

TITLE 11 LABOR AND WORKERS COMPENSATION
CHAPTER 4 WORKERS' COMPENSATION
PART 4 CLAIMS RESOLUTION

11.4.4.1 ISSUING AGENCY: Workers' Compensation Administration ("the WCA").
[11.4.4.1 NMAC - Rp, 11.4.4.1 NMAC, 1/1/18]

11.4.4.2 SCOPE: These rules apply to parties involved in claims arising under the Workers' Compensation Administration Act and Occupational Disease and Disablement Law (collectively "the act").
[11.4.4.2 NMAC - Rp, 11.4.4.2 NMAC, 1/1/18]

11.4.4.3 STATUTORY AUTHORITY: Section 52-5-4 NMSA 1978 authorizes the director to adopt reasonable rules and regulations for effecting the purposes of the act.
[11.4.4.3 NMAC - Rp, 11.4.4.3 NMAC, 1/1/18]

11.4.4.4 DURATION: Permanent.
[11.4.4.4 NMAC - Rp, 11.4.4.4 NMAC, 1/1/18]

11.4.4.5 EFFECTIVE DATE: January 1, 2018, unless a later date is cited at the end of a section.
[11.4.4.5 NMAC - Rp, 11.4.4.5 NMAC, 1/1/18]

11.4.4.6 OBJECTIVE: The objective of 11.4.4 NMAC is to establish rules governing the resolution of claim disputes under the act, including but not limited to the process for filing and service of pleadings and the conduct of mediation conferences, discovery, and formal hearings.
[11.4.4.6 NMAC - Rp, 11.4.4.6 NMAC, 1/1/18]

11.4.4.7 DEFINITIONS: See 11.4.1.7 NMAC.

A. "Initial pleading" means a workers' compensation complaint, application to workers' compensation judge, application to director, petition for lump sum payment, or notice of change of HCP that opens or reopens an action or case before the WCA.

B. "Insurer" means any workers' compensation insurance carrier, a self-insured association or group, an individual self-insured employer, or a third party claims administrator operating in the state of New Mexico.

C. "Party representative" means an individual or firm that enters an appearance before the WCA to represent or advocate on behalf of a named party. This may include attorneys licensed to practice law in the state of New Mexico, as well as claims administration or adjusting personnel.
[11.4.4.7 NMAC - Rp, 11.4.4.7 NMAC, 1/1/18]

11.4.4.8 OMBUDSMAN RULES:

A. An ombudsman shall provide information and facilitate communication regarding the act. An ombudsman is required to maintain a neutral position when providing information or facilitating communication. When responding to inquiries, an ombudsman shall:

- (1) confer with workers, employers, insurers, HCPs or other interested persons;
- (2) provide information or facilitate communication, when requested, about:
 - (a) individual rights and responsibilities established by the act;
 - (b) medical proof required to establish or deny the right to workers' compensation;
 - (c) HCP selection;
 - (d) mediation conferences, related forms, and other administrative practices and procedures;
 - (e) determination of disability;
 - (f) the right to representation by a lawyer or the right to proceed as a pro se party;

and

- (g) other disputes arising under the act, except where prohibited by Subsection B of

11.4.4.8 NMAC;

- (3) help workers, employers, insurers, HCPs or other interested parties complete mediation and HCP selection forms for submission to the administration;

(4) actively inquire into matters presented by workers, employers, insurers, HCPs or other interested persons. An ombudsman shall contact the parties involved and attempt to resolve the problem informally; and

(5) refer all inquiries concerning uninsured employers to the WCA employer compliance bureau.

B. An ombudsman shall not:

- (1) practice law or give legal advice;
- (2) act as an advocate for any person;
- (3) attend a mediation conference as a representative of a party;
- (4) provide assistance to any party beyond mediation;
- (5) provide assistance to a party represented by an attorney;
- (6) offer an opinion on whether to accept or reject a settlement offer or a recommended

resolution; or

- (7) be called as a witness in a mediation conference or adjudication proceeding before a

WCA judge.

[11.4.4.8 NMAC - Rp, 11.4.4.8 NMAC, 1/1/18]

11.4.4.9 FILING AND SERVICE:

A. General provisions:

(1) WCA employees shall be addressed in a courteous and respectful manner at all times.
(2) Unless otherwise stated or necessarily implied in these rules, the rules of civil procedure for the district courts of New Mexico shall apply to and govern all proceedings conducted pursuant to these rules.

