Public Hearing

STATE OF NORTH CAROLINA

BEFORE THE NORTH CAROLINA INDUSTRIAL COMMISSION

FULL COMMISSION

PUBLIC HEARING CONCERNING AMENDMENTS TO

WORKERS' COMPENSATION RULES 104, 404A,

501, 502, 601, 701, 702 AND 703

RALEIGH, NORTH CAROLINA

MAY 17, 2006

A P P E A R A N C E S

COMMISSIONERS PRESENT: Buck Lattimore, Chairman
Bernadine S. Ballance
Thomas J. Bolch
Laura K. Mavretic
Christopher Scott
Diane C. Sellers
Pamela T. Young

SUBJECT: Workers' Compensation Rules

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S P E A K E R S

E X H I B I T S

P R O C E E D I N G S

CHAIRMAN LATTIMORE: This is a public hearing. I'm Buck Lattimore, chairman of the Industrial Commission, and joining me today are Vice Chair Pam Young, Commissioner Diane Sellers, Commissioner Laura Mavretic, Commissioner Christopher Scott, Commissioner Bernadine Ballance, and Commissioner Tom Bolch is caught in traffic, but is on the way in, so we thought we'd go ahead and get started. This is a public hearing of the North Carolina Industrial Commission concerning amendments of Workers' Comp rules 104, 404A, 501, 502, 601, 701, 702 and 903. We have--- Did everybody get copies of this? I think the public - people in the audience had an opportunity to get a copy of the proposed changes, as well as the notice. If anybody needs a copy of that, it's available at the - at the table - the rules we'll be discussing today. The Commissioner - the Commission has given notice, as required by law. It has solicited oral and written comments of all interested persons, firms and organizations wishing to comment concerning any aspect of the proposed changes. And at this time, I'll enter

into evidence the public notice of rule-making that was published on our website and also was published in the North Carolina register, in requirements of the law. So, that's accepted into evidence at this time.

(Notice of rule-making identified and admitted into evidence.)

CHAIRMAN LATTIMORE: At this time, all written comments received as of this date will be accepted and placed in the record. Let me ask my counsel - I don't believe we've received any written comments prior to this. We did not receive any written comments as outlined in the announcement, so none can be placed in the record at this time. The record will remain open following this public hearing to receive additional comments and will remain open until the close of business - at five p.m. on June the 17th for any type of reply or comments that you may want to - want to make and they will all be considered. Today, we will hear oral presentations. Those desiring to make an oral presentation will be asked to keep remarks to not more than ten minutes in length. A request to speak was due on or before May 9th, 2006, and a list of those requests is available

for your examination. However, in view of the fact that we received a limited number of those, the Commission will allow others to speak today who did not previously sign up to speak, provided that time permits. The Commission will ask that speakers identify the specific rule or rules that they are addressing in their remarks. Comments received today will be made part of the public record of these proceedings, along with the written comments filed on or before the published deadline and the comments received after this hearing, also. The general statutes require that our rule-making be based on evidence and thus, it's required that each presenter today will give his or her presentation under oath. Let me say that the Commission is appreciative of the work of a committee that the Commission appointed to - the committee that the Commission appointed to make recommendations to us on proposed rule changes. Let me recognize Hank Patterson, Jim Lore, Victor Farah, Paul Cranfill, Rick Lewis and Bruce Hamilton. We worked hard on that committee to provide us input into the areas that we needed to take a look at and to consider

and those recommendations went into our deliberations to then make the proposed notice of rule-making and what was included in our notice and what was included in our proposed rule changes. The committee that worked - the people I just mentioned - represent both sides of the bar. They include - included representatives of both employers and labor, employees, as well as insurers and legal representatives to certain medical providers. We appreciate the efforts of these individuals, appreciate their report and, at this time, we will proceed with those who desire to speak. I have a list of speakers that have signed up prior to today and we will go in the order that we heard from them, so let me begin by calling on Jim Lore, who - Mr. Lore, would you like to come forward and be sworn?

MR. LORE: I'll pass and defer to Victor and Hank, if that's all right.

CHAIRMAN LATTIMORE: All righty. Mr. Farah? First of all, in view of the fact that this testimony must be sworn testimony, place your right hand on the Bible, raise your - your left hand on the Bible, raise your

right hand.

VICTOR FARAH

HAVING FIRST BEEN DULY SWORN, provided the following information to the Commission:

CHAIRMAN LATTIMORE: Thank you. If you'd please state your name and who you represent.

MR. FARAH: My name is Victor Farah. I'm at the Jernigan Law Firm in Raleigh and we represent - our practice is primarily representing injured workers in workers' comp cases. I'm here today only to take a very little bit of your time because I don't think there's much in controversy. But, I do want to speak to two of the rules and others may speak in more detail about them, but they are the Rule 404A and Rule 601. Rule 404A, as you know, is the trial return-to-work rule. You do have it before you on a - on a fairly minor change, I believe - changing an "an" to an "or" or an "or" to an "an."

CHAIRMAN LATTIMORE: Mr. Farah, if I may interrupt, that's contained - that's on page 2 of the proposed rules at the top of the page. Is that correct?

MR. FARAH: That is correct.

CHAIRMAN LATTIMORE: Section 7A of Rule 404A, trial return to work.

MR. FARAH: Correct. And since you have it before you, I'm not speaking about that aspect of the rule, but another aspect. And just by brief way of history - and I think Commissioner Sellers is probably going to be the one that remembers this most - but, the whole trial return-to-work provision comes out of the legislative change in the Reform Act of 1994. Before the Reform Act, the situation was that workers, either with advice of counsel or otherwise, were reluctant to go back to work when they had restrictions or if they were concerned about the sincerity of the employer in taking them back because they knew - or they believed - that, if they tried to go back to work, their benefits would stop and then, if it didn't work out, they would have to go through a full-blown hearing to get their benefits reinstated. Now, before the provision was added, oftentimes, what practitioners did were entered into trial return-to-work agreements, so that would - there would be something self-executing, that if the trial return to work didn't work out, then they had

agreed that it would restart. And back then, you know, you would try and enforce those through motions. I believe Commissioner Sellers served as Chief Deputy and Acting Executive Secretary, and that's where those things played out. Well, trial return to work was supposed to fix that. Trial return to work was simply supposed to accomplish that, if somebody was going to try to return to work, they shouldn't be in a worse position than the person who refuses to try to return to work. So, the person who refuses to try is subject to the Form 24 procedure. That's how you cut off their benefits if they're refusing legitimate work. The trial return to work, as envisioned then, was, well, okay, "So, if somebody tries and it's unsuccessful, they shouldn't be any worse off. They should still be subject to a Form 24 procedure." Unfortunately, as some of you recall - I guess we're going on eleven years ago now - the initial rule proposed by the Commission on how to implement trial return to work caused a lot of consternation in the community. It was believed by the defendants' side that there was too much control being put in the hands of the injured

worker to decide whether the trial return to work was successful or not. So, as a result of that, the current - substantially, the current rule was adopted. It adopted various provisions that are very much outside the Statute. It adopted provisions requiring that it didn't apply if it was a release without restrictions. It said, if you were released without restrictions, the doctor could then change it within forty-five days. It said it didn't apply to various other categories of cases. It said it had to be on a form signed by the authorized treating physician. Anyway, a lot of changes that, from the workers' side - said, "Wait a minute. This defeats the purpose." But, we've had a lot of experience with it now and you did make a change several years ago, where you changed it from "the authorized treating physician" to "an authorized treating physician," and that has helped because now, any authorized treating physician could sign the Form 28U and restart your benefits. The problem arises that there are a lot of reasons why a worker can't get an authorized treating physician to sign. One, they might not be able to get back to the

doctor because, if it's not authorized, they can't go back. They may not have the wherewithal to understand it. Doctors tend to be very reluctant to sign a form that appears to have a lot of legal significance, which it does, without knowing exactly what it's about, so there's been some reluctance. Then, we had the Burchette case come along and I think Matt McArthur will talk to you more about that, but what Burchette said was, "Look, you can't have this rule that dramatically limits statutory rights beyond what's intended in the Statute." So, as a result of Burchette, there's been a pretty strong feeling that the current rule really goes beyond, and is not consistent with, the statutory and case law at this point. I'm going to let Matt speak to whether it is or not, but when this committee talked about, "Well, what do we do about that? We don't want a big fight about whether all those other things should be included in the rule---" You know, personally, I don't think they should be, but if I was sitting on the defense side, I would say, "Yeah, you know [lets -] that keeps it a little more manageable. It gives us a process." The

