

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

Agency: North Carolina Industrial Commission
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Proposed New Rule Title:
Rules proposed for amendment: Rule 11 NCAC 23A .0701
Rule 11 NCAC 23A .0702
(See proposed rule text in Appendix 1)

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

Statutory Authority: G.S. §§ 97-79(g), 97-80(a), 97-85.

Introduction/Background:

Rule 11 NCAC 23A .0701 governs review of trial-level decisions appealed to the Full Commission of the Industrial Commission. The proposed rule amendments for Rule 11 NCAC 23A .0701 are intended to reorganize and update the rule, to provide some clarifications, and to add some new provisions codifying common practices related to appeals.

Rule 11 NCAC 23A .0702 governs review of administrative decisions, or decisions made based on a motion and/or without an evidentiary hearing. The proposed amendments for Rule 11 NCAC 23A .0702 are intended to update the rule with respect to filing procedures, to provide certain clarifications, and to add a new paragraph addressing review of administrative decisions by a Deputy Commissioner or Commissioner.

Proposed Rule Changes and Their Estimated Impact:

The proposed rule additions and changes include the following:

1. *Amendment of Rule 11 NCAC 23A .0701*
 - a. The rule is amended to give each paragraph a heading indicating its topic. These amendments do not have any fiscal impact.
 - b. The proposed Rule 11 NCAC 23A .0701(b) is taken from the former .0701(c) with modifications to update the rule to be consistent with the Commission’s electronic filing rule, 11 NCAC 23A .0108, and to provide clarifications regarding the remand of cases on appeal when a motion to reconsider has been filed.

- i. The deletions making the rule consistent with Rule 11 NCAC 23A .0108 will not have any fiscal impact.
- ii. One of the amendments to the rule clarifies that the Chair, not the Full Commission, will decide whether to remand a case to the Deputy Commissioner if a motion to reconsider the Deputy Commissioner's decision is filed. The amendment removes a sentence indicating that this decision is within the Full Commission's discretion. To provide background, applications for review of an Opinion and Award by a Deputy Commissioner must be filed within 15 days of notice of the decision. Similarly, a party has 15 days from notice of a decision to file a motion to reconsider or amend an Opinion and Award with the Deputy Commissioner. When a party files an application for review of a Deputy Commissioner decision, the appeal puts the case in the jurisdiction of the Full Commission. In some cases, the appealing party or another party files a motion to reconsider the decision with the Deputy Commissioner, as well. In order for the Deputy Commissioner to have adequate time to rule on the motion to reconsider or amend the decision, the Full Commission must stop its appeal processes and return the case to the Deputy Commissioner's jurisdiction. At this point in time, the case is many weeks away from being set for hearing before a Full Commission panel of three Commissioners. Therefore, a Full Commission panel would not be in a position to make the decision regarding remand. The issue of whether to remand a case to the Deputy Commissioner goes to the Chair's Office for review or delegation to another Commissioner. The rule amendment makes this process clear, codifies current practice, and avoids any challenges, however unlikely, to a decision by the Chair. The Commission does not expect any fiscal impact from this rule change.
- iii. The remaining changes to Rule .0701(b) are intended to clarify the change in jurisdiction when a remand occurs. Under the current language in effect, a party might not understand that after the ruling on the motion to reconsider or amend is issued, something additional must be done to return the matter to the Full Commission. In order to make this clear, the revised language specifies that a remand to the Deputy Commissioner transfers jurisdiction to the Deputy Commissioner and that a letter requesting review of the initial decision of the Deputy Commissioner and/or the ruling on the motion to reconsider or amend must be filed to bring the case back to the jurisdiction of the Full Commission.

There is no data on the number of times a party has failed to appeal in a timely manner due to misunderstanding the current rule. The Full Commission received 434 appeals in FY 2016-17. Thus, the pool of cases in which such an error might occur is relatively small. The Commission has received questions from attorneys for explanation of the current rule, indicating a level of uncertainty with the current rule.

While a failure to timely appeal may not occur often due to the current rule, that failure can be disaster for a party if they lose their right to appeal. In the case of injured employees, they could lose their chance for medical treatment and indemnity benefits. Employers and carriers could be required to pay for benefits and treatment that they do not believe they owe. Because each case is different, there is no way to monetize the potential effect on a case.