(3) Pleadings filed with the WCA Clerk shall:

(a) include a caption identifying the state of New Mexico workers' compensation administration as the legal forum, the name of each party, a descriptive title of the document, and the WCA case number if one has been assigned; and

(b) contain the signature of the party in interest or party representative(s) followed by the typewritten name(s).

(4) Duplicate or multiple copies of the same pleading shall not be filed. Duplicate copies will not be docketed and may be destroyed.

(5) Amended or subsequent pleadings shall be clearly identified (e.g., "Second Complaint").

(6) Pleadings shall not be submitted to the clerk by facsimile transmission.

(7) Pleadings shall not be submitted with cover letters or correspondence.

(8) Parties shall use the mandatory forms available on the WCA website. Items on the mandatory forms may not be deleted, but additional information may be provided at the end of the text. Mandatory forms include:

- (a) workers' compensation complaint;
- (b) summons for workers' compensation complaint;
- (c) worker's authorization for use and disclosure of health records;
- (d) informal response to workers' compensation complaint;
- (e) notice of acceptance or rejection of recommended resolution;
- (f) application to workers' compensation judge;
- (g) summons for application to workers' compensation judge;
- (h) subpoena or subpoena duces tecum;
- (i) request for setting;
- (j) health care provider disagreement form;
- (k) petition for lump sum payment;
- (l) summons for petition for lump sum payment;
- (m) joint request for expedited hearing;
- (n) application to director; and
- (o) summons for application to director.

(9) Filing of initial pleadings:

(a) The workers' compensation complaint shall be filed with a summons and, if filed by a worker, with an executed authorization to release the worker's medical information.

(b) The application to judge, application to director, or petition for lump sum payment shall be filed with a request for setting. A summons shall also be filed if no service of process has previously occurred in the case.

(10) WCA clerk's review of submitted pleadings:

(a) The clerk may reject pleadings that do not conform to these rules. Rejected pleadings will not be filed and will be destroyed.

(b) The clerk shall promptly notify the filing party or party representative of a rejection and the reason(s) for the rejection.

(c) The clerk's rejection of a pleading does not extend or stay the period in which a pleading is due or otherwise delay an applicable deadline.

(d) Reasons for rejecting a pleading may include, but are not limited to:

(i) the caption, WCA number, or party information is not correct;

(ii) the pleading is unsigned;

(iii) the document is incomplete or pages are missing;

(iv) the document is of such poor quality making the content unreadable;

(v) the pleading was not submitted on a mandatory form; and

(vi) initial pleadings to open or reopen the case were not submitted.

B. Electronic Filing:

(1) Effective January 1, 2018, unless exempted herein, all pleadings filed with the WCA shall be filed, served, and received by electronic means through the My E-File portal on the WCA website.

(2) E-filing is not mandatory for pro se workers or for uninsured employers; however, pro se workers and uninsured employers are encouraged to register and use My E-File.

(3) All insurers providing workers' compensation coverage in New Mexico shall register with the WCA with a single, general delivery, e-mail address for receipt of documents including initial pleadings. Insurers shall promptly update the WCA on any changes to the registered email address.

(4) All party representatives, including attorneys and adjusters, shall register with the WCA with a single, general delivery, e-mail address and thereby consent to receive documents from other party representatives and the WCA at that address. Party representatives shall promptly update the WCA on any changes to the registered email address.

(5) Registered parties shall be familiar and comply with the My E-File filing requirements set forth in the WCA's My E-File user guide available on the WCA website.

(6) The WCA shall not be responsible for inoperable email addresses, unread email, or undeliverable emails.

(7) Pleadings filed through My E-File shall contain the electronic signature of the party in interest or party representative denoted by either a graphic version of the signature or an "s/" followed by signatory's typewritten name.

(8) The date that a pleading is filed through My E-File is the filing date for the purpose of filing deadlines. For purposes of electronic transmission, a day begins at 12:01 a.m. and ends at midnight.

(9) Registered parties shall have access through My E-File to case documents after the final date of disposition in accordance with WCA electronic storage capabilities. The clerk shall provide paper copies of pleadings to parties and party representatives upon receipt of a records request. The clerk shall charge a reasonable fee for each copy requested. If the requested copies are mailed, adequate postage for mailing must be paid to the clerk.

C. Service of process:

(1) Initial pleadings

(a) The clerk shall serve initial pleadings on a responding party. Service shall be accomplished through the My E-File system for registered parties or by certified mail for pro se workers or uninsured employers who have not registered to use My E-file. When the clerk's attempt at service is unsuccessful, the clerk shall notify the filing party using the e-mail address or postal address provided at the time of filing. The filing party shall then be responsible for service on the responding party.

