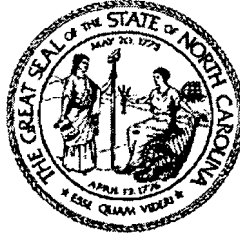


Beverly Eaves Perdue, Governor
Pamela T. Young, Chair



Bernadine S. Ballance, Commissioner
Linda Cheatham, Commissioner
Laura K. Mavretic, Commissioner
Danny L. McDonald, Commissioner
Staci Meyer, Commissioner
Christopher Scott, Commissioner

North Carolina Industrial Commission

Order Adopting New and Amended Industrial Commission Rules

Following proper public notice on and after August 9, 2010, the Industrial Commission held a Public Hearing on September 15, 2010, in the Utilities Commission Hearing Room, second floor, Room 2149 of the Dobbs Building, 430 N. Salisbury Street, Raleigh, North Carolina.

The following persons appeared and offered comments at the Public Hearing: Gina Cammarano, N. Victor Farah, Bruce Hamilton, Leonard T. Jernigan, Jr., R. James Lore, Jeffrey Misenheimer, and Jennifer Ruiz. The following Industrial Commission staff members were also asked to speak: Executive Secretary Tracey Weaver, Chief Deputy Commissioner Wanda Taylor, and Dispute Resolution Coordinator John Schafer.

The public was also invited to offer written comments through September 29, 2010. Written comments were received from the following persons: Keisha Lovelace, Director of Claims Administration for the Industrial Commission, Jolinda J. Babcock, Harry H. Clendenin, III, Bobby L. Bollinger, Jr., Trey Gillespie, Jeffrey Misenheimer on behalf of the North Carolina Association of Defense Attorneys, John D. Elvers, Gina Cammarano on behalf of the North Carolina Advocates for Justice, Leonard T. Jernigan, Jr., Seth M. Bernanke, R. James Lore, and W. Scott Fuller. These written comments were added to the record of the Public Hearing by Order of Pamela T. Young, Chair, dated October 1, 2010.

After careful review of the record, the Industrial Commission adopts the attached additions and amendments to the North Carolina Industrial Commission Rules, all of which shall be effective January 1, 2011.

This the 14th day of October 2010.

Pamela T. Young
Chair

Bernadine S. Ballance
Commissioner

Linda Cheatham
Commissioner

Laura Kranifeld Mavretic
Commissioner

Danny L. McDonald
Commissioner

Staci Meyer
Commissioner

Christopher Scott
Commissioner



North Carolina Industrial Commission

Additions and Amendments to the North Carolina Industrial Commission Rules

Notice of Proposed Rule Changes: August 9, 2010
Public Hearing: September 15, 2010
Written Comment Period: Closed September 29, 2010

A. Workers' Compensation Rules of the North Carolina Industrial Commission

1. Rule 101, Location of Offices and Hours of Business, reads as rewritten:

The offices of the North Carolina Industrial Commission (hereinafter "Industrial Commission") are located in the Dobbs Building, 430 North Salisbury Street, in Raleigh, North Carolina. The General Mailing Address is North Carolina Industrial Commission, 4340 Mail Service Center, Raleigh, NC 27699-4340. The same office hours will be observed by the Industrial Commission as are, or may be, observed by other State offices in Raleigh. The offices are open between the hours of 8:00 a.m. and 5:00 p.m. to accept documents for filing. Documents permitted to be filed electronically may be filed until 11:59 p.m. on the day due.

2. Section 1 of Rule 103, Official Forms, reads as rewritten:

The Industrial Commission will supply, on request, forms identified by number and title as follows:

Form 17 Workers' Compensation Notice

Form 18 Notice of Accident to Employer and Claim of Employee or His Personal Representative or Dependents (N.C. Gen. Stat. §§97-22, 97-23, and through 97-24)

Form 18B Claim by Employee or His Personal Representative or Dependents for Workers' Compensation Benefits for Lung Damage, Including Asbestosis, Silicosis, and Byssinosis (N.C. Gen. Stat. §97-53)

Form 18M Employee's Claim for Additional Medical Compensation

Form 19 Employer's Report of Employee's Injury to the Industrial Commission

Form 21 Agreement for Compensation for Disability Pursuant to N.C. Gen. Stat. §97-82

Form 22 Statement of Days Worked and Earnings of Injured Employee (Wage Chart)

Form 24 Application to Terminate or Suspend Payment of Compensation Pursuant to N.C. Gen. Stat. §97-18.1

Form 25C Authorization for Rehabilitation Professional to Obtain Medical Records of Current Treatment

~~Form 25D Dentists' Itemized Statement of Charges for Treatment and Certification of Treatment of Disability~~

~~Form 25M Physician's Itemized Statement of Charges for Treatment and Certification of Treatment~~

Form 25N Notice to the Industrial Commission of Assignment of Rehabilitation Professional

Form 25P Itemized Statement of Charges for Drugs

Form 25R Evaluation for Permanent Impairment

Form 25T Itemized Statement of Charges for Travel

Form UB-92 Hospital Bill

Form 26 Supplemental Agreement as to Payment of Compensation Pursuant to N.C. Gen. Stat. §97-82

Form 26A Employer's Admission of Employee's Right to Permanent Partial Disability Pursuant to N.C. Gen. Stat. §97-31

Form 26D Agreement for Compensation Under N.C. Gen. Stat. §97-37

Form 28 Return to Work Report

Form 28B Report of Employer or Carrier/Administrator of Compensation and Medical Compensation Paid and Notice of Right to Additional Medical Compensation