- c. The proposed new Subparagraph (c) in 11 NCAC 23A .0701 is taken from former Paragraph (b). The proposed changes to the rule language include minor language changes and revision of Commission procedures for sending the official transcripts, exhibits, and Form 44 *Application for Review* to the parties.
 - i. The language changes deleting the unnecessary first clause of the first sentence, inserting “if any” after “exhibits” in the second sentence, and changing “provide” to “serve” in the last sentence are minor and are not expected to result in any fiscal impact.
 - ii. The remaining changes to the .0701(c) separate the provisions for providing the transcript, exhibits, and Form 44 into two new subparagraphs.
 - o The first subparagraph addresses providing the documents electronically. The current rule indicates that the documents are provided electronically “where possible” and that the Commission will send an email to the parties providing a link to an FTP site from which the transcript and exhibits can be downloaded. The amendments to the rule specify that the documents will be provided electronically to parties represented by counsel and that the Commission will email the parties directions on how to obtain the documents electronically.
 - Currently, the Commission generally only provides the documents electronically to parties with counsel because those are the parties for which the Commission has a reliable email address. Therefore, the rule essentially codifies current practice. However, there could be occasions when the Commission has sent a link to an unrepresented party so that they could download the documents. For such cases, the impact of the rule change would be that they would receive the documents in paper form by mail. This could be a benefit to parties who do not have the capability to deal with electronic files, or it could be a cost to parties who want to have an electronic file and now will receive paper and have to scan it.

There is no data regarding the number of litigants potentially affected by this rule change, though it is expected to be small. There were 434 appeals to the Full Commission in FY2016-17 and such litigants would be a very small portion of those, if any. In addition, it is

difficult to estimate the impact per case because each case is different. Some cases have transcripts and exhibits less than 100 pages in length and some can have thousands of pages. Therefore, there is the potential for a fiscal impact, but it is not possible to monetize with any accuracy.

Notably, there is a simultaneous potential effect on the State through the Commission in that transcripts and exhibits not provided electronically must be mailed which involves the cost of postage. Because the potential number of cases involved is very small and the size of the packages unknown, the fiscal impact cannot be estimated with any accuracy.

- With respect to changing the rule to indicate that the Commission will email parties with counsel instructions on how to retrieve the documents electronically rather than a link to an FTP site, the Commission does not expect this amendment to have a fiscal impact. The amendment is intended to allow the Commission flexibility to move away from using an FTP site if desired. It is not expected that any new methods of providing the documents electronically will be markedly different such as to have a fiscal impact on the Commission or external stakeholders.
- The second subparagraph indicates that in cases where it is not possible to provide a party with the official transcript and exhibits electronically (usually when a party is without counsel), the documents will be served using “any class of U.S. Mail that is fully prepaid.” The current rule requires the Commission to use certified U.S. Mail, return receipt requested. The rule change proposed follows the trend of the 2017 legislative change to N.C. Gen. Stat. § 97-86 changing the requirement to send Opinion and Awards to the parties via certified mail with return receipt to email or any class of U.S. Mail that is fully prepaid.

The cost of certified mail is \$3.45 and the cost for a return receipt via email, which is what the Commission uses, is \$1.50. In a recent six-month period, the Commission sent transcripts and exhibits by certified return receipt email pursuant to the current rule in 17 cases. The Commission does not charge any party for this cost. Therefore, if the Commission chooses under the amended rule not to use certified mail with return receipt in the future, the State through the Commission could save up to \$84.15 per year. There may also be a minimal benefit to the Commission in terms of time saved by not filling out the e-certify request.

There are other benefits and costs to the proposed rule change that are not easily quantified. Currently, when the Commission sends a transcript package to a party by certified mail with return receipt, the Commission has access to documentation of whether the party received the package. This documentation comes into play only in those cases where the party does not timely file its Form 44 and brief and claims that it did not receive the transcript package. In these situations, currently, the Commission can check the e-certify information online to verify whether the package was received. If the Commission chooses under the amended rule not to use certified mail with return receipt, this potential documentation will not be available and the party claiming it did not receive the package will have to provide support for its claim, especially if the Commission does not receive a returned package sent by non-return receipt mail. There could be a high cost to such parties of having their appeal dismissed. However, the Commission has experienced problems using certified mail with return receipt because the package cannot be delivered if no one is home who will sign for it. The USPS will make a certain number of attempts, but will then return the package. This can cost the Commission extra time and postage to send the package again and cause delays in the appeal process which can affect both parties. As these problems happen in a limited number of cases and the potential effect could vary widely in terms of fiscal impact, it is not feasible to estimate the fiscal impact of the proposed rule change further.

- d. The proposed amendments to Paragraph (d) in 11 NCAC 23A .0701 are intended to provide clarification by rewording the provision regarding the Form 44 *Application for Review*, but do not add any additional requirements. Therefore, no fiscal impact is anticipated to result from these changes.
- e. The proposed amendments to Paragraph (e) are intended to update the rule to be consistent with Rule 11 NCAC 23A .0108 regarding electronic filing. The amendments also remove potentially confusing language about extensions of time to file the Form 44 and briefs. The changes do not alter the 15-day extension of time that each party may obtain. Therefore, no fiscal impact is expected to result from these changes.
- f. The new Paragraph (f) of Rule .0701, which addresses brief requirements, is largely former Paragraph (i). The only changes to the former language are the new requirement that briefs be prepared using a proportional font and serif typeface and a change to the form of citations to the record or depositions. None of these changes are anticipated to have any fiscal impact. The last sentence of new Paragraph (f) is taken from former Paragraph (g) with only one word change of no fiscal significance. One new sentence has been added to make clear that attachments to a brief may not be used to circumvent the 35-page limit. Occasionally, parties or attorneys will attach fact summaries or additional

argument to a brief to avoid the page limit. This occurs in only a very small number of cases. There may be a minimal savings to the Commission and a small, relatively intangible cost to the filing party as a result of the rule, but it is not feasible to monetize these effects.