recommendation that came from the plaintiffs' side, to add, was simply to codify what's existing practice now, and that is, if you can't meet those requirements, but you believe you're still entitled to have your benefits restarted under 97-32.1, you file a motion with the Executive Secretary's office. If the Executive Secretary's office says, "Yeah, you have a basis under the law to get your benefits restarted," they restart them under 32.1. That's all the plaintiffs' recommendation did. It didn't try to take away any of the other things, so I would just ask you to strongly consider--- And you said there's nothing written in the record. I believe Mr. Patterson actually did submit that, but I guess it wouldn't have been during the comment period, but I think we can supplement to the record to make sure that that one-paragraph provision is in there. So, that's what we're just asking you to consider doing. It doesn't disrupt things. It codifies what the practice is already, but unfortunately, the practice is known just to those who know and by not having it in the rule, you have a lot of people who don't know that they can just file that

motion to the Executive Secretary's office.
MS. BALLANCE: Under the current practice, when the Executive Secretary or a Deputy Commissioner reinstates benefits and the case is appealed, what has been your experience? Are the benefits paid - reinstated immediately or do they wait - or is there a practice of waiting until all appeals have been exhausted?
MR. FARAH: There - I would say, early on, there was a lot of noncompliance with an order to restart the benefits. I think, as the process has matured, it is a lot rarer for somebody to - for a - an employer or carrier to refuse to restart unless they've obtained a stay. Yeah. And my friend, Mr. Lore, was just pointing out - I'd commend to you a case that was just decided by the Court of Appeals this past week, saying that, even when a case is pending, it doesn't take away the Commission's jurisdiction to--- I believe that was on medical, but the idea was that an appeal doesn't even stay the Commission's right to continue to administer benefits on the underlying case. If he remembers the name, he can do that. But, I would say it's improved a lot. It's not perfect. You know, one

of these times, I think, in looking at Rule 703 - I believe that's right - 703 administrative decisions rule - there are some ambiguities in there and you might tighten the language to make very clear that somebody has to continue to comply pending an appeal of an administrative order. That is the practice and the policy of the Commission. The rule probably isn't worded as well as it could be. I'm probably taking more than my time. If my time is up, I'll just defer to Mr. Patterson. He can explain to you the issue on the - on the Rule 601. If I have a minute, I'll go ahead and tell you and then, he can do it in more detail. Please remember that the proposal on Rule 601 that was agreed to is not in the form that it was drafted. What has happened is that the agreed-to part has a very important provision yanked out of it. And that provision, likewise, is in the materials that Mr. Patterson sent to you and it is simply to add an additional provision - and best place where it would be - number two, and it would say, "When the employer or its carrier admits employee's right to compensation, first installment of compensation payable by the

employer shall become due on the 14th day after the employer has written their actual notice of the injury or death (unintelligible) all compensation shall then be due." Obviously, that is tracking 97-18. The reason that needs to be in there is, if you look at how Rule 601 reads without that, it would lead a carrier to believe that they have thirty, or maybe even ninety days, in occupational-disease cases, to actually pay the benefits. That was never the intention. All the changes - the change that was made to 97-18 by adding the subsection J was merely to clarify when there could be sanctions. It was not intended to change the obligation that the payments in accepted cases, or ones it's been determined are due after fourteen days--- Hank can explain it more articulately than I, but I really fear that, if you don't put in the provision tracking the Statute on that, you're going to have a lot of confusion and you're going to have a lot of dispute as to when someone has to pay. And that's what we were trying to avoid in the statutory change and I'm afraid that adopting the rule this way might make it worse.

CHAIRMAN LATTIMORE: Clarify for me where that change you suggested should go.
MR. FARAH: It would be a new number two in Rule 601, so if you look at your---
CHAIRMAN LATTIMORE: In your followup, can you submit in writing to us so there'll be - for our deliberations, so we will have no problem understanding exactly where it goes and what's your language?
MR. FARAH: Yes, sir. We'd be happy to add a comment to explain again, probably better than I just did, why it's important.
MS. MAVRETIC: Would you clarify - I may have missed something, Mr. Farah, but what - didn't - did you just say that the rules - subcommittee that looked at the rules - that this was something they agreed to, but it didn't get put in what we submitted as the draft?
MR. FARAH: No.
MS. MAVRETIC: I missed you on that one.
MR. FARAH: Yeah, and I probably said it poorly. The order of the drafting process of the committee - the draft which was submitted to the defendants came from the plaintiff side and the draft that was submitted to

them included the provision I'm talking about.
MS. MAVRETIC: Right. And then, you---
MR. FARAH: And they said, "Well, we can agree to everything except that provision."
MS. MAVRETIC: Right, and the previous one you've talked to us about.
MR. FARAH: Correct. And so, rather than say that, "Oh, we don't want to submit anything," I think, if you look at Hank's report from the committee, it does explain that that provision is not being submitted as the consensus provision because they did not agree, but Hank did send in an explanation as to why it was a necessary component, or least why the plaintiffs' side believed it was a necessary component. But, no, there - I'm not saying that anything that was agreed to wasn't (unintelligible).
MS. MAVRETIC: I thought we had missed something that was recommended, so thank you.
MR. SCOTT: Mr. Farah, I want to ask, very quickly, a question about 104. And the amendment makes reference to what's already in the rule, saying that a carrier or an employer, when they fill out a 19, needs to include

an 18. What is your experience when you pick up a case that is not immediately coming into your office, but rather, a little bit later? Are carriers, in fact, following that, or employers following that or are they not?

MR. FARAH: I seem to see, with some regularity, Liberty does, Key Risk does. I think a lot of the bigger carriers probably do, but I would say that that's not true across the board. As to the effect of it, I would say even the ones that do - somebody will come in to see us with a whole stack of stuff and there will be a thing, saying, "Here's the Form 19. Here's a Form 18," and a little note of explanation. The vast majority of the people who come to see us still didn't have a clue what that meant. And I think Mr. Hassell's here and he can - he can probably give you a lot more experience on that---

MR. SCOTT: Uh-huh.

MR. FARAH: ---but I would say this attempt is - you know, it's consensus and it's better than nothing, but I think what Mr. Hassell will tell you is that just doesn't go nearly far enough and, unless you have some

more teeth in it, it's either going to be ignored by the carriers or, even when it's done, it's not effective in doing what you want, and that's telling the worker, "Hey, this ain't your claim. You still have to do something." Thank you.

CHAIRMAN LATTIMORE: Thank you, Mr. Farah. Did I hear you say a moment ago, Mr. Farah, that you wanted to yield to Mr. Patterson as part of your presentation?

MR. FARAH: Yes, sir.

CHAIRMAN LATTIMORE: Well and---

MR. FARAH: I always yield.

CHAIRMAN LATTIMORE: ---if Mr. McArthur will allow this--- You're next on the list, but this is going in sequence. I'm going to allow that to happen, okay?

MR. PATTERSON: Be delighted if could just have a - one moment, Your Honor.

CHAIRMAN LATTIMORE: If you'll put your left hand on the Bible and raise your right hand, please, sir.

HENRY N. PATTERSON, JUNIOR

HAVING FIRST BEEN DULY SWORN, provided the following information to the Commission:

CHAIRMAN LATTIMORE: Will you please state your name

and who you represent?

MR. PATTERSON: Henry N. Patterson, Junior. I'm an attorney in Chapel Hill and I represent employees, and I today, I represent myself, I supposed. Anyway, I - just a couple of words - comments on--- Mr. Farah indicated that, in the report of the committee that reviewed the rules, dated April 5, 2006, there was a notation that, "The second part of the report contains additional changes proposed by the plaintiffs' representatives on which there is disagreement with the defense bar. They include an addition to Rule 404A and additional language to include in proposed Rule 601." And the additional language the plaintiffs' bar - or - the representatives of the plaintiffs' bar proposed is set out in part two of the report. So, the actual language is there, along with a short comment on the language by the plaintiffs' bar, so I - the specific suggestions are already available to the Commission along with a short comment. Following that submission of that report, there was a written comment by Bruce Hamilton, who is a defense member of that drafting committee, commenting - you know, responding to the

plaintiffs' bar comments. There were also some comments by Rick Lewis, who's a member of the defense group in the drafting committee. And there was another memo that I sent to Chairman Lattimore on April 6th, 2006, sort of a rebuttal, so there are written comments back on April 6th - April 5th, when the committee report was submitted, and April 6th. If the Commission doesn't have those, we'll be happy to duplicate those and distribute them.

CHAIRMAN LATTIMORE: If you would implicate those for us just to make sure we're putting in the record exactly what you'd like in the record, I would appreciate that.

MR. PATTERSON: Right. We'll do that. Thank you.

CHAIRMAN LATTIMORE: The reason they were not put in the record was it - that was submitted as part of the committee report and then, we filed the request for comments and because it didn't officially come in during that time - is the reason I don't have it to present today.

MR. PATTERSON: Right. Well, we'll just re-submit those.

