

**Regulatory Impact Analysis
Motions in Tort Claims**

Basic Information

Agency: North Carolina Industrial Commission

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

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

Impact Summary

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

Impact of the Proposed Amendments:

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

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

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

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

ii. Description of proposed changes:

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

iii. Economic impact:

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

Costs to the State through the Commission:

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

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

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

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

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

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

Total compensation adjusted for recent 2% legislative increase.

⁴ Id.

Costs to the State as an employer:

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

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

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

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

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

Total compensation adjusted for recent 2% legislative increase.

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

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

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

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

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

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

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

Benefits to the State through the Commission:

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

Benefits to the State as an employer:

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

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

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

Description of baseline situation:

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

Description of proposed changes:

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

Economic impact:

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

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

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

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

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

Summary of Economic Impact:

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

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

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

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

APPENDIX 1

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

11 NCAC 23B .0204 MOTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

Eff. January 1, 1989;

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

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