- g. The proposed Paragraph (g) of 11 NCAC 23A .0701 creates a new provision governing reply briefs. A reply brief is a brief filed by an appellant in response to issues raised in the appellee's brief. While reply briefs are currently allowed in some cases at the Commission, there is no rule setting out a procedure for reply briefs. Therefore, the rule will reduce uncertainty about the procedure.

- i. Description of baseline situation:

- There is currently no rule governing reply briefs. The Commission receives them in only a few cases per year. Parties wishing to file reply briefs with the Commission do not usually file a motion requesting permission to file one. The reply briefs generally follow the formatting requirements of the Commission's rule on briefs. It is also common practice in many courts to limit the reply brief to rebuttal of arguments raised in the appellee brief, and that is expected by the Commission.

- ii. Description of proposed changes:

- The new Paragraph (g) of Rule .0701 addresses several aspects, including the number of days within which to file a motion to file a reply brief, the page limit, format, and what the reply brief may address. In addition, the rule disallows the inclusion of a reply brief with the motion.

- iii. Economic impact:

- The costs and benefits of the proposed rule change are described below.

- o Costs to the State through the Commission:

- The only potential anticipated costs to the Commission from this provision are the possibility of a small increase in the number of reply briefs due to the existence of a rule. In addition, there could be a small increase in the number of motions filed because the rule requires a motion requesting permission to file a reply brief.
 - The costs would include the additional staff and attorney time to process and review the motions and reply briefs. This cost is expected to be minimal due to the small number of reply briefs filed. It is not anticipated that this number will increase significantly.

- o Costs to external stakeholders, including the State as an employer, local government, and private employers/carriers, and employees:

- Litigating parties may incur minor costs due to the new rule requiring the filing of a motion. They may incur minor costs due to the time limit or page limit, if they would have preferred more time or more pages. They may also incur costs from filing more reply briefs than before the rule. Lastly, they may incur a cost if they request to file a reply brief and the request is denied. These potential costs are intangible or difficult to estimate with any accuracy.

- Benefits to the State through the Commission:
 - The expected benefits for the Commission from this rule include more efficient and certain procedures due to having a rule on reply briefs, the ability to decline to allow a reply brief pursuant to rule, and limits on the length, format, and topics of the briefs. The Commission will be better able to consistently address reply briefs and may have reduced time spent reading lengthy reply briefs and reduced delay in considering and deciding cases. These potential costs are intangible or difficult to estimate with any accuracy.
 - Benefits to external stakeholders, including the State as an employer, local government, and private employers/carriers, and employees:
 - Litigating parties will benefit from the rule because it will provide clear guidelines on how to request and file reply briefs. There may also be more parties who choose to file a reply brief because there is a rule, which may result in better outcomes in their cases. These potential costs are intangible or difficult to estimate with any accuracy.
- h. The proposed Paragraph (h) was previously Paragraph (g) of the rule. Additional changes have been made to the language and new language has been added. The changes and new language relate to the use of unpublished appellate decisions to support arguments in briefs to the Commission. Unpublished appellate decisions are those filed by the North Carolina Court of Appeals under Rule 30(e) of the N.C. Rules of Appellate Procedure, because “the panel that hears the case determines that the appeal involves no new legal principles and that an opinion, if published, would have no value as a precedent.” Currently, the former Paragraph (g) only indicates that if an unpublished opinion is cited in a brief, a copy must be attached to the brief. The new rule deletes that requirement and adds information about how and when to cite an unpublished opinion. The additional information is taken from Rule 30(e) of the N.C. Rules of Appellate Procedure and is commonly known and followed by attorneys and is not expected to have an impact.
- i. Costs – There may be a small cost to the Commission in that those staff attorneys reviewing the brief will need to find the unpublished opinion on Westlaw because it will not be attached to the briefs. Given that finding the opinions takes only a few minutes and that unpublished opinions are not commonly cited, the impact will be minimal.
 - ii. Benefits – There may be a small benefit to brief filers in not having to print and scan and attach unpublished opinions to briefs. Again, this situation is not common and the benefit is minimal.
- i. The proposed amendments to Paragraph (i) of Rule 11 NCAC 23A .0701 are minor wording changes that do not change the meaning of the rule and are not expected to have a fiscal impact.