Form 28T Notice of Termination of Compensation by Reason of Trial Return to Work Pursuant to N.C. Gen. Stat. §97-18.1(b) and N.C. Gen. Stat. §97-32.1

Form 28U Employee's Request that Compensation be Reinstated After Unsuccessful Trial Return to Work Pursuant to N.C. Gen. Stat. §97-32.1

Form 29 Supplementary Report for Fatal Accidents

Form 30 Agreement for Compensation for Death

Form 30D Notice of Death Award (Approval of Agreement)

Form 31 Application for Lump Sum Award

Form 33 Request that Claim be Assigned for Hearing

Form 33R Response to Request that Claim be Assigned for Hearing

Form 36 Subpoena for Witness and Subpoena to Produce Items or Documents

Form 42 Application for Appointment of Guardian *Ad Litem*

Form 44 Application for Review

Form 50 Itemized Statement of Charge for Nursing

Form 51 Consolidated Fiscal Annual Report of "Medical Only" and "Lost Time" Cases

Form 60 Employer's Admission of Employee's Right to Compensation Pursuant to N.C. Gen. Stat. §97-18(b)

Form 61 Denial of Workers' Compensation Claim Pursuant to N.C. Gen. Stat. §97-18(c) and (d)

Form 62 Notice of Reinstatement of Compensation Pursuant to N.C. Gen. Stat. §97-32.1 and N.C. Gen. Stat. §97-18(b)

Form 63 Notice to Employee of Payment of Compensation Without Prejudice to Later Deny the Claim Pursuant to N.C. Gen. Stat. §97-18(d)

Form 90 Report of Earnings

Form IZ-510 Medical Bill Analysis Used for Approval and Reduction of Medical Bills

Form MCSC2 Petition for Order Referring Case to Mediated Settlement Conference

Form MCSC4 Designation of Mediator

Form MCSC5 Report of Mediator

Form MCSC6 Mediator's Declaration of Interest and Qualifications

Form MCSC7 Report of Evaluator

Form MSC8 Mediated Settlement Agreement

The mailing address for each Industrial Commission form appears at the bottom right corner of the Form.

3. Rule 104, Employer’s Report of Injury, reads as rewritten:

An employer shall immediately report to its carrier or administrator any injury or occupational disease, 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 of the injury or allegation, the employer or carrier/administrator or its successor in interest shall file with the Industrial Commission and provide a copy to the employee of a Form 19, *Employer’s Report of Employee’s Injury to the Industrial Commission*, if injury causes the employee to be absent from work for more than one day or the employee’s medical compensation is greater than an amount which is established periodically by the Industrial Commission in its Minutes. The employer may record the employee’s or another person’s description of the injury on the Form 19 without admitting the truth of the information.

In addition to providing the Form 19 to the employee, the employer or carrier/administrator shall also provide a blank Form 18 for use by the employee.

The front of the Form 19 shall prominently display the following statement: “To the Employee: This Form 19 is not your claim for workers’ compensation benefits. To make a claim, you must complete and sign the enclosed Form 18 and ~~mail~~file it ~~to~~with the Claims ~~Section~~Administration, North Carolina Industrial Commission, 43345 Mail Service Center, Raleigh, NC 28799-43345 within two years of the date of your injury or last payment of medical compensation. For occupational diseases, the claim must be filed within two years of the date of disability and the date your doctor told you that you have a work-related disease, whichever is later.”

4. The Rules are amended by adding a new Rule 105 to read:

Rule 105. Electronic Payment of Costs.

Electronic payment is authorized for fees and costs owed to the North Carolina Industrial Commission. The Industrial Commission shall implement guidelines to facilitate electronic payment.

5. The Rules are amended by adding a new Rule 302 to read:

Rule 302. Required Contact Information from Carriers.

All insurance carriers, third party administrators and self-insured employers shall designate a primary contact person for workers’ compensation issues in North Carolina

and shall maintain and provide annually to the Director of Claims Administration of the Industrial Commission the primary contact person's current contact information, including direct telephone and facsimile numbers, mailing addresses, and email addresses. Contact information shall be updated within 30 days of any change. Failure to comply with this Rule may result in sanctions, including those specified in Rule 802. The Industrial Commission shall implement guidelines to facilitate the collection of this information.

6. Section 6.b. of Rule 409, Claims for Death Benefits, reads as rewritten:

The parties shall file the following information along with a proposed Opinion and Award or Order filed electronically, by joint stipulation, affidavit or certified document:

- a. a stipulation regarding all jurisdictional matters;
- b. the decedent's name, social security number, employer, insurance carrier or servicing agent, and the date of the injury giving rise to this claim;
- c. a Form 22 or stipulation as to average weekly wage;
- d. any affidavits regarding dependents;
- e. the death certificate;
- f. I.C. Form 29;
- g. Guardian ad Litem forms, if any beneficiary is a minor or incompetent;
- h. proof of beneficiary status, such as marriage license, birth certificate, or divorce decree;
- i. medical records, if any;
- j. a statement of payment of medical expenses incurred, if any; and
- k. a funeral bill or stipulation as to payment of the funeral benefit.

7. Section 2 of Rule 604, Appointment of Guardian Ad Litem, reads as rewritten:

In no event, however, shall any compensation be paid directly to the guardian *ad litem*. Rather, compensation payable to a minor or incompetent shall be paid as provided in N.C. Gen. Stat. §97-48 and N.C. Gen. Stat. §97-49. The use of the word "guardian" in N.C. Gen. Stat. §97-49 does not mean a guardian *ad litem*. The Commission may assess a fee to be paid by the employer or the carrier, to an attorney who serves as a guardian *ad*

litem for actual services rendered upon receipt of an affidavit of actual time spent in representation of the minor or incompetent.