CHAIRMAN LATTIMORE: Sure.
MR. PATTERSON: I'll try to re-submit those as a package.
CHAIRMAN LATTIMORE: We'll accept them.
MR. PATTERSON: I would just say, with respect to the - to Rule 601, the - our - the plaintiffs' representatives on the drafting committee suggested that there be a provision added that, "When the employer and its insurance carrier admits the employee's right to compensation, the first installment of compensation payable by the employer shall become due on the 14th day after the employer has written their actual notice or the injury or death, on which date, all compensation due shall then be paid." That simply is taken from the Statute and we suggested that be included so that the rule accurately reflected the statutory obligations. And our---
MS. SELLERS: Well, I--- Mr. Patterson---
MR. PATTERSON: Yeah.
MS. SELLERS: ---I'm confused because I remember being seated around the table couple years back when there was another proposal - or - other proposals being

discussed and this came up and there was the agreement - not like a written agreement, but the voiced agreement that you and - I can't remember - Jim - whether Jim Moore was there or not, but - that there was an agreement that, generally speaking, these payments couldn't be made within fourteen days under most circumstances. But, the question was how far to go out, how reasonable time could be allowed, but to try to get it as tight as possible so the money would be going as tight - as quickly as possible.

MR. PATTERSON: I think that's correct, in a sense. I - my own view is, in most cases, the money can go out within fourteen days. In most cases, the money does go out within fourteen days. It's - in most cases, the injury is obvious and the visual liability is immediate, where it's (unintelligible) and the money is paid.

MS. SELLERS: We probably don't see most of those cases that go through administratively.

MR. PATTERSON: Right. And so, the Statute - and let me just read from the written - one of the written comments. This is my comment to Mr. - to

Chairman Lattimore on April 6th. "It must be remembered that the new section, 97-18J, is a sanction provision. That is, the provision for thirty days is a sanction provision. It does not alter the fourteen-day requirement for payments set forth in 97-18B."

MS. SELLERS: Well, I realize that and I realize that, whenever this agreement was made earlier, I mean, I wasn't involved - the Commission wasn't involved with that. It just seems to be a change of where we're starting from because it seemed like in - for many years, there was an agreement, after '94, when the legislation - all the people met around the table - that the defendant attorneys would make every effort to get their carriers and self-insureds on board to get those payments made sooner, and there was a - likewise, an agreement by the plaintiffs' bar not to be filing motions for sanctions for the fourteen days, as has - was beginning to be the case in '94.

MR. PATTERSON: And the - and the Statute now specifically provides for sanctions after thirty days---

MS. SELLERS: Uh-huh.

MR. PATTERSON: ---unless the Commission grants an extension. And except in cases of occupational diseases of - where there's exposure to substances in the environment, where the - where the obligation to pay does not - or - the obligation to admit or deny does not arise until thirty days after notice.

MS. SELLERS: Right.

MR. PATTERSON: So---

MS. SELLERS: Now, I - so, I understand the sanctions part. I don't have any--- I guess I just didn't understand that we were - that we - that there was a movement away from the fourteen days - that you were not in - and I use the word "agreement" loosely - I just didn't realize that, frankly, until right now.

MR. PATTERSON: I think that--- And if we look at statutes in other states, you'll find, I believe, fourteen days to be quite common, and thirty days would be outside, by far, based on my review.

MS. SELLERS: If we look at our experience here?

MR. PATTERSON: No. If we look at other states.

MS. SELLERS: Oh, okay.

MR. PATTERSON: I mean, thirty days, based on my brief

review, would be an extended period, more extended or longer than most other states. And I think the guiding principle's that payment should be made as soon as practical, soon as possible, and fourteen days seems to be, from my experience, not unreasonable where it's an obvious injury, an obvious admission, an obvious obligation to pay, so that the present statutory structure provides for an obligation to pay as soon as possible, but--- You know, and an obligation to pay within fourteen days where the employer's admitted liability, but no sanctions until after thirty days passes, just like we have a - we have a statutory requirement to pay compensation - this is a comment we made - we have a statutory obligation to pay compensation within ten days following expiration of time for an appeal to the - from a Commission decision in 97-18E. That's the obligation, to pay within ten days, but the sanction's there. The penalty doesn't attach until an additional period of fourteen days has passed, so we have a similar situation. We have a - the sanctions attaching at a time after the obligation is incurred. And our view was not to point that out in

the rule - was - you know, somewhat was misleading. And so, that - I think our written comments would cover that, you know, otherwise. But, I - you know, we think that, you know, completes the rule and - but, our comments are in writing and I'll make sure they're duplicated and distributed to the Commission. Thank you.

CHAIRMAN LATTIMORE: Thank you, Mr. Patterson. Matt McArthur?

MR. McARTHUR: Thank you, Y H.

CHAIRMAN LATTIMORE: If you'll place your left hand on the Bible, raise your right, please.

MATTHEW McARTHUR

HAVING FIRST BEEN DULY SWORN, provided the following information to the Commission:

CHAIRMAN LATTIMORE: Please state your name for the record, and who you represent.

MR. McARTHUR: My name is Matthew McArthur and I'm a plaintiffs'-side workers' compensation attorney that's been practicing in Raleigh for about three years. I speak Spanish and most of my clients speak Spanish as their first, if not only, language. Of these, I would

say that the majority are undocumented workers from Central and South America. Victor's already covered some of the history of the Act, but I just would like to reiterate that the policy underlying section 97-32.1, later implemented by Rule 404A, is quite clearly to address - at the time, a concern that the number of days the workers' compensation claimants were staying out of work was increasing in relation to previous years.

CHAIRMAN LATTIMORE: If I may interrupt, which particular rule are you speaking to at this time?

MR. McARTHUR: Oh, I'm sorry. I'm speaking to Industrial Commission Rule 404A. At the time, it was perceived that claimants were spending more time out of work and that an incentive should be created to get them back to work and also, to protect them from the perceived danger that, if they returned to work, they might not be in as good a position as someone who stayed out of work and just faced a Form 24-type procedure. It's my contention today that, in this comment, that the policy behind the Statute has not, to this day, in the actual practice of workers'

compensation law, been appropriately implemented. It's my hope that, with clearer guidance from Rule 404A, that that policy might be realized. The current rule provides for the filing of a Form 28T, and when the injured worker fails, the filing of a Form 28U. Quite apart from the problem that, in many circumstances, an injured worker must wait for the defendant to authorize a return visit to his treating physician, in my experience, doctors are very reluctant to sign these forms, even when accompanied by a letter explaining the purpose of the form and the policy underlying 97-32.1. The reason for this reluctance appears to be twofold. First, a physician may be reluctant to sign any document that appears to have a binding effect and, second, as it's been explained to me in various depositions, patients that are able to return to work after a medical provider has rendered whatever treatment is recommended, especially surgery, have better results, or better perceived results, than those who do not. And physicians do not, as a general rule, want to encourage a disability mindset and prefer to render their best-informed opinion on what a worker is

physically capable of doing or not doing without declaring that he is wholesale incapable of working at all. So, in the vast majority of cases where a worker has failed to - failed at a return to work, either because he's reinjured himself or because the work turned out to be heavier than it was initially represented, and where he's unsuccessful in obtaining a Form 28U, generally speaking, defendants will refuse to reinstate benefits voluntarily, making the argument that the work was suitable, at least in the physical sense of suitable, as being within the worker's restrictions and that the reason the injured worker is not working is due to his refusal, not the general failure of the attempt. Now, undocumented workers, in particular, are perhaps in an even worse situation, where the employer knows that the injured worker is undocumented, but entices them to return to work, only to produce a Social Security mismatch letter that's already in their file and essentially fire or suspend that person until he can remedy the mismatch. Then, the argument becomes that he's constructively refused suitable employment by being undocumented. And as a

practical effect, this turns Gayton versus Gage Carolina Metals on its head, making work authorization the first question for consideration instead of the last. But, I'm kind of digressing from my main point. When one of my clients ends up in this situation, I essentially have two choices. I can file a motion with the Executive Secretary's office, requesting immediate reinstatement of benefits, or I can file a Form 33 request for a hearing. In general, the Executive Secretary's office is in a good position to make - to order immediate relief in situations that are not factually complicated. Of course, if I were a defense attorney responding to a motion to reinstate, factual questions abound in these situations. "What are the worker's restrictions, where he's had, perhaps, two treating physicians offer opinions, a functional capacity evaluation, or more than one?" "What are the actual requirements of the job?" "Is there, indeed, a causal connection [between the medical -] in medical terms, between the initial injury and the claimed post-return-to-work disability?" Because all of these questions would seem to require the taking of testimony

at a full-blown evidentiary hearing, even - it seems unlikely that such a motion would be granted. Even where it is successful, the defendant may simply decline to comply with the order, hoping that it will later prevail before a Deputy Commissioner. My second option at that point is to file a Form 33 and then, we're right back in the situation that we were in 1994 that prompted the passage of 97-32.1. In light of those options, when my client's faced with a decision about whether to return to work, I'm often hard-pressed to advise him to attempt to return to work, at least where, if he declines to accept the work and seek determination by the Industrial Commission as to whether it's suitable, he has an opportunity to be heard at a Form 24 hearing and, if I'm successful, I've protected his benefits during the mediation process and hearing. If I'm unsuccessful, he's at least in no worse of a position than he would be if he had tried and failed.

