the day, general contract law would state that the parties can come together and negotiate that. NCADA would obviously object to any - any indication that the Industrial Commission would have the right to oversee those or determine whether they're appropriate or not. We would rely on the argument that obviously once you're talking about a Mediated Settlement Conference, you're talking about two parties who are represented and there is a basic assumption that those attorneys who have bound themselves to represent that client, if they are engaged in negotiations regarding whether to enter into any side agreements, they clearly believe that they are qualified to do that. If there is an

attorney in this room, or in the State of North Carolina, who feels like they are not qualified to do that, then that should be their argument. But certainly there are plenty of attorneys in this state who are qualified and are - general contract law enables them to negotiate with the other side's attorney as to whether that should be done. And so we'd request that language be kept out to the extent it deals with Releases and Resignations. Additional rules outlined in the summary, Rule 701-4, that just addresses the amount of time that the parties can have to submit their Full Commission briefs. It reduces it from thirty days to fifteen days and generally, the NCADA would oppose any rule that prevents the amount of time that we would need. Obviously the current rules provide that if there is a hearing in place, already scheduled, that our ability to seek an extension is limited. We believe that the current rule really does provide adequate protection against unnecessary delay, as the extension is only possible once the hearing - before the hearing has been set. The last rule I'd like to address are Rule - I'm sorry - two of the rules from Mediated Settlement Conference, Subsections "a" and "c". And this has to do with another issue that's been raised more than

once here today and that is the mediators that are eligible in Mediated Settlement Conferences. The parties should be able to agree to any mediator, even if it's not a certified mediator. We believe, to be honest, this proposed rule would only serve to disenfranchise many of the most otherwise qualified mediators who have years of experience and we would - that would obviously be unfortunate. Again, once you're talking about a Mediated Settlement Conference, you're talking about two represented parties and I think the attorneys, so long as they agree with one another on who should be appropriate to provide the mediation services, that that should be appropriate. So the NCADA believes that the parties should be allowed to use effective mediators even if they're not certified, so long as both parties agree. And then finally, the NCADA would object to language limiting the time frame for mediation to a hundred and twenty days. This would prevent the opportunity to extend the deadline even when it is legitimately necessary. A lot of times, you see a 33 filed at the same time a Form 18 is filed and it's - you know, maybe the claim is not necessarily ripe for mediation, let alone proceeding on to a hearing. There are also times such as when you have more than one defendant

that it just becomes necessary to seek additional time. So we would propose that the rules remain as they are to enable the flexibility that where it is legitimately necessary to seek additional time and receive that time, that that - that remain the case. Thank you.

CHAIR YOUNG: Are there any questions for Ms. Ruiz? Any questions? Thank you very much, Ms. Ruiz, for attending this morning.

MS. RUIZ: Thank you.

CHAIR YOUNG: Thank you very much. That concludes the public comments for this morning at this public hearing. I will mention for the record that the hearing notice will be marked as Exhibit Number 1, the proposed rules will be Exhibit 2, and all subsequent written comments and summaries will be placed into the record at a later point in time by order received.

(Public Hearing Exhibit Numbers 1 & 2 are identified and admitted into evidence.)

CHAIR YOUNG: Thank you very much. I appreciate your participation in the public hearing this morning. The period for written comments, as I mentioned earlier, pursuant to the public rule-making notice,

will be held open through the close of business on September 29th, 2010. So if you do have further comments, please do send them to us as instructed per the hearing notice. Written comments and comments made at today's hearing will be made - will be made part of the public record today. We would like to, at this time, ask if there are any further matters that need to come before this public hearing today. Before we conclude today's hearing, we do have some staff members that are present today from the Industrial Commission. And at this time, what I'd like to do is ask Mr. John Schafer to come forward and just get sworn in and give us just a brief overview of the task force that has met in the past regarding the mediation issues. I think I earlier outlined the names of those that participated. So at this time, just very briefly, Mr. Schafer. Would you place your left hand on the Bible and raise your right hand?

JOHN SCHAFER

HAVING FIRST BEEN DULY SWORN, did present facts and remarks as follows:

MR. SCHAFER: Chair Young---

CHAIR YOUNG: If you would state your name for the record and your position---

MR. SCHAFER: Yes, ma'am.

CHAIR YOUNG: ---here at the Commission?

MR. SCHAFER: My name is John Schafer. I'm a deputy commissioner here at the Industrial Commission. My primary responsibility is to administer the Commission's mediation program. Chair Young listed a list of attorneys who practice in the workers' comp area, both on the plaintiff's side and the defense side, who participated over the years with regard to reviewing the mediation rules and procedures as well as related forms that are used in the mediation process. That review began actually early in 2007 and went in - in spurts, if you will, from early 2007 up through recent months, occasionally focusing on the rules and procedures aspect and occasionally focusing on the forms. Most of that input came to me via e-mail and telephone calls, but we also had some meetings where we got together at least in part with some of those attorneys. I would say that the - the input was extremely helpful with regard to the rules as well as the forms. We rarely, if ever, received any kind of unanimous concurrence or agreement on - on everything but for the most part, there was a consensus expressed about the - the rules and the forms. And with regard to those areas where there were differences of opinion, I think those differences

of opinion were very clearly expressed today at this hearing.