8. Section 2 of Rule 605, Discovery, reads as rewritten:

Interrogatories may relate to matters which are not privileged which are relevant to an issue presently in dispute or which the requesting party reasonably believes may later be disputed. Signature of a party or attorney serving interrogatories constitutes a certificate by such person that he or she has personally read each of the interrogatories, that no such interrogatory will oppress a party or cause any unnecessary expense or delay, that the information requested is not known or equally available to the requesting party and that the interrogatory relates to an issue presently in dispute or which the requesting party reasonably believes may later be in dispute. A party may serve an interrogatory, however, to obtain verification of facts relating to an issue presently in dispute. Answers to interrogatories may be used to the extent permitted by the rules of evidence.

9. The Rules are amended by adding a new Rule 609A to read:

Rule 609A. Medical Motions and Emergency Medical Motions.

1. Expedited Medical Motions

a. Medical motions pursuant to N.C. Gen. Stat. §97-25 brought before the Office of the Executive Secretary for an administrative ruling shall comply with applicable provisions of Rule 609 and shall be submitted electronically to medicalmotions@ic.nc.gov, unless electronic submission is unavailable to the party.

b. A party may file with the Deputy Commissioner Section a request for an administrative ruling on a medical motion. A party, also, may appeal an Order from the Executive Secretary's Office on an Expedited Medical Motion by giving notice of appeal to the Dockets Department within 15 days of receipt of the Order or receipt of the ruling on a Motion to Reconsider the Order filed pursuant to Rule 703(1). The Motion shall contain a designation as an administrative "Expedited Medical Motion", documentation in support of the request, including the most recent medical record/s and a representation that informal means of resolving the issue have been attempted in good faith, and the opposing party's position, if known.

a. A Pre-Trial Conference will be held immediately to clarify the issues. Parties are encouraged to consent to a review of the contested issues by electronic mail submission of only relevant medical records and opinion letters.

b. If depositions are deemed necessary by the Deputy Commissioner, only a brief period for taking the same will be allowed. Preparation of the transcript will be expedited and will initially be at the expense of defendants. Requests for independent medical examinations may be denied unless there is a demonstrated need for the evaluation.

c. Written arguments and briefs shall be limited in length, and are to be filed within five days after the record is closed.

c. A party may appeal an Order by a Deputy Commissioner on an Expedited Medical Motion by giving notice of appeal to the Full Commission within 15 days of receipt of the Order or receipt of the ruling on a Motion to Reconsider the Order filed pursuant to Rule 703(1).

a. A letter expressing an intent to appeal a Deputy Commissioner's Order on an Expedited Medical Motion shall be considered notice of appeal to the Full Commission, provided that it clearly specifies the Order from which appeal is taken.

b. After receipt of notice of appeal, the appeal will be acknowledged by the Dockets Department within three (3) days by sending an appropriate Order under the name of the Chair of the Panel to which the appeal is assigned. The parties may be permitted to file briefs on an abbreviated schedule in the discretion of the panel chair. The panel chair will also determine if oral arguments are to be by telephone, in person, or waived. All correspondence, briefs, or motions related to the appeal shall be addressed to the panel chair with a copy to the law clerk of the panel chair.

2. Emergency Medical Motions

a. Motions requesting emergency medical relief administratively shall contain the following:

a. A boldface, or otherwise emphasized, designation as "Emergency Medical Motion".

b. An explanation of the need for a shortened time period for review, including any hardship that warrants immediate attention/action by the Commission.

c. A statement of the time-sensitive nature of the request, with specificity.

d. Detailed dates and times related to the issue raised and to the date a ruling is requested.

e. Documentation in support of the request, including the most recent medical records.

f. A representation that informal means of resolving the issue have been attempted in good faith, and the opposing party's position, if known.

b. A party may file an Emergency Medical Motion with the Executive Secretary's Office, the Chief Deputy Commissioner, or the Office of the Chair. A proposed Order shall be provided with the motion. The non-moving party(ies) will be advised regarding any time allowed for response and may be advised whether informal telephonic oral argument is necessary.

c. Emergency Medical Motions and responses thereto shall be submitted electronically, unless electronic submission is unavailable to the party.

a. Emergency Medical Motions and responses thereto filed with the Executive Secretary's Office shall be submitted to medicalmotions@ic.nc.gov.

b. Emergency Medical Motions filed with the Chief Deputy Commissioner shall be submitted electronically directly to the Chief Deputy Commissioner and his/her legal assistant.

c. Emergency Medical Motions filed with the Chair of the Commission shall be submitted electronically to the Chair, his/her legal assistant, and his/her law clerk.

10. Section 3 of Rule 610, Pre-trial conference and Pre-trial order, reads as rewritten:

A Commissioner or a Deputy Commissioner may issue a Pre-Trial Order requiring the parties to submit a Pre-Trial Agreement. The parties shall have 15 days following the hearing within which to schedule the taking of medical depositions unless otherwise extended by the Commission.

If not specified in the Pre-Trial Agreement, the parties shall file with the Deputy Commissioner within 15 days following the trial a list specifically identifying all expert witnesses to be deposed and the dates of their depositions.

