



State of New Mexico  
**WORKERS' COMPENSATION ADMINISTRATION**

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Effective January 1, 2023, the New Mexico Workers' Compensation Administration amended certain administrative rules. The Office of General Counsel Office has prepared the following summary of the changes made.

**Part 1 – General Provisions**

11.4.1.7(A): The WCA struck the reference to “the Subsequent Injury Act” as the Subsequent Injury Act has been repealed.

11.4.1.7(W): The WCA added specific reference to insurer and third-party administrator in the definition section of Part 1 to be consistent with NMSA 52-1-28.1, which permits the director to adopt by rule definitions of “unfair claims-processing practices.”

11.4.1.8(B)(2) & (C)(3): To keep terminology consistent throughout the WCA rules, WCA changed minor terms from “clerk” to “records custodian” and the term “file” to “records.”

**Part 4 – Claims Resolution**

11.4.4.8(2)(g): The WCA deleted the last part of the sentence “except where prohibited by Subsection B of 11.4.4.8 NMAC” as unnecessary in light of other rule revisions applicable to ombudsman.

11.4.4.8(3): The WCA deleted from the reference to forms the descriptive phrase “mediation and HCP selection” and substituted “administrative” to clarify the types of forms an ombudsman may help complete.

11.4.4.8(B): The WCA added “When responding to inquiries,” to conform this part of the rule to a similar structure at 11.4.4.8(A).

11.4.4.8(B)(4): The WCA clarified that the assistance of an ombudsman must stop once a rejection of a recommended resolution is filed.

11.4.4.9(A)(3)(b): The WCA clarified that an e-filing parties' signature block must include a mailing address, telephone number and email address.

11.4.4.9(B) & (C): The WCA made a change to how the WCA references its e-filing system by, for example, deleting the phrase "My E-File" and substituting in more generic phraseology such as "the WCA electronic filing 'system' or 'portal' - to keep the language consistent throughout Part 4.

11.4.4.9(B)(2): The WCA added language to bolster the clerk of the court's ability to contact, during the litigation process, non-participants in the e-filing system by placing upon them the duty to keep the WCA clerk of the court informed of any change in mailing address.

11.4.4.9(B)(3): The WCA added language to help provide greater participation at mediation of insurers who participate in the e-filing system by creating a duty upon insurers to annually confirm with the WCA within the first two weeks of a new calendar year their mailing address, phone number and general delivery email address for service of documents. In addition, the WCA added enforcement language to this new duty in that non-compliance may result in a referral to the WCA's enforcement bureau.

11.4.4.10(B)(2): The WCA added items to the list of mandatory production to enhance the mediation process, including an average weekly wage calculation; a job description; documents and correspondence regarding the initial selection of HCP; and indemnity and payment ledgers.

11.4.4.10(C)(2): The WCA addressed the issue of rescheduling of mediations to provide that a rescheduling request is subject to the mediation bureau calendar; that a request to reschedule means that the parties are stipulating to waiving the 60-day requirement for the WCA to issue a recommended resolution. Further, requests by the parties to reschedule a conference that is set in less than five days will only be granted upon demonstration of good cause shown as determined by the mediation bureau chief. WCA added this language so that when parties wish to reschedule a mediation, they will understand the requirements.

11.4.4.10(C)(3): The WCA outlined how a mediation conference shall be conducted. Specifically, it shall be hosted on an online web platform and/or by a telephonic conference. However, an in-person mediation may be requested by any party at least five days before the scheduled conference; provided, that all parties agree, or it is otherwise approved by the director or director's designee. If the mediation conference is held through an online web platform, the parties will enable and use video, if available. In addition, recording of mediation conferences is prohibited.

11.4.4.10(C)(5): The WCA made some miscellaneous and minor changes to the purpose of a mediation conference; the duties of the mediator; and the ability of the mediation bureau to refer violations to the WCA enforcement bureau.

11.4.4.10(C)(6): The WCA added a new provision to better address the situation when the parties reach a stipulated agreement that resolves the complaint prior to mediation. If such a stipulated agreement is reached, the parties should utilize the stipulated recommended resolution form provided on the WCA website. Further, if the stipulated agreement is adopted by the assigned mediator, the mediation conference will be vacated, and the stipulated recommended resolution will be filed with the clerk of the court. In addition, a scheduled mediation conference can only be vacated at the direction of the assigned mediator or mediation bureau chief.