MS. YOUNG: Are you - are you saying that you would hesitate, then, to ask - propose a motion to the Executive Secretary's office?

MR. McARTHUR: Only because - only because it's so factually complicated and it seems so easy to thwart. Also, in many, many circumstances, when an injured worker comes to me, he's already long been back at work and I don't have the kind of documentary evidence that I would like to present to support a motion like that.
MS. YOUNG: So, even though the facts, to you, seem uncomplicated - I mean, if the facts, to you, did seem uncomplicated, would you then make the request?
MR. McARTHUR: They could easily be made complicated or made to appear complicated. And in a case where an injured worker comes to me before he has returned to work, at least then, I have the benefit of the procedure where, you know, I've got the defendant providing me with a written job description, which I then have seven days to review and comment on before it goes to the treating physician. These are the sorts of things that build an evidentiary record that I could attach to a - to a simple motion to the administrative - or - to the Executive Secretary. My---
MS. MAVRETIC: So, how does this---
MR. McARTHUR: Yes.

MS. MAVRETIC: I'm sorry for interrupting you, but how would the proposed amendment help the current situation? I guess I don't understand that. If the Executive Secretary's office is already doing what you proposed, as a practical matter, and you're - what I hear you saying is it's not working very well, so how does this help?

MR. McARTHUR: Well, I respectfully - Your Honor, I wasn't involved in the - in the political process with the defense attorneys and the plaintiff - the committee, but--- And---

MS. MAVRETIC: I mean, you're saying that we need to something even more than this?

MR. McARTHUR: I'm saying that - I am, indeed. In fact, the proposal that the Executive Secretary's procedure be codified, I feel, is insufficient under the law and in practice. I feel, and it's my contention today, that anything less than a rule saying - stating that, upon notice of a failed return to work, the defendants shall immediately reinstate benefits or be subjected to sanctions and, if they don't like it, they can file a Form 24 or they can

file a Form 33. At least this protects the injured worker's right to receive benefits. It's a switch or a remedy in keeping with the general policy underlying the Act.

CHAIRMAN LATTIMORE: Was your first comment that the majority of these people are undocumented workers?

MR. McARTHUR: Of the clients that I represent, yes, but I think that the problem is beyond simply the undocumented workers. There's just a specific complication for them, where they are. As a tactic - and I can cite you to my Adalberto Casades (phonetic) case. Enticed to return to work, and all of a sudden, they've got this Social Security mismatchment letter that they've had for a long time in their file. They let him return to work and then, fired him. And he's in the same position as the guy who makes a good-faith effort, goes back to work, tries it, fails at it, and is then left litigating, with no benefits. And I think that anything less than just a straight order to reinstate benefits confounds the policy underlying the Act.

CHAIRMAN LATTIMORE: We've actually got two sets of

circumstances here, the workers' comp laws and the immigration laws that are complicating your scenario.

MR. McARTHUR: Well, I think Gayton really does address that situation, Your Honor. The immigration consideration should be the last sort of consideration, where he's - everybody knows that undocumented workers can work and get jobs all the time or they wouldn't be injured and coming in here. So, to say that the reason that he's disabled is his documentation status is almost a legal fiction, where the question is, Can he speak English? Can he lift more than ten pounds? Has he ever had experience in an office-working situation before? And the documentation question should come last.

CHAIRMAN LATTIMORE: But, the real question is, Can he get a job somewhere else? And if we're going to play by the rules and he goes to another employer who's going to play by the rules, that employer - we shouldn't be put in the situation because somebody has not played by the rules to start with.

M: That's true, Your Honor, but the employers that employed the - my clients from the beginning benefitted

from their labor and paid money on their labor and they broke in the process and should be equally entitled to benefits to any American citizen that's working, in my opinion. That's my understanding underlying the Comp Act. It's unaffected---

CHAIRMAN LATTIMORE: Please realize I don't think everybody agrees with that, but keep going.

MR. McARTHUR: I do understand. Thank you, Your Honor. Again - so, my feeling is that the proposed amendment to the rule or change to the rule would be insufficient. The prejudice, if any, to the defendants, in following the rule that I propose would be minimal as compared with the impact to the injured worker and his family of not receiving these benefits - not receiving any income, and easily remedied by granting a credit to the defendant for any monies that are later determined to be improperly paid. It's my hope that, if something like this happens, my clients will inure to the psychological benefits, as well as the other many benefits of returning to work, more often. I certainly - with some sort of protection like this, I would advise my clients to give it the old

college try a whole lot more often. And I respectfully thank you for your time.

CHAIRMAN LATTIMORE: Let me ask you. Oh, I'm sorry. Go ahead.

MR. McARTHUR: Oh, yes, of course.

MS. BALLANCE: Are you saying that - is it your position that the proposed amendment that was presented to us by Hank Patterson and Victor Farah would not help? Is it your position that it wouldn't help the situation at all or is it just that it will help, but does it go far enough?

MR. McARTHUR: It would help, but not go far enough. I think, perhaps, accompanied with something to the effect that, "No stay of this order shall be allowed, pending a hearing or further order of the Industrial Commission." Something going further, I think, would be required and would more accurately reflect the statutory policy.

CHAIRMAN LATTIMORE: You have proposed language that you can submit?

MR. McARTHUR: I can certainly draft some and submit it before the - June 17th.

MS. SELLERS: So, you're actually saying the proposal should be there should be no stay allowed and you'd want to encompass that other rule - the administrative rule?

MR. McARTHUR: Exactly, and if I can, I'd like to turn your attention to a recent Court of Appeals opinion, written by Judge Hudson. Believe it is unpublished, but I'm not exactly certain about that. This is Torres versus Smith and Green Company, filed September 6th, 2005, Court of Appeals number 04-693. In that case, it was found that, on both procedural and substantive grounds, that the plaintiff, who returned to work for one day, was entitled to reinstatement of benefits. One day, failed work - return-to-work attempt, and if you look, you know, Frank Briccio (phonetic) and his client fought this case all the way through the Deputy Commissioner, the full Commission, and ultimately, to the - to the Court of Appeals, before the defendant ever paid dime one on that temporary total disability, benefits that he was ultimately found to be entitled to. That kind of thing is devastating on an injured worker and his family.

MS. BALLANCE: Well, I - that why I asked Mr. Farah about what the practice is, so you are not - what you're really asking, it appears, is that - well, one way of dealing with what you're asking is that, if there's a failed trial return to work and benefits are reinstated - that benefits be paid immediately unless there's a stay because---

MR. McARTHUR: Yes. Or either that---

MS. BALLANCE: I mean, this is not as strong as what you're saying---

MR. McARTHUR: Exactly.

MS. BALLANCE: ---but it seems to be - it seems to be a - another way of approaching what you're requesting.

MR. McARTHUR: That might also help, yes, to say that, in the absence of a stay specifically granted, where granting the stay would not frustrate the purposes--- But, I don't know where granting a stay would ever not--

MS. SELLERS: When would you ever have a stay that wouldn't frustrate the purpose, though?

MR. McARTHUR: That wouldn't frustrate the purposes. Exactly.

MR. SCOTT: Let me ask you to comment just a little bit farther down the line, when the benefits are reinstated and the employer pursues suitable employment options. Since the Statute makes very little reference to any kind of international situations, and since the law of the land is that persons who are undocumented shouldn't be employed, why is it that foreign nationals - or why is it that the employer doesn't have the obligation to provide some - the same benefits, such as vocational rehabilitation leading to suitable employment, in the country of origin of those workers, as opposed to trying to overcome language difficulties and so on?
MR. McARTHUR: Well, I think, as a practical matter, that the insurer could provide vocational rehabilitation in the form of English classes, GED classes, education that might help them ultimately return to work at something that - if they'll never be good for construction again, in the United States or anywhere else. It seems to me that their employability in their home country is probably even less or they wouldn't be here at all and I'm guessing that even an insurance company would not - would find the task of

providing vocational rehabilitation services to a worker in Guatemala, in his home company - home country of Guatemala, for example, even a more daunting task than coming up with the kind of evidence here that they might need to successfully complete a Form 24.

MR. SCOTT: Well, maybe they shouldn't employ the person in the first place, then.

MR. McARTHUR: In an ideal world, Y H, I agree - that there wouldn't have human migration across borders and that there might be---

MR. SCOTT: Well, I mean, by employing that person, they do take on certain obligations.

MR. McARTHUR: They do, indeed.