- j. The new Paragraph (j) of Rule 11 NCAC 23A .0701 addresses oral argument before the Full Commission. Subparagraph (3) is the former Paragraph (j) and contains no changes. Subparagraph (4) is taken from former Paragraph (h) and is re-worded, but its effect is not changed. Subparagraphs (1), (2), (5), and (6) are new provisions though they largely codify current practice.
 - i. Subparagraph (1) places allows 20 minutes for each party for oral argument and describes when time may be reserved for rebuttal. It is very common in most courts for oral argument to have time limits. The rule codifies the time limits and rebuttal procedure the Commission has used for many years. The Commission does not expect to incur any costs or benefits on behalf of the State based on the rule. Litigating parties could experience a cost in that their time is now limited through regulation. They may also experience a benefit from the certainty provided by having a rule.
 - ii. Subparagraph (2) provides a procedure for requesting additional time for oral argument beyond that allowed in Subparagraph (1). There is no data on the number of requests for additional time. Based on the Commission's experience, they are known to be rare.
 - o The Commission expects to experience a small cost from receiving written requests that must be processed and reviewed. However, the Commission also expects a small benefit from no longer receiving such requests in various forms or at the last minute prior to hearing.
 - o Litigating parties may experience a cost from the regulation because it imposes limits on how and when they can request additional time. There is likely to be a small cost in staff and attorney time to prepare and file written requests, as opposed to oral requests. Parties may receive a benefit from the existence of a rule allowing them to request additional time if they believe they need it. Parties may also benefit from not being surprised close to the hearing with a request from the other party for more time.
 - o As stated above, additional time for oral argument is not a common request, usually reserved only for cases involving multiple parties, very complicated facts or arguments, or cases involving more than one injury claim. Therefore, the impact of this rule provision is expected to be minimal.
 - iii. Subparagraph (5) of Rule .0701 addresses what happens if a party or parties do not appear for scheduled oral argument. If one party fails to appear at the call of the case, the Full Commission may disallow their right to present oral argument. If both parties fail to appear, the matter may be decided on the records and briefs alone. There is nothing unusual about this rule provision in terms of how most courts operate. The Commission will benefit from having this rule in the Code so that a decision to disallow oral argument for failure to appear at the call of the case cannot be challenged. Litigating parties may incur a corresponding cost if they lose the right to argue because they are late or fail to appear

and want to appeal the decision to disallow their arguments. It is very rare that attorneys do not appear on time for oral argument without reasonable excuse, such that their arguments would be disallowed. This may occur slightly more frequently with unrepresented parties, but is still rare. The fiscal impact of this rule is expected to be minimal.

- iv. Subparagraph (6) is copied from former Paragraph (g) with one minor word change. Former Paragraph (g) applied only to briefs. Subparagraph (6) indicates that parties may not discuss matters outside the record, use personal opinions or experiences, or make negative statements about opposing counsel or members of the Commission during oral argument. This rule reflects and allows enforcement of a best practice. It is rare that litigants try to go outside the record, mention personal opinions, or make disparaging comments during oral argument, so the impact will be minimal. However, the Commission and other parties will benefit from being able to point to the rule if a party does behave in such a manner. A party restrained by the rule may experience a cost due to limitations placed on its oral argument. These costs and benefits are relatively intangible and cannot be monetized with any accuracy.

2. *Amendment of Rule 11 NCAC 23A .0702*

- a. There are several proposed amendments to 11 NCAC 23A .0702 that are not anticipated to have any fiscal impact.
 - i. The amendments to new Paragraph (b) add some phrases and re-word the provision for clarification, but do not change the meaning of the rule.
 - ii. The first amendment to new Paragraph (d) clarifies that the Paragraph applies to requests for hearing to review an administrative decision referenced in Paragraph (b). The second amendment updates the rule because the Docket Director is now within the Office of the Clerk.
 - iii. The amendment to Paragraph (f) clarifies the orders subject to this provision.
- b. As stated at the beginning of this fiscal note, the proposed rule changes add a new paragraph to the rule that addresses review of administrative decisions by a Deputy Commissioner or Commissioner. This paragraph will affect very few cases per year and is not expected to result in significant impact.

New Paragraph (e) first states that administrative decisions made by a Commissioner or Deputy Commissioner during the pendency of a case pursuant to G.S. § 97-84 may be reviewed by the Full Commission. The concept of interlocutory decisions or orders is established and familiar to attorneys and is utilized by a variety of tribunals. Next, the provision states that requests for review of such administrative decisions by the Full Commission will be reviewed by the Chair of the Commission to determine whether there is a right of immediate review. The parties are to address the grounds for immediate review in the request for review for the Chair's consideration. The practice of reviewing and analyzing appeals of interlocutory decisions to determine whether they should proceed or wait until the entire matter is decided is common to many tribunals,

with a primary goal of judicial efficiency. The grounds presented are analyzed according to the existing body of case law addressing interlocutory orders. The first and last sentences of the rule reflect the current practice of the Commission. They are included in the new provision to codify the current practice, but also to provide context for the second sentence of the paragraph, which involves a procedural change.

