November 11, 2024

Via Electronic Mail Only to gc.clerk@wca.nm.gov

New Mexico Worker's Compensation Administration

Re: Proposed Rule Changes

Dear Workers' Compensation Administration:

I am writing to ask for additional rule changes and to comment on the Workers' Compensation Administration's (WCA) proposed rule changes . This letter includes a brief explanation of my proposed rule changes, why my proposed rule changes should occur, and responds to the WCA's proposed changes:

Requested Changes to NMAC

11.4.1.7 The term "misconduct" has been defined overly broadly by the New Mexico Court of Appeals. Misconduct should defined to include some intent. I am providing the Mirriam-Webster websites definition of "misconduct" which is "intentional wrongdoing" and "improper behavior." The definition lists the synonyms of "misconduct" as "wrong doing" "misbehavior" "malfeasance" and "misdoing," all of which indicate an intent do something improper. In *Fitzhugh v. NM Dep't of Labor*, 1996-NMSC-044, ¶ 42, the New Mexico Supreme Court painstakingly evaluated what should be considered misconduct in unemployment cases and, and came to the following conclusion that is contrary to how the New Mexico Court of Appeals has defined misconduct. The Administration should consider using the *Fitzhugh* language as well:

"Misconduct" is limited to conduct in which employees bring about their own unemployment by such callousness, and **deliberate or wanton misbehavior** that they have given up any reasonable expectation of receiving unemployment benefits. The employee's actions may evince a wilful or wanton *{*184}* disregard of an employer's interests as is exemplified by deliberate violations of or indifference to the employer's reasonable expectations regarding standards of behavior. The employee's misconduct may demonstrate carelessness or negligence of such degree or recurrence so as to suggest equal culpability, wrongful intent, or evil design, or so as to reveal an intentional and substantial disregard of the employer's interests, or of the employee's duties and obligations to his employer. **See Mitchell**, 89 N.M. at 577, 555 P.2d at 698; **Rodman**, 107 N.M. at 761, 764 P.2d at 1319.

11.4.3.8 It is important for a worker to have a full understanding of why a claim is being denied so they can determine what they need to provide the insurer to convince the insurer to accept the claim as compensable. Many times adjusters just tell the worker the claim is denied because of no notice or no causation without telling them exactly who said there was no notice or what they need to do to fix a record if a doctor or employer made a mistake. Timely notice of the reasons for a denial, such as 10 days, prevents delay and meets the goals set forth in NMSA 1978, Section 52-5-1 to assure the quick and efficient delivery of indemnity and medical benefits to injured and disabled workers at a reasonable cost to the employers who are subject to the provisions of the Workers' Compensation Act.

11.4.3.9 One of the biggest headaches for workers, their attorneys, and employer/insurer attorneys is a worker not timely receiving checks. Delays in receiving checks cause workers to fall into more debt because of missed payments, late payments, and inability to meet their obligations and avoid using public assistance. The rule should provide a way for a worker to ask the court to review late payments at any stage of the case, not just initial payments, and determine what steps, if any, need to be taken to make sure a worker receives his or her check timely.

11.4.3.11 The costs included in Section (A) are outdated and need to be revised to reflect the reality of the increased expenses involved in traveling for treatment. Subsection (B) changes are necessary to ensure that a worker has the money to attend medical appointments in advance of the appointments instead of placing a financial burden on the worker who may not have the funds needed for travel. The proposed change requires that the worker provide the employer/insurer with sufficient notice to advance the costs.

11.4.3.13(A)(4) and (B)(2) The requirement for an unlimited blanket release arguably violates *Pina v. Espinosa*, 2001-NMCA-055 and the New Mexico Constitution's prohibition against unreasonable searches and seizures as set forth in Art. II, Sec. 10. To avoid a complaint for declaratory judgment in district court to declare this rule unconstitutional or a violation of law, a compromise rule limiting the timeframe for the release would have a higher chance of withstanding scrutiny for the invasion of privacy and reflect the fact that if a worker does not have any medical conditions interfering with his or her life or work in the 10 years prior to an accident, the preexisting condition could not have played a significant role in an accident.