(b) An employer's insurer is the employer's registered agent for service of process of an initial pleading. If an employer is uninsured, the initial pleading shall so state and the clerk shall then serve the uninsured employer and the uninsured employers' fund separately.

(2) All other pleadings

(a) All pleadings generated by the WCA, including but not limited to orders and notices, shall be served by the clerk through My E-File except that the clerk shall serve all unregistered pro se workers and uninsured employers by U.S. mail.

(b) The clerk shall serve notice of all other filed pleadings on registered parties and the parties shall be responsible for logging into the My E-File system to access said pleadings.

(c) Unregistered pro se workers and uninsured employers shall be responsible for service on all parties of record. Service on unregistered pro se workers and unregistered uninsured employers shall be the responsibility of the filing party.

D. The clerk shall accept a notice of lien filed by the child support enforcement bureau of the New Mexico department of human services. The notice of lien shall state the worker's name and social security number, and the total dollar amount of the lien. The notice of lien shall include a copy of the district court order requiring the payment of child support by the worker.

[11.4.4.9 NMAC - N, 1/1/18]

11.4.4.10 MEDIATION RULES:

A. Mediation of complaints:

(1) The director's designee, a mediator, shall evaluate all initial complaints in new cases.

(2) The mediator shall evaluate and mediate the merits of the complaint for jurisdiction, proper parties, compensability, the nature and extent of any benefits due the worker, and the strength or availability of any defenses. A mediator may also evaluate the compliance of the parties with the mediation rules.

B. Mandatory production:

(1) The purpose of mandatory production is to ensure that the parties and the mediator have access to all pertinent information regarding the issues disputed in the complaint.

(2) No later than five days before the mediation, the parties shall exchange any and all of the following within the parties' possession:

(a) medical records, including unpaid bills;

(b) payroll records;

(c) witness statements; and

(d) any other documents related to a claim or defense.

(3) The documents outlined above need not be produced if they are unrelated to a claim or defense, were previously produced, or if there is a good faith objection or privilege.

(4) Parties shall deliver mandatory production directly to the mediation bureau. Mandatory production delivered to the mediation bureau shall not be part of the case record, although parties may file a notice with the clerk indicating compliance with the rule. Mandatory production shall be destroyed by the WCA following issuance of the recommended resolution.

C. Mediation conferences:

(1) Responses:

(a) Respondent shall file an informal response to the complaint not less than five days prior to the mediation conference.

(b) The response shall include a statement of facts and affirmative defenses together with a short summary of reasons for denials of any benefits claimed.

(c) Respondent may file an answer as set forth in this rule, in lieu of an informal response.

(2) By agreement, the parties may reschedule a mediation conference to occur within 75 days of filing the complaint.

(3) Mediation conferences shall be held at the WCA in Albuquerque unless otherwise requested by the parties and agreed to by the assigned mediator. Parties to the conference who live outside of the Albuquerque area may appear via video conference at one of the WCA's regional offices. Mediation conferences may also be conducted telephonically with prior approval from the mediator.

(4) The mediator may recommend an amendment to the caption of the complaint to correct an improperly named party or to reflect the joining of appropriate parties who otherwise have notice or attended the mediation conference.

(5) Purposes of mediation conferences and duties of the mediator:

(a) to bring the parties together and attempt to settle disputed issues by discussing the facts and applicable law pertaining to the complaint and by suggesting compromises or settlements using mediation and other dispute resolution techniques;

dispute;

- (b) to define, evaluate, and make recommendations on all issues remaining in
- (c) to state an opinion of the strength of any argument or position, and the possible results if the complaint is tried by a judge;
- (d) to issue a recommended resolution within 60 days of the filing of the complaint;
- (e) to identify all potential parties;
- (f) to make a recommendation regarding attorney's fees; and
- (g) to refer any violation of these rules or the act for administrative investigation, if appropriate.