11.4.4.10(C)(7)(b): The WCA added new language to ensure mediations are started and completed in a professional manner. Namely, parties will ensure they are available for the entirety of the time scheduled for the mediation conference and, if they are participating through an online web platform or telephonically, there are no background distractions.

11.4.4.10(C)(7)(e): The WCA clarified the situation regarding parties who fail to attend a mediation without a reasonable excuse. In particular, if a party fails to attend a scheduled mediation conference without reasonable excuse, as determined by the mediator, the mediator may still file a recommended resolution based upon the information provided by the attending party and applicable workers' compensation law. Further, if the non-attending party rejects the recommended resolution, the assigned workers' compensation judge - in the interest of justice - may refer the matter back to mediation.

11.4.4.10(C)(7)(f): The WCA gave greater discretion to the mediator in that the mediator has the authority to determine the level of participation of each party in the mediation process.

11.4.4.10(D)(1): The WCA replaced the word "issue" with "file" to make the process clear as to what the mediator will do with the recommended resolution once it is completed.

11.4.4.10(D)(4): The WCA clarified that the thirty-day period to file with the clerk of the court an acceptance or rejection of a recommended resolution begins with a party's receipt of the recommended resolution, as opposed to the prior reference to the "transmission" of the recommended resolution.

11.4.4.10(D)(5)(a): The WCA reaffirmed by rule that a recommended resolution and its terms are not binding and do not reflect an agreement between the parties until all parties have accepted the recommendation or fail to timely reject it.

11.4.4.10(D)(5)(d): The WCA added that a proposed order be included when a party submits a written application to the director which requests that a rejection be considered timely.

11.4.4.10(E): The WCA clarified and bolstered the potential for administrative enforcement and penalties when a party fails to comply with mediation rules, including the untimely filing of a pre-mediation, informal response.

11.4.4.10(G): The WCA bolstered the confidential nature of mediations, including that that all mediation notes are confidential and that a mediator may not be called to testify in a workers' compensation or other proceeding regarding a mediation conference they facilitated.

11.4.4.13(A)(3): The WCA clarified the prior rule regarding which applications for relief may be pursued before a judge even though the mediation process is still ongoing. Specific enumeration and clearer language are now used to delineate which types of relief may be sought before a judge despite the mediation process not being final.

11.4.4.13(N)(2): The WCA revised the introductory paragraph that governs by rule the admissibility of evidence during the adjudication process. The prior rule limited a judge's discretion to "documentary" evidence; under the revision, the word "documentary" has been removed as a limitation. Under the revised rule, a judge has discretion to admit all evidence, including the specific enumerated documentary evidence listed in subparagraphs (a) through (h), assuming the other conditions of the introductory paragraph are met, *i.e.*, relevancy; reliability; authenticity; and assisting the judge in determining a fact or issue in dispute.

11.4.4.13(Q)(5): The WCA added a new sentence at the end of the existing paragraph to clarify the captioning of a pleading following a consolidation. Under the revision, the caption of the lowest case number shall appear on all pleadings.

#### **Part 5 – Enforcement and Administrative Investigations**

11.4.5.10(E): The WCA struck reference to the New Mexico Rules of Evidence and clarified they do not apply to administrative enforcement hearings before the director. However, rules of privilege shall apply to the extent required to be recognized in a district court civil action.

11.4.5.11(B)(2): The WCA, to conform the rule to contemporaneous changes being made in other sections, and to give the director more discretion in determining the existence of probable cause, struck the sentence: "The director may consider hearsay evidence from a credible source with a factual foundation."

11.4.5.12(A)(1): The WCA added the word "entity" as a summons may reflect a business name.

11.4.5.12(A)(2): The WCA clarified that the alleged violator is to appear before the WCA by reference to the direction contained within the summons.

11.4.5.12(A)(3): The WCA added language "including video conference and telephone information if appropriate," to recognize that the mode of appearances before the WCA will be reflected in the summons and may include video conference and/or telephone information. This change gives the WCA more flexibility in how it holds enforcement hearings.

11.4.5.12(B)(1): The WCA revised how the enforcement bureau effectuates initial service of summons and associated, initial pleadings. Specifically, the summons and initial pleadings are to be served by any means listed New Mexico Rule of Civil Procedure 1-004, unless the

director orders service by other manner reasonably calculated to apprise the alleged violator of the existence and pendency of the action.