11.4.3.13(B)(1) Return to work issues cause too much litigation. To limit litigation involving multiple depositions of employer's personnel, and to have a clear record of what any return to work offer includes, the employer should provide the information to the worker in writing.

11.4.4.9(A)(10)(C) The rule should be changed so that a party is not punished for a problem with filing. The current rule is inconsistent with *Ennis v. K-Mart Corp.*, 2001-NMCA-068.

11.4.4.10 Judge Couture's plan to limit depositions to 2 hours is great. It should specify that each person gets 1 hour unless the parties agree otherwise or the court extends the time. Too often doctors avoid workers' compensation cases because of unnecessarily long depositions

where attorneys ask the same questions over-and-over again in different ways or go through records in unnecessary detail. Likewise, the workers' compensation system is not supposed to be as adversarial as district court or personal injury cases, and a worker or employer representative should not be subject to a 3 or 4-hour fishing expeditions that try to wear them down and catch them off-guard to make them look not credible. It is important that the worker know who will be the employer's representative so that they can set depositions and discover the information the representative has without delay. Finally, subpoenas should not be considered a discovery tool and should not require approval from a judge. The use of subpoenas helps both the worker and the employer gather information from outside sources with limited effect on the other party – medical records, medical bills, employment records, pay records, and unemployment records all are necessary to a case from outside sources, and requiring a judge's approval for every subpoena unnecessarily wastes time.

11.4.4.12(B)(2)(a) and (b) Selection of the authorized health care provider is a contentious issue. Once a worker is injured, it is imperative that the employer/insurer provide guidance on who can select the first provider after emergency care. *See, e.g., Howell v. Marto Elec.*, 2006-NMCA-154. Delay in notifying the worker delays care and delays recovery and adds confusion as to who made the initial selection. The current rule 11.4.4.12(B)(2)(b) is not compliant with *Silva v. Denco Sales Co.*, 2020-NMCA-012.

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11.4.4.12(G) and (H) There is currently no rule that allows a reasonable and necessary dispute between the parties, not a health care provider and an insurer, to be heard quickly. 11.4.7.11 specifically addresses a doctor's billing and payment dispute. There is nothing that meets the requirements of NMSA 1978, Sec. 52-5-1's requirement of assuring the quick and efficient delivery of indemnity and medical benefits to injured and disabled workers at a reasonable cost to the employers who are subject to the provisions of the Workers' Compensation Act. The Administration should develop a rule that allows medical records to be admitted as testimony so that the parties do not have to conduct so many depositions of doctors just to get them to say that their treatment is reasonable and necessary. There should be a presumption that if a doctor requests a treatment or referral for a worker, that treatment is reasonable and necessary. There should be quick hearings similar to 11.4.7.11's quick time frames. Form letters rarely get completed by doctors, and when they do, they are usually completed by a doctor's staff and are incomplete or internally inconsistent or inconsistent with other records. Another suggested way to change 11.4.4.12(H) is to treat reasonable and necessary disputes like HCP disputes and have the judge hold a hearing within 7 days of the notice of the dispute and decide the issue on medical records unless the judge finds that it is not possible to decide the issues by reviewing the records.

11.4.4.13 There is conflicting case law on whether medical records are testimony. According to *Juardo v. Levi Strauss & Co.*, 1995-NMAC-129 and *Kaufman v. Univ. of NM Hosp.*, A-1-CA-36456, (unpublished 4/17/2019), these records are testimony. Allowing them to be admitted as testimony would reduce the number of doctors' depositions that would have to be taken and reduce litigation and meet both the policy goals of NMSA 1978, Sec. 52-5-1 to assure the quick and efficient delivery of indemnity and medical benefits to injured and disabled workers at a reasonable cost to the employers who are subject to the provisions of the Workers' Compensation Act. The biggest costs and delays in the workers' compensation system involve the need to

arrange and take the depositions of doctors. In many instances the doctors' staff refuse to give dates for months or the doctor agrees to the deposition and then does not appear. If either of these things occur, the case can be delayed for months and cost both parties in additional attorney's fees and costs. The doctor's depositions and the associated court report's costs make litigating these cases more costly than they need to be. Recognizing that medical records are testimony will eliminate the need to depose doctors in many cases. If a party thinks the medical record is unclear and should not be considered testimony, then that party can raise that issue with the judge in limine and have the judge decide what should be done. \