Within ten days after each expert witness deposition, defendants' counsel shall submit to the Deputy Commissioner, via email, a request to approve such expert's fee. In these requests, counsel shall provide to the Deputy Commissioner, in a cover letter along with the invoice (if provided to counsel), the following: (1) the name of the expert deposed; (2) his/her practice's name; (3) his/her fax number; (4) his/her area of specialty and board certifications, if any; and (5) the exact length of the deposition and the length of time the expert spent preparing for the deposition. Counsel shall submit a proposed Order that shows the expert's name, practice name and fax number under the "Appearances" section. Failure to make prompt payment to an expert witness following the entry of a fee order will result in the assessment of a 10 percent penalty.

~~Such~~The Pre-Trial Agreement shall be prepared in a form which substantially complies with the Order on Final Pre-Trial Conference adopted in the North Carolina Rules of Practice for the Superior and District Courts. Should the parties fail to comply with a Pre-Trial Order, the Commissioner or Deputy Commissioner may remove the case from the hearing docket. Should the parties thereafter comply with the Pre-Trial Order after the removal of the case, the Pre-Trial Agreement must be directed to the Commissioner or Deputy Commissioner who removed the case from the docket; and the Commissioner or Deputy Commissioner will order the case returned to the hearing docket as if a Request for Hearing had been filed on the date of the Order to return the case to the hearing docket. No new Form 33 Request for Hearing is required.

11. Section 2 of Rule 613, Dismissals and Removals, reads as rewritten:

2. Removals

a. A claim may be removed from the hearing docket by motion of the party requesting the hearing or by the Industrial Commission upon its own motion.

b. Upon settlement of a case or approval of a form agreement, the parties shall submit a request for removal and/or a dismissal and proposed Order.

c. A removed case may be reinstated by motion of either party; provided that when the issues have materially changed since the Order of Removal or where the motion to reinstate is filed more than one year after the Order of Removal, a Form 33 Request for Hearing will be required.

ed. When a plaintiff has not requested a hearing within two years of the filing of an Order of Removal requested by the plaintiff or necessitated by the plaintiff's conduct, and not pursued the claim, upon proper notice and an opportunity to be heard, any claim may be dismissed with prejudice by the Industrial Commission, in its discretion, on its own motion or by motion of any party.

12. Section 2.a. of Rule 614, Attorneys Retained for Proceedings, reads as rewritten:

A Motion to Withdraw which shall contain a statement of reasons for the request and a statement that the request has been served on the client. The attorney shall make reasonable efforts to ascertain the last known address of the client and shall include this information in the motion.

13. Rule 614, Attorneys Retained for Proceedings, is amended by adding a new section to read:

4. An attorney withdrawing from representation whose client wishes to appeal an Order, Decision, or Award to the Full Commission shall timely file a notice of appeal on behalf of his or her client either before or with his or her Motion to Withdraw.

14. Rule 616, Foreign Language Interpreters, is amended by adding a new section, to read:

6. Interpreter Ethics. Foreign language interpreters shall abide by the code of ethical conduct for court interpreters promulgated by the North Carolina Administrative Office of the Courts and adopted by the Industrial Commission and shall interpret as word for word as is practicable, without editing, commenting, or summarizing, testimony or other communications.

15. The Rules are amended by adding a new Rule 617 to read:

Rule 617. Electronic Service and Verification of Service by the Commission.

Consistent with the provisions in N.C. Gen. Stat. §§97-84, 97-85, and 97-86, the Commission shall establish guidelines for the electronic submission, including electronic mail and facsimile, of documents and communications.

16. Section 4 of Rule 701, Appeals to the Full Commission, reads as rewritten:

Appellant's Form 44 and brief in support of his grounds for appeal shall be filed in triplicate with the Industrial Commission, with a certificate indicating service on appellee by mail or in person, within 25 days after receipt of the transcript, or receipt of notice that there will be no transcript. Thereafter, appellee shall have 25 days from service of appellant's brief within which to file a reply brief in triplicate with the Industrial Commission, with written statement of service of copy by mail or in person on appellant. When an appellant fails to file a brief, appellee shall file his brief within 25 days after appellant's time for filing brief has expired. A party who fails to file a brief will not be allowed oral argument before the Full Commission. If both parties appeal, they shall each file an appellant's and appellee's brief on the schedule set forth herein. ~~The parties may file with the Docket Director a written stipulation to a single extension of time for each party, not to exceed 30 days, if the matter has not been calendared for hearing.~~ If the matter has not been calendared for hearing, any party may file with the Docket Director a written stipulation to a single extension of time not to exceed 15 days. In no event shall the cumulative extensions of time exceed 30 days.

17. Section 2 of Rule 702, Appeal to the Court of Appeals, reads as rewritten:

If the parties cannot agree on the record on appeal, appellant shall furnish the Chair of the Industrial Commission, or his designee, one copy of the proposed record on appeal, objections and/or proposed alternative record on appeal along with a timely request to settle the record on appeal. The hearing to settle the record on appeal shall be held at the offices of the Industrial Commission or by telephone conference. The record on appeal shall be settled in accordance with the provisions of Rule 18(d) of the North Carolina Rules of Appellate Procedure.

18. Rule 703, Review of Administrative Decisions, is amended by adding a new section, to read:

4. Orders filed by a single Commissioner, including Orders dismissing appeals to the Full Commission or denying the right of immediate appeal to the Full Commission, are administrative orders and are not final determinations of the Industrial Commission. As such, an Order filed by a single Commissioner is not immediately appealable to the North Carolina Court of Appeals. A one-signature Order filed by a single Commissioner may be reviewed by filing a Motion for Reconsideration addressed to the Commissioner who filed the Order or may be appealed 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.