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

In terms of impact, the average number of appeals of interlocutory administrative decisions over the past two fiscal years is 16. The potential benefits and costs of the new provision, which are likely to be minimal in sum, are described below:

- For those requests for review where there is no certification by the Deputy Commissioner, the rule does not contemplate a change in procedure. There may be a small benefit to the Commission and litigants from having a rule on the subject that outlines the procedure. There may also be a small cost to the litigants in that the rule prevents arguments for a different procedure.
- For those cases in which the second sentence of the rule applies, which are projected to occur between zero and five times a year, the Commission will have a small cost savings of approximately three hours of law clerk time and 30 minutes of the Chair's time that would have been spent reviewing the request for review and related grounds. There is unlikely to be a corresponding savings to the litigants in not having to draft arguments for the Chair's review because they will most likely include them in their briefs and arguments before the Full Commission panel. It is anticipated that the Full Commission panel will review the issue of whether the decision should be immediately reviewed as well as the merits of the request for review.
- When an administrative decision is reviewed pursuant to this procedure, the case before the Deputy Commissioner is placed on hold. If the administrative decision is not a final judgment and the request for review is reviewed by the Chair, there can be a delay of up to 45 days before it is known whether the appeal will be referred to a Full Commission panel. If review is not allowed, the matter then proceeds before the Deputy Commissioner. If it is referred to the Full Commission, it may take four to six months before a decision is issued and the proceedings before the Deputy Commissioner may resume. Therefore, in cases where there is a

certification by the Deputy Commissioner (potentially 0-5 times a year), the parties will have the benefit of saving up to 45 days of delay by proceeding directly to a Full Commission panel. There is a chance in such cases that a Full Commission panel may find that the request for review is not proper and should not be allowed, in which case the matter will have been delayed an extra 4-6 months, but this situation is equivalent to situations that already occur if the Chair allows a request for review to go forward and the Full Commission later disagrees or the Chair disallows a request for review and it is reviewed by the Full Commission.

Summary of impact:

Most benefits and costs related to the changes to 11 NCAC 23A .0701 and .0702 are not quantified in this analysis due to lack of data. Most are expected to be minimal because of the small numbers of cases affected. These include the benefits of procedural clarifications, the costs and benefits of a new reply brief rule, the costs and benefits of a new interlocutory review rule, and the costs and benefits of changes to the service of transcripts. The Commission is able to estimate that it could save up to \$85.00 a year in certified and return receipt mail costs depending on how it chooses to mail transcripts under the proposed 11 NCAC 23A .0701.

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

APPENDIX 1

Proposed Rule Text

11 NCAC 23A .0701 REVIEW BY THE FULL COMMISSION

(a) Notice of Appeal. Application for review shall be made to the Commission within 15 days from the date when notice of the Deputy Commissioner's Opinion and Award shall have been given. A letter expressing a request for review is considered an application for review to the Full Commission within the meaning of G.S. 97-85, provided that the letter specifies the Order or Opinion and Award from which appeal is taken.

(b) Motions to Reconsider to the Deputy Commissioner. A motion to reconsider or to amend the decision of a Deputy Commissioner shall be filed with the Deputy Commissioner within 15 days of receipt of notice of the award. The time for filing a request for review from the decision of a Deputy Commissioner under the rules in this Subchapter shall be tolled until a motion to reconsider or to amend the decision has been ruled upon by the Deputy Commissioner. However, if either party files a letter requesting review of the decision as set forth in Paragraph (a) of this Rule after a motion to reconsider or to amend has been filed with the Deputy Commissioner, jurisdiction shall be transferred to the Full Commission. Any party who had a pending motion to reconsider or amend the decision of the Deputy Commissioner may file a motion with the Chair of the Commission requesting remand to the Deputy Commissioner with whom the motion was pending. Upon remand, jurisdiction will be transferred to the Deputy Commissioner. Following the Deputy Commissioner's ruling on the motion to reconsider or amend the decision, a party requesting review of the initial decision of the Deputy Commissioner or the ruling on the motion to reconsider or amend the decision shall file a letter requesting review as set forth in Paragraph (a) of this Rule to transfer jurisdiction of the matter back to the Full Commission.

~~(b)(c) Acknowledging Receipt; Form 44; Joint Certification. After receipt of a request for review, the~~ The Commission shall acknowledge the request for review by letter. The Commission shall prepare the official transcript and ~~exhibits~~ exhibits, if any, and provide them along with a Form 44 *Application for Review* to the parties involved in the appeal at no charge within 30 days of the acknowledgement letter. ~~The official transcript and exhibits and a Form 44 *Application for Review* shall be provided to the parties electronically, where possible. In such cases, the Commission shall send an e-mail to the parties containing a link to the secure File Transfer Protocol (FTP) site where the official transcript and exhibits may be downloaded. The e-mail shall also provide instructions for the submission of the parties' acknowledgement of receipt of the Form 44 *Application for Review* and the official transcript and exhibits to the Commission. Parties represented by counsel shall sign a joint certification acknowledging receipt of the Form 44 *Application for Review* and the official transcript and exhibits and submit the certification within ten days of receipt of the Form 44 *Application for Review* and the official transcript and exhibits. The certification shall stipulate the date the Form 44 *Application for Review* and the official transcript and exhibits were received by the parties and shall note the date the appellant's brief is due. The Commission shall save a copy of the parties' acknowledgements in the file for the claim to serve as record of the parties' electronic receipt of the Form 44 *Application for Review* and the official transcript and exhibits. In cases where it is not possible to provide a party with the official transcript and exhibits electronically, the Commission shall provide the official transcript and exhibits and a Form 44 *Application*~~