RESPONSES TO PROPOSED CHANGES:

11.4.3.8(B): You should not remove the language requiring payment on a compensable claim no later than 14 days. NMSA 1978, § 52-5-1 NMSA requires timely payment of benefits. This change could lead to the conclusion that the Employer/Insurer can just pay whenever they feel.

11.4.3.8(C): Many workers call adjusters and ask for information. Many do not email, text, or send letters. This should not add the requirement of a written request. Currently, insurers who send letters denying the claim do not provide a specific reason why the claim is being denied. In most instances, they just say something like, "we do not believe an accident occurred." They do not inform a worker of what information is missing or what will help convince the adjuster that the claim is compensable. This leads to unnecessary and prolonged litigation just to determine why the claim is denied. The Employer/Insurer should have to state the specific reasons the claim is being denied.

11.4.3.11(A)(3) and (4): The proposed changes are good and should be implemented.

11.4.3.11(B): The change indicated that a judge can order advance payments is a good change and should be kept.

11.4.4.13(B)(1)(J): Is a good change and should be implemented.

11.4.4.13(H): Is a good change: there is no need for lengthy depositions in workers' compensation. Lengthy deposition increase the costs of litigating cases and make doctors less likely to want to cooperate with the litigation process.

11.4.4.13(I): Is a good change that provides clarification and should be implemented.

11.4.4.13(J)(4): This is a good rule that is needed to provide clarity. Forcing a worker to use discovery costs to translate extensive written discovery from the Employer/Insurer would eviscerate the discovery advance and leave nothing for actual discovery. Translation is not discovery.

11.4.4.13(N): As stated above, the medical records should be treated as testimony for all purposes. Carving out an exception so that they cannot be used as testimony for causation does nothing to help move cases along. There is no reason why they should not be considered testimony for causation: If a doctor's report says that something is or is not causally related, then

the there should be a presumption in favor of the doctor's position, and it is up to the party to determine whether they want to depose the doctor or not; Conversely, if the record is not testimony for causation, you force the parties to always depose the doctors and create unnecessary litigation. If a Form Letter to Health Care Provider can establish causation, why can't a medical record?

11.4.4.13(S): NMSA 1978, § 52-1-51(A) requires IMEs to be performed immediately. This proposed rule change would be ultra vires in that it does not meet the legislative requirement of an immediate IME. While the proposed Rule seems to be based on an effort to speed-up litigation, the practical effect is that the cases will still take 6 months to a year because there is no limitation on when the IME must occur or how quickly the IME report must be issued.

11.4.7.13(D)(1): The proposed increase will require the Administration to support a change to the amount of the discovery advance to double to $6,000.00. The cost associated with depositions are the biggest costs in a case. The proposed increased payment to doctors without a corresponding increase in the discovery costs will end up taking money out of workers pockets: Although attorney's can advance discovery costs, the worker remains responsible for payment of any costs out of any recovery. Even if the rule change related to limited depositions is implemented, one deposition of a doctor lasting two hours can cost the worker $2,650.00 eating-up almost the entirety of the discovery advance: $1500.00 for a two-hour deposition plus up to $1,150 for three hours of preparation time. When the cost of the transcript is added, the cost of one doctor's deposition will easily exceed $3,000.00. No case just requires the deposition of just one doctor. Many cases involve three or more. This rule change can unintentionally take more money out of the workers' pocket because discovery will cost much more. This change should not be implemented unless the discovery advance is doubled as well.

Please call me with any questions.

Respectfully,

Michael J. Doyle, Esq.