B. Tort Claims Rules of the North Carolina Industrial Commission

1. Section 2.a. of Rule T201, Rules of Civil Procedure, reads as rewritten:

2. In medical malpractice cases filed by or on behalf of prison inmates where the plaintiff is alleging that a health care provider as defined in N.C. Gen. Stat. §90-21.11 failed to comply with the applicable standard of care under N.C. Gen. Stat. § 90-21.12 and the defendant has filed a Motion to Dismiss the claim, all discovery is stayed until the following occurs:

- a. An informal recorded telephonic hearing or other similar method of informal hearing as determined appropriate by the Industrial Commission is held before a Deputy Commissioner for the purpose of determining
 1. whether a claim for medical malpractice has been stated;
 2. whether expert testimony is necessary for the plaintiff to prevail; and
 3. if expert testimony is deemed necessary, whether the plaintiff will be able to produce such testimony on the applicable standard of care.

2. Section 2 of Rule T205, Motions, reads as rewritten:

A motion shall state with particularity the grounds on which it is based, the relief sought, and a brief statement of the opposing party's position, if known. The party making the motion shall make a reasonable and diligent effort to ascertain the position of the opposing party and if unable to do so, should specify the reasonable efforts made. A proposed Order shall be submitted with all motions. Service shall be made on all other parties.

The above provisions shall not apply to inmate torts, except that service shall be made on all other parties.

3. Sections 1 and 3 of Rule T206, Hearings, read as rewritten:

1. The Industrial Commission may, on its own Motion, order a hearing-~~or~~, rehearing, or pre-trial conference of any case in dispute.

[...]

3. In cases involving a plaintiff who is an inmate in the North Carolina Department of Correction, the Industrial Commission shall set contested cases for hearing as

follows:

- a. In the prison unit where plaintiff is incarcerated or in some other prison facility or secure facility agreed upon by the Industrial Commission and the Attorney General's office; or
- b. By video teleconference according to procedures adopted by the Industrial Commission; or
- c. By telephone conference according to procedures adopted by the Industrial Commission.

4. Rule T303, Assignments of Error, reads as rewritten:

The appellant shall, within 25 days of receipt of the transcript of the record, or receipt of notice that there will be no transcript of the record, file in triplicate with the Industrial Commission, a written statement of the ~~particular grounds for the proposed issues that the appellant intends to present on appeal.~~ Particular grounds for the proposed issues that the appellant intends to present on appeal. The statement shall certify service of a copy by mail or in person upon the opposing party or parties. ~~Particular grounds for appeal not set forth in the written statement will be deemed to be abandoned and argument thereon will not be heard before the Full Commission. The grounds must be stated in particularity, including the specific errors allegedly committed by the hearing Commissioner or Deputy Commissioner and the pages in the transcript on which the alleged errors are recorded.~~ Proposed issues on appeal are to facilitate the preparation of the record on appeal and shall not limit the scope of the issues presented on appeal in appellant's brief.

5. The Rules are amended by adding a new Rule T503 to read:

Rule T503. Sanctions.

Upon failure to comply with any of the aforementioned rules, the Industrial Commission may subject the violator to sanctions outlined in Rule 37 of the North Carolina Rules of Civil Procedure, including reasonable attorney fees to be taxed against the party or counsel whose conduct necessitates the order.

C. Rules for Mediated Settlement and Neutral Evaluation Conferences of the North Carolina Industrial Commission

1. Section (i) of Rule 1, Order for Mediated Settlement Conference, reads as rewritten:

(i) Motion to Authorize the Use of Neutral Evaluation Procedures. The parties may move the Commission to authorize the use of a neutral evaluation procedure in lieu of a mediated settlement conference. The Commission may require that such motion be filed on a form provided by the Commission, and such motion shall be filed within 55 days of the filing of a Form 33 Request for Hearing, or otherwise within 21 days of the order requiring a mediated settlement conference entered pursuant to Rules 1(c) and 1(d), and shall state:

1. that all parties consent to the motion.
2. that the neutral and the parties have agreed upon the selection and all terms of compensation of the neutral selected-;
3. the name, address and telephone number of the neutral selected by the parties;
4. the names of all persons and entities the parties have agreed to excuse from attending the proceeding-; and
5. such other information as may be required by the Commission.

If the parties are unable to agree to the selection of a neutral or the persons excused from attending, then the Commission shall deny the motion for authorization to use a neutral evaluation procedure and the parties shall attend the mediated settlement conference as originally ordered by the Commission. If the parties are able to timely agree on the above matters, then the Commission may order the use of a neutral evaluation proceeding. Provided, however, that the Commission will not order the use of a neutral evaluation proceeding in any case in which the plaintiff is not represented by counsel.