MR. SCOTT: And one of them is to pursue workers' compensation. However, those persons who are not reasonably fluent in English provide - or - create a much more difficult situation for return to work and it seems to me that when you employ a person, you do accept those obligations, one of which is to help with return to work and---

MR. McARTHUR: Very much like the thin-skulled plaintiff, Your Honor, in the classic---

MR. SCOTT: What's that?
MR. McARTHUR: Very much like the thin-skulled plaintiff, Your Honor, in the classic common law, that you take him as you find him, with all of his preexisting conditions. And that Act really, I believe, and the case law interpreting the Act, has recognized that. Over time.
CHAIRMAN LATTIMORE: Further questions?
MR. McARTHUR: I think I've probably gone over. Thank you very much for your time.
CHAIRMAN LATTIMORE: Thank you. If the record will reflect that Commissioner Tom Bolch joined us right before ten o'clock this morning. I meant to say that when he came in, Madam court reporter. Next name on our list, Charles Hassell. Mr. Hassell? Mr. Hassell, if you'd place your left hand on the Bible---
MR. HASSELL: Good morning, Mr. chairman.
CHAIRMAN LATTIMORE: ---raise your right hand, please, sir.

CHARLES HASSELL, JUNIOR

HAVING FIRST BEEN DULY SWORN, provided the following information to the Commission:

CHAIRMAN LATTIMORE: Please state your name for the record, and who you represent.

MR. HASSELL: I'm Charles Hassell, Junior, of the Wake County bar and I practice workers' compensation law on behalf of employees, and have for more years than I care to relate. And I'd like to address the proposed Rule 104. As others have indicated, Mr. Chairman and members of the Commission, we did do some - I did bring this to your attention in writing earlier. I collected a number of comments and suggestions from members of the plaintiffs' bar and submitted before the publication of the rules and we will certainly reduce that to writing. In fact, since that time, I've heard from a number of others who have echoed our sentiments and suggested what I'd like to suggest today, which is that the change, which is welcome - it doesn't go far enough. I can tell you that many - those many years ago, when I first began practicing before the Commission and trying, I was handed a case by a senior practice of an employee of one of his big clients and told to handle it. And so, I had to rush off and become familiar with the Workers' Compensation Act and the

case law and - in a hurry, in order not to fall completely on my face. I'm not sure I didn't do that, anyway, but it was certainly a strange legal creature to me and I can tell you, from the telephone calls that I get from lawyers - very good lawyers who don't practice here--- Even today, it would be like me trying to decipher an Internal Revenue Service problem. They have no idea. One of the first things that struck me was that I was - I was amazed to find out that the definition of accident was one that was not recognized in the dictionary in the English-speaking world. And fortunately, that's been somewhat ameliorated over the years with the STI amendments and so forth. The other thing that struck me was I read it and read it and read it and read it and it was confusing to me as to how in the world somebody got a claim started in this business. And soon after - a few years later, when I began doing this work on a more - on a - on a more frequent basis and studied it very carefully and began to receive the anecdotal reports and see the way that people ended up finding their way to me or my colleagues when their claims were denied

and some of the defenses that were asserted, it bothered me that it was not very simple - a simple thing for an employee to file a claim. Not only was there no provision for an employee to simply be told, in writing, or on those placards that sit in every business' bathroom that nobody reads or in the bulletin or on television or somewhere, if you are injured on the job or you've been told that you have a disease that comes from your job, you must file a report with the employer and send a copy of it to the Industrial Commission, and have a blank where you put your name and your employer's name and you mail it in and the situation gets started. What happens is, as you know - and I say this - you know because all of us are victims of having only anecdotal evidence here - the records of the Commission and claims are sealed. Nobody can see them. We only know what we've experienced. And I've heard many of you tell me that you'd like to have these situations where people come in and tell you what happens at the front end of claims because you're busy dealing with interpretations of the law and appeals and things like that and you don't have that kind of input

from the docket section and from the claims section. So, what really - what happens is that--- And I disagree with Victor. I - there may be some situations - and I certainly - if it's a policy of Liberty Mutual or some of the other major carriers to file - to give people copies of Forms 18, then I applaud that. I hope that happens. In many instances, the Form 19 is filed by the employer. If it's going to be a timely filing, and it says five days after notice, it isn't going to be filed by a carrier because the 19 is what triggers the carrier's attention, or should trigger the carrier's attention, in the first place. So - but, I can tell you that I have never had anyone come to me who's been given a Form 18 by an employer. And I'm not saying it hasn't happened, but I've never seen it. Almost in all instances when an 18's been provided to somebody, it's come from this agency, once the Commission receives notice that there is a claim out there. And the Rule 104, as it's always written, starts out by saying, "An employer shall immediately report to its carrier or administrator any injury or occupational disease [or allegation -] or allegation by

an employee, of an injury or occupational disease sustained in the course of employment, for which the attention of a physician is needed or actually sought." Within five days of knowledge, the 19 is to be filed. Well, employers routinely make their own determination, "We don't think this is covered, so we're not going to do anything." So, that frequently happens. I have a case pending - and I won't identify it, other than to describe the circumstances, which are not uncommon - client suffered a severe head injury, ended up in the hospital for five days, in intensive care, and doesn't remember anything. Didn't have the ability to hardly communicate within thirty days. What happens to that person? The employer decided, somehow, this is not something that needs to be reported. Well, they're going to miss the thirty-day requirement. And in fact, it was an embarrassing situation because, when the claimant followed up to visit the neurosurgeon who attended her in the hospital when she was in neuro-intensive care, the doctor's office had no idea there was a claim. The employer hadn't done anything. The carrier hadn't done anything. There had

been no reporting. There had been no filing of anything. There had been no investigation. And she couldn't even see her doctor because she couldn't pay for it. These situations are routine. I think that the trap that brought this discussion up at advisory council is the one that says, "If the employee fails to file a report of accident within two years, then it's not only a statute of limitations violation, but our Supreme Court, a long time ago, in its wisdom, decided it was a jurisdictional matter." It's a condition precedent, so it's a danger zone. How many employees do you think, both literate and illiterate, understand that, when they get hurt and somebody hands them a Form 19 - it sure looks like a notice of an injury filed with some agency - that they're obligated to do something or else, they're not - they don't have a legitimate claim filed? Fortunately, many claims are administered from that point forward and an 18 is never necessary, but in too many instances, it's a real trap. If - I started asking people, maybe fifteen or twenty years ago, "What was your understanding about what you were supposed to do?" "Well, nothing." I mean, here's

this form. I mean, they - it came to me in the mail. "Well, did you know that you haven't filed a claim yet?" "Well, of course not." So, if we're going to stay with the Rule 104 situation, my suggestion to you - that by adding that - in addition to providing a Form - a Form 18, which, in my experience, I have to tell you, doesn't happen, that you must give written notice to the employee that, "This does not constitute the filing of a claim." Well, for those who are incapable, because of injury, to take care of their business affairs and for those who are illiterate or non-English speaking, hopefully, these materials are available in - at least in Spanish these days. That's not very helpful. But, my main concern about it is that it has no consequences. Just like, "Shall immediately report to its carrier," has no consequences. Unless you're going to add something to this - and I would suggest something like, "If you don't offer proof, employer/carrier, that you gave this written notice to the employee, then you will be estopped from asserting a defense under 97-24." That will stop it. If it doesn't stop it, it's only fair that they pay medical

expenses for people. Why would you not think you have a claim covered if you - if the workers' comp carrier or your self-insured employer is paying your doctor bills? How in the world is anybody supposed to know that? In any event, I think, if you're going to stay with the Rule 104 approach to this situation, that some sanctions or some consequences should be added. Otherwise, it's going to be left to the discretion of the employer or the carrier to do anything or not and we're going to be in the same situation. If the experience that we've seen is similar to what others have seen about whether or not a blank Form 18 is handed to people and telling them they have to file it is followed in this situation, it's not going to correct it. Personally, I think a more detailed look at this whole situation ought to be considered and that the Commission ought to consider, Is it, in this Workers' Compensation Act, where prompt payment and swift and sure but limited benefits is the watchword and to be liberally construed - make a simple filing procedure. Put the burden on the employee. "If you get hurt or you think you were made sick at work, then

it's up to you to notify the employer and notify the Industrial Commission and we'll take it from there," rather than let them think they're covered, when they're probably not. And there have been situations where people failed to file a claim within two years, medical expenses were paid. The carrier - the wise carrier sat there and watched the clock tick away and, at the end of two years, pulled the plug. We've had those cases. Hopefully, not too many, but they're there. It's a horrible situation. Maybe you can do it by rule. Maybe you can suggest to the bar groups that this is not fair. This is too much of a trap for the unwary and it's unfair to injured workers, who, in many instances, such as the one I just described of an employee with brain damage and a head injury, who's incapable of doing anything, it needs to be made simple. Very simple. I appreciate your attention.

CHAIRMAN LATTIMORE: Thank you, Mr. Hassell.

MR. SCOTT: Mr. Hassell?

CHAIRMAN LATTIMORE: Question, Mr. Scott?

MR. SCOTT: You brought up the question of these posters that are to be put up for employees to read.

They are impenetrable. I would say, just as a guess, that less than one percent of our employees have read and studied the - either the workers' compensation poster or the Department of Labor poster. It seems to me that a small part of the problem could be addressed by requiring a separate part of that poster that directly addresses this question, in large type. I agree with you, that when workers who - even when they do receive a Form 18, they may not pay attention to it, just as when I get a mortgage. I don't pay attention to all the paper in the package. I just sign away. So, it's a very real problem that you talked about here.