~~for Review via certified U.S. Mail, with return receipt requested. The Commission shall save a copy of the return receipt to serve as record of the party's receipt of the official transcript and exhibits and Form 44 Application for Review.~~

(1) The official transcript and exhibits and a Form 44 Application for Review shall be provided electronically to parties represented by counsel. In such cases, the Commission shall send an e-mail to the parties with directions on how to obtain an electronic copy of the official transcript and exhibits. The e-mail shall also provide instructions for the submission of the parties' acknowledgement of receipt of the Form 44 Application for Review and the official transcript and exhibits to the Commission. Parties represented by counsel shall sign a joint certification acknowledging receipt of the Form 44 Application for Review and the official transcript and exhibits and submit the certification within ten days of receipt of the Form 44 Application for Review and the official transcript and exhibits. The certification shall stipulate the date the Form 44 Application for Review and the official transcript and exhibits were received by the parties and shall note the date the appellant's brief is due. The Commission shall save a copy of the parties' acknowledgements in the file for the claim to serve as record of the parties' electronic receipt of the Form 44 Application for Review and the official transcript and exhibits.

(2) In cases where it is not possible to provide a party with the official transcript and exhibits electronically, the Commission shall serve the official transcript and exhibits and a Form 44 Application for Review via any class of U.S. Mail that is fully prepaid.

~~(e) A motion to reconsider or to amend the decision of a Deputy Commissioner shall be filed with the Deputy Commissioner within 15 days of receipt of notice of the award with a copy to the Docket Director. The time for filing a request for review from the decision of a Deputy Commissioner under the rules in this Subchapter shall be tolled until a motion to reconsider or to amend the decision has been ruled upon by the Deputy Commissioner. However, if either party files a letter requesting review as set forth in Paragraph (a) of this Rule, jurisdiction shall be transferred to the Full Commission, and the Docket Director shall notify the Deputy Commissioner. Upon transfer of jurisdiction to the Full Commission, any party who had a pending motion to reconsider or amend the decision of the Deputy Commissioner may file a motion with the Chairman of the Commission requesting remand to the Deputy Commissioner with whom the motion was pending. Within the Full Commission's discretion, the matter may be so remanded. Upon the Deputy Commissioner's ruling on the motion to reconsider or amend the decision, either party may thereafter file a letter requesting review of the Deputy Commissioner's decision as set forth in Paragraph (a) of this Rule.~~

(d) Appellant's Form 44. The appellant shall submit a Form 44 Application for Review upon which appellant shall state stating with particularity all assignments of error and grounds for review, the grounds for the review. The grounds shall be stated with particularity, including the errors allegedly committed by the Commissioner or Deputy Commissioner and, when applicable, including, where applicable, the pages in the transcript or the record on which the alleged errors are recorded. Grounds for review and assignments of error not set forth in the Form 44 Application for Review are deemed abandoned, and argument thereon shall not be heard before the Full Commission.

(e) Timing Requirements. The appellant shall file the Form 44 *Application for Review* and brief in support of the grounds for review with the Commission with a certificate of service on the appellee within 25 days after receipt of the transcript or receipt of notice that there will be no transcript. The appellee shall have 25 days from service of the Form 44 *Application for Review* and appellant's brief to file a responsive brief with the Commission. The appellee's brief shall include a certificate of service on the appellant. When an appellant fails to file a brief, an appellee shall file its brief within 25 days after the appellant's time for filing the Form 44 *Application for Review* and appellant's brief has expired. A party who fails to file a brief shall not participate in oral argument before the Full Commission. If multiple parties request review, each party shall file an appellant's brief and appellee's brief on the schedule set forth in this Paragraph. ~~If the matter has not been calendared for hearing, any a party may file with the Docket Director obtain a single extension of time not to exceed 15 days by filing a written stipulation pursuant to Rule .0108 of this Subchapter. to a single extension of time not to exceed 15 days. In no event shall the cumulative extensions of time exceed 30 days.~~

(f) Brief Requirements. Briefs to the Full Commission shall not exceed 35 pages, excluding attachments. In no event shall attachments be used to circumvent the 35-page limit. No page limit applies to the length of attachments. Briefs shall be prepared using a 12 point proportional font and serif typeface, shall be double spaced, and shall be prepared with non-justified right margins. Each page of the brief shall be numbered at the bottom of the page. When a party quotes or paraphrases testimony or other evidence from the appellate record in the party's brief, the party shall include, at the end of the sentence in the brief that quotes or paraphrases the testimony or other evidence, a parenthetical entry that designates the source of the quoted or paraphrased material and the page number within the applicable source. The party shall use "T" to refer to the transcript of hearing testimony and "Ex" for exhibit. For example, if a party quotes or paraphrases material located in the hearing transcript on page 11, the party shall use the following format "(T 11)," and if a party quotes or paraphrases material located in an exhibit on page 12, the party shall use the following format "(Ex 12)." When a party quotes or paraphrases testimony in the transcript of a deposition in the party's brief, the party shall include the last name of the deponent and the page on which such testimony is located. For example, if a party quotes or paraphrases the testimony of John Smith, located on page 11 of such deposition, the party shall use the following format "(Smith 11)." Parties shall not discuss matters outside the record, assert personal opinions or relate personal experiences, or attribute wrongful acts or motives to opposing counsel or members of the Commission.