2. Sections (a) and (c) of Rule 2, Selection of Mediator, read as rewritten:

- (a) By Agreement of Parties. The parties may choose a mediator certified by the Dispute Resolution Commission by agreement within 55 days of the filing of a Form 33 Request for Hearing, or otherwise within 21 days after the Commission's order entered pursuant to Rules 1(c) and 1(d), unless otherwise specified therein, subject to the Commission's authority to remove the mediator selected by the parties for specific reasonable cause. ~~The mediator selected shall either meet the qualifications specified in Rule 8, or be a person who, in the opinion of the parties, is otherwise qualified by training or experience to mediate all or some of~~

~~the issues in the action.~~ Such stipulation may be transmitted by either party, shall be dated as of the date it is transmitted to the Commission, and ~~the stipulation~~ must be received by the Dispute Resolution Coordinator within 55 days of the filing of a Form 33 Request for Hearing, or otherwise within 21 days of the mediation order entered pursuant to Rules 1(c) and 1(d), ~~and~~. The scheduled date of the mediation conference shall be within 120 days of the mediation order. The stipulation shall include the date of the scheduled mediation, the name, address, and telephone number of the mediator selected by agreement, and shall state whether confirm that the mediator is certified by the Dispute Resolution Commission, and if not, whether the mediator is a member of the Bar and/or has any other certification, training or experience pertinent to his or her ability to mediate a case. The 21 or 55 day deadline may be extended by the Dispute Resolution Coordinator upon request of the parties. Any party may waive the 21 or 55 day periods for the selection and suggestion of mediators and request that the Commission immediately appoint a mediator from the Commission's appointed list.

[...]

- (c) Mediator Lists. To assist parties in the selection of mediators by agreement, the Commission shall maintain a list of mediators eligible for appointment by the Commission in compensation and tort cases, and a list of mediators who are not eligible for appointment, but who may be selected by the parties and approved by the Commission. The Commission shall provide copies of these lists to parties on request, and may charge a reasonable fee for maintaining and distributing these lists.

3. Rule 3, The Mediated Conference, reads as rewritten:

- (a) Where Conference Is to Be Held. Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the county where the case is pending. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice to all attorneys and unrepresented parties of the time and location of the conference.
- (b) When Conference Is to Be Held. Subject to the Commission's orders, the conference shall be held at the time agreed to by the parties and the mediator, or if the parties do not agree, at the time specified by the mediator.
- (c) Request to Extend Date of Completion. A party, or the mediator, may request that the Commission extend the deadline for completion of the conference. The Commission may grant the request and extend the completion deadline ~~orally or~~ by written order.

- (d) Recesses. The mediator may recess the conference at any time and may set times for reconvening. No further notification is required for persons present at the recessed conference.
- (e) The Mediated Settlement Conference Is Not to Delay Other Proceedings. A mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, and the filing or hearing of motions, except by order of the Commission. However, no depositions shall be taken following a Commission order requiring mediation until mediation is concluded, except by agreement of the parties or order of the Commission.
- (f) ~~Inadmissibility of Mediation Proceedings~~ Negotiations by Parties and Attorneys. Evidence of statements made and conduct occurring in a ~~mediation~~ mediated settlement conference or other settlement proceeding conducted under these rules, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other actions on the same claim, except:
1. In proceedings for sanctions for violations of the attendance or payment of mediation fee provisions of Rules 4 and 7;
 2. In proceedings to enforce or rescind a settlement of the action;
 3. In disciplinary proceedings before the State Bar or any agency enforcing standards of conduct for mediators or other neutrals, including the Industrial Commission; or
 4. In proceedings to enforce laws concerning juvenile or elder abuse.

As used in these rules, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at the proceeding conducted under this subsection or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties. However, n~~No~~ evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a ~~mediation~~ mediated settlement conference or other settlement proceeding.

~~No mediator shall be compelled to testify or produce evidence concerning statements made and conduct occurring in a settlement proceeding in any civil proceeding for any purpose, except proceedings for sanctions under this section, disciplinary proceedings of the State Bar, disciplinary proceedings of any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.~~

(g) Inadmissibility of mediator testimony. No mediator, other neutral, or neutral observer present at a settlement proceeding shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference or other settlement proceeding pursuant to these rules in any Industrial Commission case or civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions for violations of the attendance or payment of mediation fee provisions of Rules 4 and 7, disciplinary hearings before the State Bar or any agency enforcing standards of conduct for mediators or other neutrals, including the Industrial Commission, and proceedings to enforce laws concerning juvenile or elder abuse.

4. Section (a)4. of Rule 4, Duties of Parties, Representatives, and Attorneys, reads as rewritten:

Other Parties and Persons. By order of the Commission other representatives of parties, employers or carriers who may be obligated to pay all or part of any claim presented in the action not required to attend the conference pursuant to the above rules may be required to attend the conference if the Commission determines that the person's attendance may be necessary for purposes of resolving the matters in dispute in the subject action. All (i) employers and (ii) carriers who may be obligated to pay all or part of any claim presented in the action and who are not required to attend a mediation conference pursuant to these rules or Commission orders, are nevertheless allowed to attend the mediation conference if they elect to do so. If, during a mediation conference, the mediator determines that the attendance of one or more additional persons is necessary to resolve the matters in dispute in the subject action, the mediator may recess the conference, and then reconvene the conference at a later date and time in order to allow for the attendance of the additional person or persons.

5. Section (d) of Rule 4, Duties of Parties, Representatives, and Attorneys, reads as rewritten:

Finalizing Agreement. If an agreement is reached in the mediation conference, the parties shall reduce the agreement to writing, specifying all the terms of their agreement bearing on the resolution of the dispute before the Industrial Commission, and sign it along with their counsel. The parties may use IC Form MSC8 for this purpose. The execution by counsel of a mediated settlement agreement for an employer or carrier who does not physically attend the mediation conference shall be deemed to be in compliance with this Rule and Rule 502(3)(b) of the Workers' Compensation Rules of the North Carolina Industrial Commission. By stipulation of the parties and at their expense, the agreement may be electronically or stenographically recorded. All agreements for payment of compensation shall be submitted in proper form for Industrial Commission approval, and shall be filed with the Commission within 20 days of the conclusion of the mediation conference.