11.4.5.13: The WCA clarified that it is the director or the director's designee that has the authority to approve discovery in an enforcement proceeding.

11.4.5.15(A): The WCA again struck reference to the rules of evidence governing an enforcement proceeding. Instead, the standard will be that the director may admit any documentary evidence, including hearsay evidence, if it is relevant, has sufficient indicia of reliability and authenticity and will assist the director in determining a fact or issue in dispute.

### **Part 6 – Judicial Selection**

11.4.6.8(B): The WCA slightly altered the timeline by which the applicant must apply to the director by filing an application for reappointment. The application must be submitted 110 days (formally 105 days) prior to the expiration of the term to which the incumbent is currently appointed.

11.4.6.8(C): Upon the director's receipt on an incumbent's application for reappointment, the WCA will solicit via a posting on the WCA website and by way of an email to the workers' compensation community from the WCA Public Information Officer. The public comment period is two weeks, and all comments will be directed to the WCA General Counsel Office.

11.4.6.8(D): The WCA specified that information obtained pursuant to the rules for reappointment shall not be public records under the Inspection Public Record Act.

11.4.6.8(E): The WCA outlined that once public comment has ended, the General Counsel will compile the public comment and provide it to the director without identifying information regarding the person or entity providing the comment. Further, no public comment will be provided to the incumbent judge or, if the comments are shared, all personal identifying information will be redacted to protect the identity of the commentator.

### **Part 7 – Payments for Health Care Services**

11.4.7.6 - Objective: The WCA added an additional objective for Part 7, namely, return-to-work services is now another specified subject matter of the rules.

11.4.7.7 - Definitions: The WCA added new terms for which specific definitions are provided, namely, definitions are now included for the following terms/phrases: By-Report; Corrected Claim; Healthcare Common Procedure Coding System; HCP Fee Schedule; Provider's Report of Physical Ability; Telemedicine Services; and Telephonic Services. The agency made other, minor revisions to existing definitions.

11.4.7.8 – Ground Rules for Billing and Payment. The revisions include:

Clarifies the requirement that certain, specified medical services require pre-authorization prior to the provision of same. Failing such pre-authorization, the payer is not liable to make payment.

Clarifies the requirement that the payer communicate its pre-authorization or denial within the deadlines imposed by the rules. In the case of a payer's untimely response, the procedure is deemed to be authorized.

Requires the provider and payer to document all attempts to obtain authorization from the date of the initial request.

Initial billing for outpatient services is extended to 60 days from the date on which services were performed.

Establishes that a Health Care Provider's ("HCP") documented, good faith effort to submit billing within the time limits provided by these rules shall not constitute untimely filing. However, an HCP's failure to submit billing, or to demonstrate a good faith effort to submit billing, within the time limits established by rule, constitutes a violation of WCA rules and absolves the employer of financial responsibility for the bill.

Clarifies that reimbursement under the HCP fee schedule for items based upon a provider's cost require the HCP to submit an invoice showing that cost at the time of billing.

Requires that the employer/insurer remains fully responsible for timely payment, along with compliance with WCA rules, regardless of any bill review sub-contractual agreements.

Adds "corrected claims," as newly defined by these rules, to the provider's reconsideration timeline in that both a request for reconsideration, and a corrected claim, must be submitted to the payer within the 30-day timeline from receipt of the payer's written disposition.

#### 11.4.7.9 - Fees for Health Care Services. The revisions include:

Recognizes that telehealth and telephonic services are allowable for workers' compensation patients and shall be reimbursed according to the HCP Fee Schedule. Hospital reimbursement methodology wording was removed from the existing rule; as revised, hospitals are to be reimbursed according to the methodology set forth in the director's HCP schedule order and the HCP fee schedule.

#### 11.4.7.10 – Qualifications of Out of State Health Care Providers. The revisions include:

Clarifies that an out of state HCP and payer may negotiate fees outside of the HCP fee schedule for any health care service set forth in these rules.

Adds a provision that permits a payer to accept an Out of State Health Care Provider Affidavit from an HCP licensed in their state and in good standing, in lieu of submitting a formal application to the director seeking director approval of the out of state HCP.