(g) Reply Briefs. Within 10 days of service of the appellee's brief, a party may request by motion to file a reply brief. The motion shall not contain a reply brief. A reply brief may only be filed if ordered by the Full Commission. Reply briefs shall not exceed 15 pages, excluding attachments. Reply briefs shall be prepared in accordance with the requirements of Paragraph (f) of this Rule. Any reply brief filed shall be limited to a concise rebuttal of arguments set out in the appellee's brief, and shall not reiterate arguments set forth in the appellant's principal brief.

(h) Citations. Case citations shall be to the North Carolina Reports, the North Carolina Court of Appeals Reports, or the North Carolina Reporter, and when possible, to the South Eastern Reporter. An unpublished appellate decision does not constitute controlling legal authority. If a party believes that an unpublished opinion has precedential or persuasive value to a material issue in the case and that there is no published opinion that would serve as well, the party may cite the unpublished opinion. When citing an unpublished opinion, a party shall indicate the opinion's

unpublished status. If no reporter citation is available at the time a brief is filed, the party citing to the case shall attach a copy of the case to its brief.

~~(f)(i) Motions. After a request for review has been submitted to the Full Commission, any motions related to the issues for review shall be filed with the Full Commission, with service on the other parties. Motions related to the issues for review including motions for new trial, to supplement the record, including documents from offers of proof, or to take additional evidence, filed during the pendency of a request for review to the Full Commission, shall be argued before considered by the Full Commission at the time of the hearing of the request for review, review of the appeal, except motions related to the official transcript and exhibits. The Full Commission, for good cause shown, may rule on such motions prior to oral argument.~~

~~(g) Case citations shall be to the North Carolina Reports, the North Carolina Court of Appeals Reports, or the North Carolina Reporter, and when possible, to the South Eastern Reporter. If no reporter citation is available at the time a brief is filed or if an unpublished decision is referenced in the brief, the party citing to the case shall attach a copy of the case to its brief. Counsel shall not discuss matters outside the record, assert personal opinions or relate personal experiences, or attribute wrongful acts or motives to opposing counsel or members of the Commission.~~

~~(h) Upon the request of a party or on its own motion, the Commission may waive oral argument in the interests of justice or to promote judicial economy. In the event of such waiver, the Full Commission shall file an award based on the record and briefs.~~

(j) Oral Argument.

- (1) Each appellant shall have twenty minutes to present oral argument and may reserve any amount of the twenty-minute total allotment for rebuttal, unless otherwise specified by Order of the Commission. Each appellee shall also have twenty minutes to present oral argument, unless otherwise specified by Order of the Commission; however, the appellee(s) may not reserve rebuttal time. In the case of cross-appeals, each appealing party may reserve rebuttal time.
- (2) Any party may request additional time to present oral argument in excess of the standard twenty-minute allowance. Such requests shall be made in writing and submitted to the Full Commission no less than ten days prior to the scheduled hearing date. The written request for additional time shall state with specificity the reason(s) for the request of additional time and the amount of additional time requested.
- (3) An employee appealing the amount of a disfigurement award shall personally appear before the Full Commission to permit the Full Commission to view the disfigurement.
- (4) A party may waive oral argument at any time with approval of the Commission. Upon the request of a party or on its own initiative, the Commission may review the case and file an Order or Award without oral argument.
- (5) If any party fails to appear before the Full Commission upon the call of the case, the Commission may disallow the party's right to present oral argument. If neither party appears upon the call of the case, the Full Commission may decide the case upon the record and briefs on appeal, unless otherwise ordered.

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

~~(i) Briefs to the Full Commission shall not exceed 35 pages, excluding attachments. No page limit applies to the length of attachments. Briefs shall be prepared using a 12 point type, shall be double spaced, and shall be prepared with non justified right margins. Each page of the brief shall be numbered at the bottom of the page. When a party quotes or paraphrases testimony or other evidence from the appellate record in the party's brief, the party shall include, at the end of the sentence in the brief that quotes or paraphrases the testimony or other evidence, a parenthetic entry that designates the source of the quoted or paraphrased material and the page number within the applicable source. The party shall use "T" to refer to the transcript of hearing testimony, "Ex" for exhibit, and "p" for page number. For example, if a party quotes or paraphrases material located in the hearing transcript on page 11, the party shall use the following format "(T p 11)," and if a party quotes or paraphrases material located in an exhibit on page 12, the party shall use the following format "(Ex p 12)." When a party quotes or paraphrases testimony in the transcript of a deposition in the party's brief, the party shall include the last name of the deponent and the page on which such testimony is located. For example, if a party quotes or paraphrases the testimony of John Smith, located on page 11 of such deposition, the party shall use the following format "(Smith p 11)."~~