6. The Rules are amended by adding a new Rule 4A, to read:

Rule 4A. Foreign Language Interpreters.

(a) Services of Foreign Language Interpreters Required Unless Waived. When a person who does not speak or understand the English language is required to attend a mediation conference, the person shall be assisted by a qualified foreign language interpreter unless the right to an interpreter is waived by both parties.

(b) Qualifications of Interpreters. To qualify as a foreign language interpreter, a person must possess sufficient experience and education, or a combination of experience and education, speaking, and understanding English and the foreign language to be interpreted, to qualify as an expert witness pursuant to N.C. Gen. Stat. §8C-1, Rule 702.

(c) Notice to Industrial Commission and Opposing Party of Need for Interpreter. Any party who is unable to speak or understand English shall so notify the Industrial Commission and the opposing party, in writing, not less than 21 days prior to the date of the mediation conference. The notice shall state with specificity the language(s) that must be interpreted.

(d) Designation of Interpreter. Upon notice of the need for an interpreter, the employer or insurer shall retain a qualified, disinterested interpreter, either agreed upon by the parties or approved by the Industrial Commission, to assist at the mediation conference.

(e) Interpreter Fees. The interpreter's fee shall constitute a cost as contemplated by N.C. Gen. Stat. §97-80. A qualified interpreter who appears at a mediation conference shall be entitled to payment of the fee agreed upon by the interpreter and employer or insurer that retained the interpreter. Except in cases where a claim for compensation has been prosecuted without reasonable ground, the fee agreed upon by the interpreter and employer or insurer shall be paid by the employer or insurer. Where it is ultimately determined by the Commission that the request for an interpreter was unfounded, attendant costs may be assessed against the movant.

(f) Interpreter Ethics. Foreign language interpreters shall abide by the code of ethical conduct for court interpreters promulgated by the North Carolina Administrative Office of the Courts and adopted by the Industrial Commission and shall interpret, as word for word as is practicable, without editing, commenting, or summarizing, testimony or other communications.

7. Section (b)4. of Rule 6, Authority and Duties of Mediators, reads as rewritten:

Reporting Results of Conference. In all cases within the Commission's jurisdiction, whether mediated voluntarily or pursuant to an order of the Commission, the mediator shall report the results of the conference on a form provided by the Commission. If an agreement was reached, the report shall state whether the issue or matter under mediation

will be resolved by Industrial Commission form agreement, compromise settlement agreement, other settlement agreement, voluntary dismissal or removal from the hearing docket, and shall identify the persons designated to file or submit for approval such agreement, or dismissal. ~~A copy of the Commission's Report of Mediator form is attached to these rules as Addendum A.~~ The mediator shall not attach a copy of the parties' memorandum of agreement to the mediator's report transmitted to the Commission and, except as set forth above or as may be ordered by the Commission, the mediator shall not disclose the terms of settlement in the mediator's report. The Commission may require the mediator to provide statistical data for evaluation of the mediated settlement conference program on forms provided by the Commission.

8. Rule 7, Compensation of the Mediator, reads as rewritten:

- (a) By Agreement. When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator.
- (b) By Commission Order. When the mediator is appointed by the Commission, the mediator's compensation shall be as follows:
 - 1. Conference Fees. The mediator shall be paid by the parties at the rate of ~~\$125.00~~\$150.00 per hour for mediation services at the conference.
 - 2. Administrative Fees. The parties shall pay to the mediator a one time, per case administrative fee of ~~\$125.00~~\$150.00, unless otherwise ordered by the Commission. The mediator's administrative fee shall be paid in full unless, within 10 days after the date that the mediator has been appointed, written notice is given to the mediator and the Dispute Resolution Coordinator that the issues for which a request for hearing had been filed have been fully resolved or the hearing request has been withdrawn.
 - 3. Postponement Fees. As used herein, the term "postpone" shall mean to reschedule or otherwise not proceed with a scheduled mediation conference after that conference has been scheduled to convene on a specific date. After a conference is scheduled to convene on a specific date it may not be postponed without the requesting party first notifying all other parties concerning the grounds for the requested postponement, or without the consent and approval of the mediator or the Dispute Resolution Coordinator. If a mediation conference is postponed without good cause, ~~or as a result of a settlement, within seven days of a mediation conference,~~ the mediator shall be paid a postponement fee unless, upon application of the party or parties charged with the fee, the fee is waived by the Commission. Unless the Commission otherwise orders, the postponement fee shall be ~~\$225.00~~\$300.00 if the mediation conference is postponed within ~~three~~ seven calendar days of the scheduled conference, and ~~\$125.00~~\$150.00 if the mediation conference is postponed ~~four to seven~~ more than seven calendar days prior to a scheduled conference. Postponement fees shall be ~~paid~~ allocated in equal shares ~~by~~ to the party or parties requesting the postponement unless otherwise ordered by the Commission.
 - 4. The settlement of a case prior to the scheduled date for mediation shall be good cause for a postponement provided that the mediator was notified of the

settlement immediately after it was reached and the mediator received notice of the settlement at least fourteen (14) calendar days prior to the date scheduled for mediation.