11.4.7.11 – Billing and Payment Dispute Resolution. The revisions include:

Clarifies the procedural processes for director’s determinations of billing and payment disputes, principally, by requiring parties to exchange all relevant exhibits and documentation prior to the hearing. The revisions also clarify that the parties’ submissions are also to be presented to the WCA clerk of court and not the WCA director.

11.4.7.12 – Inpatient Admissions, Case Management and Utilization Review. The revisions include:

The WCA struck language on the information hospitals were required to report to the WCA. The information required to be reported is now more limited.

Case management and utilization review processes and procedures were separated out from one another to clarify each process separately as the two services are different in nature from one another. The existing rule conflated these services causing confusion.

For the utilization review component, the revision includes specificity regarding the referral process to initiate utilization review; a timeline by which the WCA medical cost containment bureau is to notify the parties of its decision; and a timeline and process by which the objecting party can petition the director for review of the decision made.

The revision clarifies that utilization review is only appropriate for one treatment.

11.4.7.13 – Non-Clinical Services. The revisions include:

With certain enumerated exceptions, both paper and electronic copies of medical records and reports requested for the purposed of investigating or administering a workers’ compensation claim shall be reimbursed according to the HCP fee schedule. The addition of a new provision tying reimbursement to a practitioner for completing the WCA’s Provider’s Report of Physical Ability to the amount specified in the HCP fee schedule.

11.4.7.16 - Return to Work. The revisions include:

Requires the agency to maintain education return to work information on its website.

**Part 12 – Uninsured Employers’ Fund**

11.4.12.7: The WCA added/clarified certain definitions, including that the determination of eligibility and compensability shall be determined in accordance with applicable law; that UEF “in-house counsel” not only litigates UEF claims but also pursues reimbursement of benefits against uninsured employers; and the “WCA” references the New Mexico Workers’ Compensation Administration.

11.4.12.8(A): The WCA struck unnecessary details about the contents of a workers' compensation complaint and, instead, merely referenced the need for the injured worker to use the mandatory WCA complaint form when naming the UEF in the complaint.

11.4.12.8(B)(1): The WCA struck a reference to the timing of when determinations of "eligibility" and "compensability" are to be made. As noted above, those determinations are to be made in accordance with applicable law, understanding that the timing of those determinations would be governed by applicable law as well.

11.4.12.8(B)(7): The WCA clarified that, if a district court determines that an employer was not insured at the time of the worker's injury, that such a determination must be final before it is a conclusive determination on the issue of insurance coverage.

11.4.12.9(A)(4): The WCA expanded the concept that the UEF may permissibly pay disputed benefits under a reservation of rights beyond merely disputed wage benefits.

11.4.12.9(D): The WCA clarified the existing rule which referenced the UEF's right of subrogation as being rights that "would be otherwise available to the payer," and, in its place, is tying those rights of subrogation to the language of the UEF statute, which is 52-1-9.1 NMSA (1978).

11.4.12.11: The WCA raised the cap on benefits for indemnity and medical from the current cap of \$40,000.00 to \$60,000.00, relative to accident dates occurring on and after July 1, 2023. A further raise to \$75,000.00 will occur relative to accident dates occurring on and after July 1, 2025. The existing caps remain in effect on or before June 30, 2023.

11.4.12.12(D): The WCA struck language in the rule that references the parties being permitted to participate via telephone and videoconferencing as this language was not necessary to the rule.

11.4.12.12 (E): The WCA clarified and added language to bolster the rights of the UEF regarding collecting penalties or reimbursement from the uninsured employer. The UEF's rights will embrace the collection of reimbursement for indemnity and medical benefits, costs, and attorneys' fees paid by the UEF.

11.4.12.12(F): The WCA added language to bolster the UEF's abilities in district court in pursuing reimbursement against the uninsured employer, including the UEF's right to seek in a legal action against the uninsured employer an award of attorney fees.

### **Part 13 – Controlled Insurance Plans**

The changes to Part 13 were minor. To have more consistency in timelines applicable to the OCIP application and administration process, the WCA changed its rule to increase the time allowed for notification by the OCIP applicant or OCIP owner to the NM WCA of a change of address for individuals authorized to accept notices and service of process from three days to ten days. In addition, the revised rule increases the time allowed by the OCIP entity to



report to the NM WCA the replacement of a third-party safety consultant from five days to ten days. Lastly, the statutory citation regarding extra-hazardous employers has been updated.

This concludes the summary of the overview of the rule revisions.