MR. HASSELL: I think it is and that's what I envision, frankly, when I'm speaking about it - is, you know, do away with all the legalese. I mean, they're not going to understand it if they read it. But, the most important thing is to get your claim started so that you don't get thrown out of court and not have any idea why. That's my concern. And you know---

MS. SELLERS: Mr. H, one of the concerns you had was about when they're paying - medical bills are being

paid, why would they think they need to file a form?
MR. HASSELL: Yeah.
MS. SELLERS: I mean, that's reasonable, but isn't that whey we added the - recommended the provision be added so that it was two years from the date of the last payment made that they could file a claim. I mean, under 24, that amendment was made.
MS. HASSELL: Well, yeah - well, certainly, it extends the time.
MS. SELLERS: I mean, then, you'll have two years from that time.
MR. HASSELL: Certainly, it extends the time, but it doesn't give them any information.
MS. SELLERS: Well, but at least, the situation is their medical bills are currently being paid, which--- I agree with you. If my current bills are being paid, I might not think I need to do anything, but if that - I mean, seems like that addresses that, to open that window longer to file.
MS. HASSELL: Well, I'm (unintelligible) again, here, we're all - we're all strapped with an inability to have any - have any data based on all the thousands of

claims that are filed, in terms of what really happens. And my experience is only mine. My colleagues' is only theirs.

MS. SELLERS: I guess I'm asking, Are---?

MR. HASSELL: There - I can imagine a scenario where somebody would, whether that's the medical recommendation or not, receive medical treatment for a while and decide not to get any more or move away and not be able to establish with another---

MS. SELLERS: I'm just asking, What would you---?

MR. HASSELL: Whatever. The two years could run.

MS. SELLERS: What would you suggest adding to that to make it work better? That's what I'm asking. How can that better address your concern?

MR. HASSELL: Well, I think the fairest thing would be that if - would be - the logical thing, to an uneducated person would be, if the employer picks up the tab or the carrier picks up the tab for anything and pays your bill, then you got a claim. Period.

MS. SELLERS: Just go back to the beginning? Change the underlying---?

MR. HASSELL: You got a claim and we [sic] going to

treat it like a claim and we're not going to beat you over the head in two years and say, "You screwed up. You didn't file a claim." "What do you mean, I didn't file a claim? They've been paying my claim. You know, the doctor got paid and [now - you know -] now, my arm is falling off and I want to look at it and I can't because I didn't file a claim." I mean, come on. That's pretty harsh. And it doesn't - and if it only happens a few times, it's still absurd.

MS. BALLANCE: So, the issue that you bring to us today is that the process that we are proposing, and have in place, is not adequate to let employees know that they need to file a claim and that, maybe, something needs to be done to educate employees about the fact that a Form 19 is not a claim. And this rule, again, attempts to address that. The proposed rule change attempts to address that, but, again, it doesn't go far enough, and perhaps---

MR. HASSELL: Yeah. What are you going to do when the situation comes up and the employer's lawyer stands up and says, "I didn't do it, but so what? I'm not required to. [I don't - you know -] I'm not going to

get sanctioned for it. I can still assert the two-year defense because it's a condition precedent," and what are you going to do about it because the Court - Supreme Court of North Carolina has said that that's jurisdictional.

MS. BALLANCE: So, the---?

MR. HASSELL: Take it away from them.

MS. BALLANCE: Uh-huh. So that, perhaps - maybe the Industrial Commission and - might have some responsibility, also, with the rule or outside the rule, to make sure that we do everything that we can to notify employees of their obligation to file a claim.

MR. HASSELL: Right. I think - I think, by telling - by saying, as you have in your proposal, that there - in addition to giving out an 18, which - again, there's no enforcement mechanism - that you give a written notice that, even though you have this 19, you got to fill out and file this blank 18 in order to have your claim basically legitimized, which is what it means - is a step in the right direction. But, unless you put the burden on the employer and/or the - and I see a lot of 19s filed by carriers. You know, understand, there

are big companies in North Carolina that have HR people, that have claims benefit people, you know, bevies of administrative personnel that know how to deal with all this stuff. There are small businesses who don't have anybody who knows anything about it. You know, half the people who come to me have been handed a blank Form 19 and told to go fill it out and send it in. I mean, that's what's going on out there. We live in a state where - you know, southeastern North Carolina, for sure, and maybe, in other places, we got people that ain't even buying comp. I mean, that's the reality, so I think you've got to put some teeth in it. You've got to say to the employer, "Unless you can prove to me that you told this person this, in writing--- Show it to me. They signed that they got this notice that they have to file a claim---" As long as we're going to have this 18 requirement, then you're not going to be able to assert that defense. I think you can do that.

MS. BALLANCE: Could I change gears for a minute and go through 903 - the proposed changes, where - the proposed change says that, "When the employee is

represented by an attorney, a Form 90 shall be sent to the attorney for the employee and not to the employee." Now, in many of the cases that we deal with where there are Form 90s involved, you may be two - three - four years down the road and, with this fifteen- to thirty-day requirement, do you see, in practice - do you think that, in practice - that - out there - that some attorneys might miss the fifteen-day deadline or the thirty-day deadline because of the way they practice?

MR. HASSELL: Well, I mean, I hope not. I mean, if we get it and it says it, then, you know, it's supposed to go on our calendars. Now, is somebody going to miss it?

MS. BALLANCE: Well, the experienced lawyers, for example, would understand this rule. Is it - is it - do you - do you foresee any problem with this particular statement? Should it have said that, "You must send it to the attorney and the employee," so you've got two ways---?

MR. HASSELL: I don't know. I mean, when I first this thing, I wondered, you know, "Why do we have a perjury

trap for employees only?" Can we have one to send to carriers? I mean - so, I wondered why it was there in the first place, but---

MS. BALLANCE: I'm just trying to address this issue.

MR. HASSELL: No, I don't - I mean, fifteen days, to a lawyer who practices, I mean, you know, we should put it on our calendars. You know, if you miss it for some reason, there ought to be some way to get an extension of time and we may--- I don't think it should be a death knell. I don't think that the employee's benefits should be terminated because somebody misses a fifteen-day deadline on a form that--- You know---

MS. BALLANCE: Yeah. And this---

MR. HASSELL: ---we may not have seen our client in two years and have to find him or her.

MS. BALLANCE: I suppose that this will be in situations where the lawyers are getting every fourth check or something of that nature, so the case is going to be very alive and in their office, in terms of---

MR. HASSELL: Maybe it's short. Maybe it's a little short.

MS. BALLANCE: Well, I can see motions before the

Industrial Commission because the lawyer didn't tell the client and the fifteen days ran and then, the thirty days ran. But, anyway, we'll deal with it when it comes up.

MR. HASSELL: Thank you, ma'am.

CHAIRMAN LATTIMORE: Thank you, Mr. Hassell.

MS. BALLANCE: He wants to - Victor (unintelligible) deal with that.

CHAIRMAN LATTIMORE: Excuse me?

MS. BALLANCE: Mr. - is it - Mr. Farah wants to deal with that.

MR. FARAH: The issue on that was whether it should - the old rule had just gone to the employee and it wasn't required to be copied to the employee's lawyer, so that was the problem. So then, the question arose, Who should it go to? Should it go to just the lawyer or should it go to both? And it's certainly a close call and if you want to make it so it goes to both, I don't think that's a big problem, but the concerns against that, from the plaintiffs' lawyers side, was it's a really important document that, if it gets to the client first, without any explanation as to what it

is, then a lot of lawyers feel like that's a disservice. They don't want the client to be getting this very important document, except from them, with an explanation as to what it is and what the importance of it is. So, I don't think you'd get a lot of complaints if you did it like, I think, the Form 24 ones does. It goes to both. But, the majority, let's say, among the plaintiffs' bar that talked about it would rather that it just go to the lawyer and the lawyer be responsible. I think you're correct that you're only getting Form 90s in cases of ongoing benefits. Most of the lawyers, in cases of ongoing benefits, there's stuff going on. They'll be pretty aware. Also, keep in mind that, even if somebody fails to do it, there's nothing automatic. That's just grounds for them filing a Form 24, so a lot of other stuff happens. I mean, I think if you just miss - if a lawyer who's not paying attention misses that deadline, there's nothing that happens automatically.

CHAIRMAN LATTIMORE: Just for the record, that was attorney Victor Farah that replied to the question from Commissioner Ballance. Do we have other speakers that

have signed up to speak today? Okay. We don't have any signed up. Do we have others who would care to speak today? Yes, ma'am. If you will come forward and be sworn. Put your left hand on the Bible and raise your right hand, please.

SHARON PATRICK-WILSON

HAVING FIRST BEEN DULY SWORN, provided the following information to the Commission:

CHAIRMAN LATTIMORE: Please state your name, who you represent, and you have up to ten minutes.