- (c) Payment by Parties. Payment shall be due upon completion of the conference; provided, that the State shall be billed at the conference and pay within 30 days of receipt of the billing, and insurance companies or carriers whose written procedures do not provide for payment of the mediator at the conference may pay within 15 days of the conference. Unless otherwise agreed to by the parties or ordered by the Commission, costs of the mediated settlement conference shall be allocated to the parties, as follows: one share by plaintiff(s); one share by the workers' compensation defendant-employer or its insurer, or if more than one employer or carrier is involved, or if there is a dispute between employer(s) or carrier(s), one share by each separately represented entity; one share by participating third-party tort defendants or their carrier, or if there are conflicting interests among them, one share from each such defendant or group of defendants having shared interests; and, one share by the defendant State agency in a State Tort Claims Act case. Parties obligated to pay a share of the costs shall be responsible for equal shares; provided, however, that in workers' compensation claims the defendant shall pay the plaintiff's share of mediation, postponement, and substitution fees, as well as its own. Unless the Dispute Resolution Coordinator enters an Order allocating such fees to a particular party, the fees may be taxed as other costs by the Commission. ~~and the~~ The defendant shall be reimbursed for the plaintiff's share of such fees when the case is concluded from benefits that may be determined to be due to the plaintiff, and the defendant may withhold funds from any award for this purpose.

9. Section (a) of Rule 8, Mediator Certification and Decertification, reads as rewritten:

Party Selection. The parties may select any Dispute Resolution Commission-certified mediator~~person~~ as their mediator by mutual consent, with or without the qualifications in (b); provided, that the Commission may, for good cause, bar any persons from holding themselves out as a mediator of cases within its jurisdiction or from receiving a fee for mediation of such cases.

10. Rule 11, Motions, reads as rewritten:

Unless otherwise indicated, motions pursuant to these rules shall be addressed to the Commission's Dispute Resolution Coordinator (unless the applicable order provides otherwise) and served on all parties to the claim and the settlement procedure. Responses may be filed with the Commission within 10 days after the date of receipt of the motion. Notwithstanding the above, for good cause the Commission may act upon oral motions, or act upon motions prior to the expiration of the 10-day response period. Motions will be decided without oral argument unless otherwise ordered. Any appeals from orders

issued pursuant to a motion under these rules shall be addressed to the attention of the Commission Chair or the Chair's designee for appropriate action.

11. Addendum A, I.C. Form MSC5, is to be deleted from the Rules.

[The I.C. Form MSC5 will remain in use by the Commission and available on the Commission's website.]

ADDENDUM A — I.C. Form MSC5

IC Form MSC5 _____ **NORTH CAROLINA INDUSTRIAL COMMISSION**

John C. Schafer
Dispute Resolution Coordinator
430 North Salisbury Street
Raleigh, NC 27611

I.C. File No. _____
Carrier No. _____
_____ County

_____, Plaintiff

_____ v. _____

_____, Defendant

_____, Carrier

REPORT OF MEDIATOR

Mediator _____ telephone _____ fax _____

Address _____

The undersigned mediator reports the following results of a mediated settlement conference in this case:

Conference ___ was held. ___ was not held. If not held, the reasons were: _____

_____. Number of sessions held: _____. Date conference was completed: _____

Names of parties, attorneys, insurance representatives or others who were absent: _____

The parties reached: ___ agreement on all issues. ___ an impasse. ___ agreement on the following issues: _____

If this case was not settled in mediation, the parties estimate that the length of the hearing in this case will be _____

Issues settled to be disposed of by: ___ clincher ___ other agmt. ___ voluntary dismissal ___ removal from hearing docket

The person who will submit the agreement/clincher /dismissal to the Commission is _____

_____, who will submit it by _____
(date).

Mediator's Fee

PREPARATION FEE: \$ _____
(\$100.00 for appointed mediator unless settled and cancelled more than seven days before the conference date.)

MEDIATION FEE: \$ _____
Total time spent in Mediated Settlement
Conference: _____ hours
(\$100.00 per hour for appointed mediator, billed in quarter hour segments.)

OTHER FEE (Postponement fee, etc., if any) \$ _____

TOTAL FEE \$ _____

Mediator's Federal Tax ID No.

All fees to the mediator have been paid except as follows:

Party owing fee _____ Amount owed _____ Address of party _____

I have mailed this report to the Commission within seven days of the conclusion of the mediated settlement conference.

This the ____ day of _____, 199 ____.

Mediator

This report is to be returned to the Commission in all cases, whatever the mediation results.

NORTH CAROLINA INDUSTRIAL COMMISSION

CHRISTOPHER SCOTT, Commissioner, concurring and dissenting in part:

I concur with my fellow Commissioners in adopting the foregoing changes to the North Carolina Industrial Commission Rules; however, I find it unfortunate that the Full Commission failed to adopt the proposed amendment to Rule 502, specifically a new section reading as follows:

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

Therefore, I dissent.

It has come to my attention that some parties appearing before the Commission are routinely placing essential terms of the overall settlement in a separate document commonly known as a "side agreement." This practice is particularly troubling, as it allows certain parties to hide essential and dependent terms of an overall settlement agreement and, in effect, enable a release of an employee's employment rights. Often, plaintiffs are required to forfeit their jobs in order to reach a compromise agreement embodied in a side agreement that is not submitted to the Industrial Commission for review and approval.

G.S. 97-17 and 97-82 have been construed by case law to require the Industrial Commission to review the entire compromise settlement agreement, not just part of it. The Industrial Commission is obligated to make a judgment on the entire agreement as to whether it is in the best interests of the worker before it can act on approving it.

This the 13th day of October 2010.



CHRISTOPHER SCOTT
COMMISSIONER