~~(j) An employee appealing the amount of a disfigurement award shall personally appear before the Full Commission to permit the Full Commission to view the disfigurement.~~

History Note: Authority G.S. 97-80(a); 97-85; S.L. 2014-77;

Eff. January 1, 1990;

*Amended Eff. ***** **, *****, November 1, 2014; January 1, 2011; August 1, 2006; June 1, 2000;*

Recodified from 04 NCAC 10A .0701 Eff. June 1, 2018.

11 NCAC 23A .0702 REVIEW OF ADMINISTRATIVE DECISIONS

(a) Administrative decisions include orders, decisions, and awards made in a summary manner, without findings of fact, including decisions on the following:

- (1) applications to approve agreements to pay compensation and medical bills;
- (2) applications to approve the termination or suspension or the reinstatement of compensation;
- (3) applications to change the interval of payments; and
- (4) applications for lump sum payments of compensation.

~~(b) Administrative decisions made in cases not set for hearing before a Commissioner or Deputy Commissioner or before the Full Commission for review shall be reviewed upon the filing of a Motion for Reconsideration. Reconsideration, upon a request for hearing on the administrative decision, or upon request for hearing on the ruling on a Motion for Reconsideration. A Motion for Reconsideration shall be filed within 15 days of receipt of the administrative decision and addressed to the Administrative Officer who made the decision. A request for hearing shall be filed within 15 days of the administrative decision or a ruling on a Motion for Reconsideration. with the Commission addressed to the Administrative Officer who made the decision or may be reviewed by requesting a hearing within 15 days of receipt of the decision or receipt of the ruling on a Motion to Reconsider. These issues may also be~~ Notwithstanding the provisions above, issues addressed by an administrative decision may be raised and determined at a subsequent hearing.

~~(b)~~ (c) Motions for Reconsideration shall not stay the effect of the order, decision, or award; provided that Administrative Officer making the decision or a Commissioner may enter an order staying its effect pending the ruling on the Motion for Reconsideration or pending a decision by a Commissioner or Deputy Commissioner following a formal hearing. In determining whether or not to grant a stay, the Commissioner or Administrative Officer shall consider whether granting the stay will frustrate the purposes of the order, decision, or award. Motions to Stay shall not be filed with both the Administrative Officer and a Commissioner.

~~(c)~~ (d) Any request for a hearing to review an administrative decision pursuant to Paragraph (b) shall be ~~made to the Commission and~~ filed with the ~~Commission's Docket Director,~~ Office of the Clerk. The Commission shall designate a Commissioner or Deputy Commissioner to hear the review. The Commissioner or Deputy Commissioner hearing the matter shall consider all issues de novo, and no issue shall be considered moot solely because the order has been fully executed during the pendency of the hearing.

(e) Any request for review by the Full Commission of an administrative decision by a Commissioner or Deputy Commissioner made during the pendency of a case assigned to them pursuant to G.S. 97-84 shall be filed with the Office of the Clerk. If the administrative decision made by the authoring Commissioner or Deputy Commissioner is a final judgment as to one or more issues or parties and the administrative decision contains a certification that there is no just reason for delay, the request for review shall be referred directly to a panel of the Full Commission. If the administrative decision contains no certification, requests for review will be referred to the Chair of the Commission for a determination regarding the right to immediate review, and the parties shall address the grounds upon which immediate review shall be allowed.

~~(d)~~(f) Orders filed by a single Commissioner in matters before the Full Commission for review pursuant to G.S. 97-85, including orders dismissing reviews to the Full Commission or denying the right of immediate request for review to the Full Commission, are administrative orders and are not final determinations of the Commission. As such, an order filed by a single Commissioner is not appealable to the North Carolina Court of Appeals. A one-signature order filed by a single Commissioner may be reviewed by:

- (1) filing a Motion for Reconsideration addressed to the Commissioner who filed the order; or
- (2) requesting a review to a Full Commission panel by requesting a hearing within 15 days of receipt of the order or receipt of the ruling on a Motion for Reconsideration.

~~(e)~~(g) This Rule shall not apply to medical motions filed pursuant to G.S. 97-25; provided, however, that a party may request reconsideration of an administrative ruling on a medical motion, or may request a stay, or may request an evidentiary hearing de novo, all as set forth in G.S. 97-25.

*History Note: Authority G.S. 97-79(g); 97-80(a); 97-85; S.L. 2014-77;
Eff. January 1, 1990;
Amended Eff. **** *, ***, November 1, 2014; January 1, 2011; June 1, 2000;
Recodified from 04 NCAC 10A .0701 Eff. June 1, 2018.*