MS. PATRICK-WILSON: Okay. My name is Sharon Patrick-Wilson. I'm with the Attorney General's office and I represent the State. Sorry. I hadn't really planned on speaking today, actually, until I heard Mr. Hassell speak. And in all respect to him, I mean, it seems clear to me, from this change, especially on Rule 104, that the Form 19 clearly is going to say - the Form 19 is not just claim for workers' compensation. I mean, he doesn't seem to have given any credit to the employees for having any intelligence to read and understand, "Your claim is not filed when you get this Form 19," that you need to complete the Form 18 and

mail it in. I just don't see how much clearer it can get than that. Also, he talked about, if the employer pays the medical bills but hasn't really accepted the claim. I don't really understand if we're trying to say that, in that case - I mean, what, usually, the employer is doing during that time, if they pay without prejudice, is try and investigate. I mean, fourteen days, really, for the employer, is not enough time to investigate some of the claims, depending on what it is. Yeah, there's some claims where it's obvious and, you know, we accept liability right away, but there's some claims where it isn't, especially if it's late reporting by the employee. I mean, I think we have to have some situations where the employees take some responsibilities for notifying people or for letting the employer know, you know, what the injury was, when it occurred or having time to talk to the doctor, review some medical records, to make a determination on the liability issue. I mean, we can't just assume, every time somebody gets injured at work, that it's compensable, which is why there is a definition of injury by accident. And he says there's no enforcement

mechanism. I can tell you, representing State agencies, that we're sanctioned a lot if we deny a case - you know, wrongfully deny a case if it's determined by the Industrial Commission or if proper forms aren't filed. You know, this has been happening more and more in the past few years and the sanctions are getting higher and higher, so there is certainly enforcement mechanisms, sanctions, whatever you want to call it, for the employer not proceeding correctly. Also, I - as far as the appeal goes - and I believe it was Mr. McArthur - was it - did I get that right - that talked about that stopping the stays. I mean, what happens in the cases--- First of all, stays aren't granted that often, I find, but in the cases where it turns out that it's not compensable - you know, the employer getting a credit isn't really going to help because the reality is we never get any money back from the employee, which I understand. I mean, they don't have money to pay back, but, you know, I understand liberally construed in favor of the employee and I actually believe that's what it should be. But, I think we've gotten to a level just - where the employer's responsible for

absolutely everything and the employee has no obligations and no responsibilities. Thank you. That's all I had to say.

CHAIRMAN LATTIMORE: Thank you.

MR. SCOTT: Let me just say my comments certainly - I don't know about Mr. Hassell - were not intended to leave the impression that the employees were not pretty sharp. The difficulty may well be that they're very sharp about a lot of things, but they're not so sharp about paperwork that looks kind of formal and difficult. And I would say to you that, in my time as a small employer, we had one employee who was hurt - was hurt - broke his arm in a softball game that we had at a company picnic, and nobody knew what to do. Not the employee, who was college-educated, not myself, as the employer. And so, it is a foreign, difficult system, so I certainly didn't mean to imply that employees were not pretty sharp, but rather, that they're not sharp in this strange and difficult world.

MS. PATRICK-WILSON: I mean, I can understand that to an extent, but I think the reality is - I mean, we read and fill out applications to get a job. We - if we're

reading the form and the form gives you the information you need - maybe I'm one of the few people that actually read my employee handbook, but there's information about what you do in a workers' compensation case. And to have this obligation on the employer now - one, we're giving them the Form 18, but then, to have it sworn, in writing, you know, we give them the paperwork. Then what? I mean, what if the employee refuses to sign the paperwork? That's happened before. Then, where do we go from there? I mean, do we have an obligation to force them to sign the paperwork? You know--- I just - and it's because I am a defense attorney for the employer, but I just feel that there - the responsibilities and obligations of the employees are severely lacking and everything is on the employer.

MS. BALLANCE: Do you concede that there is some confusion as relates to whether or not there is a claim when you're dealing with medical-only cases? In the usual scenario, the person is sent to the doctor, might miss a day, could miss two or three days or more out of work--- The carrier or defendant jump in and start

dictating where they go for medical treatment. "You go here." And if it's - if the first place is medical - is the emergency room, then they direct the next place and, sometimes, the next place. And sometimes, in the minds of the - well, in the practice of the adjusters on the case, if there's one doctor that says, "This person can go back to work," but this person does not go back to work within - I don't even want to start with two days because the thought out there seems to be that it's medical-only unless you miss more than seven days from work---

MS. PATRICK-WILSON: All right.

MS. BALLANCE: Okay. That's---

MS. PATRICK-WILSON: But, that's changing.

MS. BALLANCE: That's the first thought.

MS. PATRICK-WILSON: All right.

MS. BALLANCE: But, let's say the - it appears to be that defendants dispute whether or not the person should be out of work, even though that person is out of work, so the case is treated, sometimes, as medical-only. Nobody files anything. Defendants say, "We didn't file anything because it's medical-

only," and the plaintiff says - plaintiff said, "I didn't know I was supposed to file anything." So, anyway, you get that kind of confusion out there. In a case like that, do you concede that an employee may have some problem? Now, they generally don't come to us to file anything until it is clear that, if they stay out of work for, say, a number of days and they don't get anything, and they don't know why they're not getting compensation--- But, initially, even if that person had been given a 19, as long as they were being sent through and directed - medical treatment directed, does that not create some confusion in their mind as to whether or not the claim was accepted?

MS. PATRICK-WILSON: Well, I think if it's the limited circumstances you're talking about, yes, but I think if - you know, it also goes on to give them two years to file from the last date of payment. If something doesn't come up in two years after your injury, then it's usually not as a result of a compensable injury if - and I don't know if it's compensable, in the end, or not, because you're saying, If it's medical only, you know---

MS. BALLANCE: So, the question is - then, you're not saying that there is - that the - that the system is - a process that we - and the system that we have in place is very clear. You're just saying that, if an employee wants to investigate and look into it---

MS. PATRICK-WILSON: Uh-huh.

MS. BALLANCE: ---that they will be able to figure it out somehow.

MS. PATRICK-WILSON: No. I'm not - I don't have a problem with giving the employee a Form 18.

MS. BALLANCE: But, is it - I mean, the - but, you're not saying that there is not some lack of clarity in the system that we are - we have in place now on the - and that employees could be confused?

MS. PATRICK-WILSON: Well, anybody could be confused. I mean, you know, some people are more intelligent than others. I'm saying what you're putting here on the Form 19 is pretty clear, though, that that's not the filing of your claim. I mean, I---

MS. BALLANCE: So, you support this, but you don't support what Mr. Hassell was saying? I understand.

MS. PATRICK-WILSON: I'm okay with this. I don't know

if I support it, but, I mean, I certainly understand it. I think the employee should know that they have a right to file a claim, but I don't think we should just assume that any time anybody's hurt at work, that it becomes a workers' comp claim and, if the employer doesn't have verified proof that they provided a Form 18, that automatically becomes compensable.

MS. BALLANCE: Okay.

MS. PATRICK-WILSON: I mean, what if it isn't a workers' comp claim - a valid workers' comp claim later on?

MS. BALLANCE: I see.

MS. PATRICK-WILSON: What if that determination is made?

MS. BALLANCE: I understand. (Unintelligible) position.

CHAIRMAN LATTIMORE: Thank you.

MS. MAVRETIC: Could I ask you another question, since you're the first defense attorney to talk us? What's your opinion on the plaintiffs' bar proposal about the trial return to work on the amendment to 404A? What's your experience with trial return to work?

MS. PATRICK-WILSON: Our experience is that a lot of the plaintiffs' bar are telling their attorneys - their clients not to return to work.

MS. MAVRETIC: Right.

MS. PATRICK-WILSON: I mean, that's really what it comes down to. It's very frustrating because the Industrial Commission wants us to make sure that we at least - you know, in cases where they can't do that job, do voc rehab or try to get them back to work, but we can't get them back to work because their attorneys are telling them not to come back to work, you know, and if somebody comes back to work, I don't agree that they don't have a remedy if they come back to work and say, "I'm unable to work." The problem comes in when we have attorneys that come to work - I mean - excuse me - plaintiffs that come to work and say, "I can't do it," but then, we have the doctor saying they can do it.

MS. MAVRETIC: Uh-huh.

MS. PATRICK-WILSON: I mean, y k, we're expected, on the one hand, to listen to what doctors say, if it's something, you know, that's in the employee's favor,

but if it's something that's in our favor, we're supposed to ignore it. So, I mean, trial return to work, I've found, just hasn't really been - it hasn't really been successful because a lot of the employees are coming to work - they're either not coming to work or the ones who really want to come to work - they're still finding their attorneys are telling them not to come. And then, when they come, I think there are a lot of forms and procedures. We can't just stop payment on it and - on the cases where we have, and we have before, we're getting sanctioned and we're getting punished for it, so the employers are very careful about that, at least the State employers. I can't talk about anybody else. But, you know, we're really careful on what's going on with trial return to work because we do understand the consequences of that. The I.C. has made it very clear to us you just can't cut off somebody's benefits. You have to go through procedure. They need to have their forms, just like we need to have our forms. And I don't think it's unreasonable to request a form from an authorized treating physician, saying that they're not able to

work. I mean, we depend on the doctors' testimonies and depositions for everything else in making decisions on whether or not a case is compensable. You know, why should it be different in making a determination whether or not they can return to work?