CHAIR YOUNG: Thank you. Are there any questions from the Commissioners for Mr. Schafer? Thank you, sir. You may step down. Thank you, Mr. Schafer.

(WITNESS DISMISSED)

CHAIR YOUNG: Ms. Taylor, if you'd come forward, please? Wanda Taylor, the Chief Deputy.

MS. TAYLOR: It feels so different on this end.

CHAIR YOUNG: Place your left hand on the Bible and raise your right hand.

WANDA BLANCHE TAYLOR

HAVING FIRST BEEN DULY SWORN, did present facts and remarks as follows:

CHAIR YOUNG: Ms. Taylor, I'll have you state your name and the position that you - for which you work here at the Commission. I'd also then like for you, if you would please, just to give us a brief overview of some of the comments that you have received that bear specifically on the rules - the proposed rules today as they affect the deputy commissioner section and the hearing unit that we have here at the Commission, please, ma'am.

MS. TAYLOR: Okay. My name is Wanda Blanche Taylor and I am the Chief Deputy

Commissioner at the Industrial Commission and have been for about a year and a half. And during the past year, let's say - maybe a little less than that - we've been working on some of the potential rules. A lot of what we do is - I think several people have talked about what actually happens versus what's done. And what the Commission does is deal with the issues that are presented to us and we have to come up with an answer for whatever is presented whether or not that immediately fits into the framework that we have. So over a period of time, special committees with various deputies, sub-committees - that would be meetings with the Full Commission and discussions with various and sundry attorneys, medical care providers, rehabilitation specialists, mediators. We have come up with certain issues that we're required to rule upon with some frequency and have come up with various and sundry notes over time as to things that we need to be able to deal with, and have made certain comments with regard to those provisions. For example, one of the ones is the settlement agreement. I know there's discussion about whether or not the claimant's attorney will be accepting the unpaid medical providers and that is an issue that has been

raised time and time again over not only my year and a half as the Chief Deputy but the preceding thirteen before that. And it happens with a lot of frequency and there have been a lot of meetings about it, and there have been many discussions with different members of the Bar in individual cases. And so I would say that the vast majority of the changes that affect the deputy section have been as a result of the ongoing process of the problems that we actually see, that are presented to us, that we have to produce a result on, that we have to review. I know that one of the processes that the Commission is currently working on is payment of unpaid medical providers and that is something that we've also spent a lot of time and effort on.

CHAIR YOUNG: As you know---

MS. TAYLOR: And if it wasn't a problem that we've been dealing with, we wouldn't know about it, but that all backs up into the discussions about certain provisions.

CHAIR YOUNG: As you know, Ms. Taylor, one of the activities that's - that's paramount to us here at the Commission is to always move cases as expeditiously as possible through the system, including not only the mediation, the hearing, the actual rendering of

decisions in these matters. In the proposed rules, as you've reviewed them, do they - do they seem to address some of the issues that have been raised through discussions that you've had with members of the Bar, members of - with other concerned parties?

MS. TAYLOR: I think so. There's always a tension between how fast we can get things through, which is very important to the litigants - justice delayed is justice denied - and pushing them through so quickly that they don't have time to do what they need to do. We are going to be getting more cases presented to us through this mediation - through the change of the mediation deadline and we've discussed that a deputy commissioner is not prohibited from allowing the parties to mediate even once it's on their docket, but they are required to maintain jurisdiction of that. Which means that it's sort of like asking for a continuance, which is something that we do not favor, we do not like. And as you well know, if you ask for extensions over and over and over to write briefs, soon you have fifty briefs to write instead of five briefs to write, so we don't want too many extensions. But we still have, as far as we're concerned, some discretion for the deputy to be able to say "yes, I will allow this period of time to

mediate", even at this point but that period is going to be circumscribed by the deputy and monitored by the deputy, and the case is going to remain with the deputy, which I think will make some allowances for the specific instances that the various commentators today have mentioned. But, you know, it's all a balancing act. But that is one way that we have sort of worked on, taking into account some of these concerns. It doesn't address all the concerns, but it is a method of addressing at least some of them.

CHAIR YOUNG: Are there any questions for Ms. Taylor? Commissioners, any questions? All right. You may step down. Thank you very much.

MS. TAYLOR: Thank you.

(WITNESS DISMISSED)

CHAIR YOUNG: At this time, this public hearing is adjourned and the Commissioners will exit at this time. Thank you very much for attending.

(WHEREUPON, THE HEARING WAS ADJOURNED.)

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TRANSCRIBED BY: Sharyn Klein, Graham Erlacher and Associates

STATE OF NORTH CAROLINA

COUNTY OF GUILFORD

C E R T I F I C A T E

I, Susan V. Thomas, Notary Public, in and for the State of North Carolina, County of Guilford, do hereby certify that the foregoing seventy (70) pages prepared under my supervision are a true and accurate transcription of the testimony of this public hearing which was recorded by Graham Erlacher & Associates.

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

WITNESS my Hand and Seal on this 22nd day of September 2010.

My commission expires on October 13, 2013.

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NOTARY PUBLIC