MS. BALLANCE: I'm not sure I follow you. You're saying that, if your doctor says - will not sign the 28U or if your doctor's position is that this person can return to work, that ought to be the definitive statement in the case, that the Executive Secretary should not be able to - or a Deputy - or - if the Executive Secretary or the Deputy reinstates compensation, that you should not required to pay that compensation until the case has gone through the whole appeal process? Is that pretty much your position?

MS. PATRICK-WILSON: Yes. That's my position. It's different - you know, they have an - a doctor that's saying something different and, at least then, you have conflict that maybe you need to litigate, but, otherwise, what are we going on?

MS. BALLANCE: And that's really---

MS. PATRICK-WILSON: Just what the employee says?

MS. BALLANCE: That's really what the practice is on the part of the State at this point? If the - if a person returns to work and say - and they say, "I can't work---"

MS. PATRICK-WILSON: Uh-huh.

MS. BALLANCE: ---and you - your doctor - your doctors say that they can work---

MS. PATRICK-WILSON: Uh-huh.

MS. BALLANCE: ---or, in some capacity, they - usually, doctors say, "Well, you can do light duty," and---

MS. PATRICK-WILSON: Uh-huh.

MS. BALLANCE: ---there's a question about whether the worker's - there are other issues, but if the Executive Secretary says the trial return to work was unsuccessful, because you don't have a 28U, your position is that compensation will not be reinstated upon order of the Executive Secretary?

MS. PATRICK-WILSON: Oh, no, that's not what I'm saying. No, we don't stop benefits unless the I.C. says we can stop benefits. No, we don't---

MS. BALLANCE: Usually, when there's a trial return to work, you stop benefits on the day they return to work?

MS. PATRICK-WILSON: Right.
MS. BALLANCE: You submit a return-to-work form---
MS. PATRICK-WILSON: Right.
MS. BALLANCE: ---and you stop benefits. Then, the question is, Under what circumstance can we get the benefits reinstated? If your doctor says, "I think this person can [return to work -]---"
MS. PATRICK-WILSON: Uh-huh.
MS. BALLANCE: "---can work in some capacity"---
MS. PATRICK-WILSON: Uh-huh.
MS. BALLANCE: ---the person goes back to work. Say, he works one or two days and says, "I can't do it"---
MS. PATRICK-WILSON: Uh-huh.
MS. BALLANCE: ---but your doctor or the doctor who has been assigned to the case says, "I'm not going to sign a 28U"---
MS. PATRICK-WILSON: Right. We should file a motion with the Industrial Commission, asking to terminate benefit - or - asking to stop paying benefits because I think we should pay them and then, file a motion - you know, hopefully, it'll be heard quickly - saying, "We shouldn't have to pay for the benefits [because the

doctor says - you know -] because they didn't get a 28U."

MS. BALLANCE: So, your position is that benefits ought to continue and that the defendants should be the ones to file the motion?

MS. PATRICK-WILSON: Yes, I do. I think that we should file. If they go out and they're saying, "Well, I can't work," but the doctor says they can work, then I think we should file an emergency motion, and hopefully, get it heard quickly, saying, "Look, we should not have to pay further benefits because this person is capable of working, according to the authorized treating physician."

MS. BALLANCE: Sounds like the practice is all different out there, just depending---

MS. PATRICK-WILSON: Well, I'm sure it is and that's why I can only speak for the - for the State agencies.

MS. BALLANCE: All right.

MS. PATRICK-WILSON: Thank you.

CHAIRMAN LATTIMORE: Thank you. Are there other comments? Please come forward and identify yourself and put your left hand on the Bible and raise your

right hand.

BAIN JONES

HAVING FIRST BEEN DULY SWORN, provided the following information to the Commission:

MR. JONES: My name is Bain Jones and I represent employees, as well, and I'm here, basically, just to reaffirm, very briefly, some of the comments that have been made earlier. It has been my experience, during the entire time that I've been in private practice, that I have never had an employer to give an employee a Form 18. They generally - an employee generally does believe that, when they receive a Form 19 - that that somehow is beginning the process in regards to their claim. The only ones that have - that I have seen that have been able to obtain additional information have become frustrated, for whatever sense it may be, and have contacted the Industrial Commission, and have been provided the form through the Industrial Commission and, therefore, have been able to complete it themselves without receiving the assistance from an attorney. I would like to also reiterate again - and I think this has been an ongoing historical problem and I

appreciate the attention that the Commission is now showing to this - I do have to agree with many of the comments that have already been made here today, that without true sanctions being imposed for failure to comply with the rules of the North Carolina Industrial Commission or the Workers' Compensation Act, individuals will continue to try to do things that we're all familiar with, in terms of trying to avoid the radar, and I have to particularly draw attention - I know there have been comments made about this previously in regards to meds-only cases, there are egregious, egregious violations going on in regards to this, in which there is great miscommunication going on in regards to what the amounts are that are acceptable, in terms of when it should go beyond the time period of being a meds-only case and when there should be other filings occur. And these are the types of cases that others have drawn attention to today, which go under the radar and, by the time it is recognized that there is something that needs to be done, it, unfortunately, may often be too late, and these people are left out in the cold. I appreciate the attention that the

Commission is giving to these matters because, in fact, I do think there needs to be greater clarification in regards to that, so clearly, employees will understand exactly what they must do in order to be able to protect their rights. Thank you.

CHAIRMAN LATTIMORE: Thank you, Mr. Jones. Anyone else who would like to present? I see a number of insurance company representatives out there and we haven't heard from - much from the defense. Have we got anyone who would like to go on record? If not--- Yes, ma'am.

MS. SMITH: I'll talk.

CHAIRMAN LATTIMORE: Sure.

MS. SMITH: Victor talked me into it.

CHAIRMAN LATTIMORE: If you'll please - right - raise your right hand.

UNIDENTIFIED SPEAKER: Other way.

MS. SMITH: Wrong one. Sorry.

CINDY SMITH

HAVING FIRST BEEN DULY SWORN, provided the following information to the Commission:

CHAIRMAN LATTIMORE: Please state your name, who you represent, proceed.

MS. SMITH: I'm Cindy Smith. I work for the North Carolina League of Municipalities and our whole group is here because all of these changes affect how we do business on a daily basis. We're fortunate that we only handle North Carolina workers' comp laws. It's all we have to deal with. We hear the horror stories as claims adjusters and we try to do what's right. I'm kind of nervous, so forgive me. But, I've listened to all this and it all boils down to education. We, as League employees that we are - we go out to our members - our carriers - we call them members - I guess you would call them employers - and we educate them. We sit in a room full of employees and we tell them what their benefits are. And we were at the safety conference last week. There's not a whole lot on workers' comp in your safety. You know, what prevents us from going out to these employers that are not following the rules and educating the employees, getting in their face, explaining it to them? It seems to be the whole process. We keep adding on stuff. We keep making new rules, but we're not getting out to the employees - to the injured workers before they're hurt,

and explaining. Workers' comp is this black hole and, until you're injured, you don't have a clue. I agree. I tell a lot of workers that when they call me because we do contact these workers. When they don't return to work when the doctor has released them to light duty, we call them and say, "You know, you need to go to the doctor. You need to get a note." You know, it's all about communication and education. That's all.

CHAIRMAN LATTIMORE: Thank you very much. We welcome the other members from the League here today, too. Thank you. Anyone else who would like to make a comment on the record? Well, if not, let me again reiterate that we will keep the record open following this hearing and we'll receive comments until the close of business - and there's a change here - until five o'clock on June the 19th. It was published June the 17th and we're trying to do it for thirty days. Just noticed that was on a Saturday, so we'll give you until that following Monday, June the 19th, close of business - five o'clock on June the 19th. Also, the people who spoke today with specific recommendations, if we could have those in writing, in the form that you'd like us

to review them, we will. Once we receive the written responses and additional written comments--- And you don't have to have been here today to get written comments. If others would like to submit comments, we will review all of that after the thirty-day period. We will meet. We'll consider everything that has been said today. Then, we'll make our final determination in adopting these rules. If there is no further business before the - before the Commission, I declare this hearing adjourned. Thank you for being with us.

(WHEREUPON, THE HEARING WAS ADJOURNED.)

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TRANSCRIBED BY: Kelly W. Kenion, 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-two (72) pages prepared under my supervision are a true and accurate transcription of the testimony of this trial which was tape 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 30th day of May 2006.

My commission expires on October 13, 2008.

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NOTARY PUBLIC