(6) Conduct of mediation conferences:

- (a) Mediation conferences shall be in the control of the mediator.
- (b) Each party shall come to the mediation conference prepared to discuss settlement of the case.
- (c) The mediator shall be addressed in a courteous and respectful manner by all parties.
- (d) Mediation conferences are informal meetings with no transcript of the proceedings. No motions practice shall be allowed. Conferences shall be conducted in a civil, orderly manner, with all presentation geared towards discussion and negotiation of disputed issues. Attorneys and other representatives of the parties shall be attired in an appropriate manner, suitable to a court proceeding.
- (e) Employer and attorney, or a representative if no attorney has entered an appearance, and worker and attorney, if any, shall appear in person at the mediation conference. The mediator may enter recommendations against any party failing to attend the conference, without a reasonable excuse as determined by the mediator.

- (f) Appearances by a legal assistant, paralegal, or other agent or employee of the attorney, in lieu of a personal appearance by an attorney, are prohibited. This rule does not prohibit the appearance of an employer through an adjuster or third-party administrator, nor does it prohibit a worker from attending a mediation conference with the assistance of an unpaid assistant. The attendance of any other person at the mediation conference is subject to the discretion of the mediator.
- (g) All issues may be considered at the discretion of the mediator when consistent with the goals of economy and fairness, and when an opportunity can be granted for additional response.
- (h) The parties are encouraged to prepare written narratives and summaries to assist the mediator.

D. Recommended resolutions:

- (1) The mediator shall issue the recommended resolution within 60 days of the filing of the complaint unless the parties have stipulated to a waiver of the 60-day requirement and the mediator approves. The mediator may allow additional time to supplement the file prior to issuance of the recommended resolution.
- (2) The clerk shall serve a copy of the recommended resolution on parties.
- (3) Service on an unregistered party by certified mail domestic return receipt with a signature and date of receipt shall create a presumption of receipt of the recommended resolution on the indicated date. Service through My E-File shall create a presumption of receipt upon transmission.
- (4) An acceptance or rejection of the recommended resolution must be filed with the WCA clerk on or before the 30th day after transmission of the recommended resolution. A rejection shall contain a statement of the party's reasons for rejecting the recommended resolution.
- (5) Effect of recommended resolution:
 - (a) A rejection in whole or in part of a recommended resolution shall result in assignment to a judge for a determination of all issues in a formal hearing.
 - (b) Once a party has filed an acceptance or a rejection of a recommended resolution, the party is bound to the acceptance or rejection, unless permitted to withdraw it by written order of the director. The party requesting leave to withdraw a previously filed acceptance or rejection shall submit a written application and proposed order to the director, reciting good cause, within 30 days following receipt by that party of the recommended resolution. The clerk may cancel any judge assignment when a rejection is withdrawn.
 - (c) If a rejection appears to be untimely, the clerk shall notify the parties of the untimeliness. A party requesting that a rejection be considered timely shall submit a written application to the director within 60 days of receipt of the recommended resolution. The application shall state the grounds to support a finding of excusable neglect.

E. Penalties:

(1) Willful failure or refusal to participate in the mediation process shall not preclude the issuance of a recommended resolution, and may constitute bad faith or unfair claims processing.

(2) The assigned mediator, or any party, may refer any such violation for administrative investigation by the enforcement bureau.

(3) Failure to comply with the mediation rules, including those requiring mandatory production of evidence prior to the mediation conference, or failure to cooperate with an inquiry of the enforcement bureau may subject a party to penalties.

F. Amendment of recommended resolution: The recommended resolution may be amended by a mediator or by the agreement of the parties within the time allowed for acceptance or rejection of a recommended resolution, which time shall not be expanded or modified in any way by the issuance of an amended recommended resolution.

G. A mediator's notes taken in conducting a mediation conference are not subject to discovery and shall not be admissible as evidence in any legal proceeding.

[11.4.4.10 NMAC - Rp, 11.4.4.10 NMAC, 1/1/18]

11.4.4.11 DIRECTOR'S MATTERS:

A. The following matters shall be pleaded on the mandatory application to director form:

- (1) judge assignment disputes;
- (2) request for relief from an untimely rejection of a recommended resolution;
- (3) request to withdraw an acceptance of a recommended resolution;
- (4) appointment of a recipient of benefits for a minor child or an incompetent worker;
- (5) approval of an out of state health care provider, if necessary;
- (6) attorney withdrawal when no judge is assigned;
- (7) objection to case management or utilization review by the WCA; and
- (8) any other matter within the director's jurisdiction.

B. A party responding to an application to the director may submit a written response.

C. Recipient of benefits for minors and incompetent workers:

(1) General provisions.

(a) "Recipient" means the individual or entity approved to receive benefit payments on behalf of a minor child or incompetent worker pursuant to Section 52-5-11 NMSA 1978.

(b) The director may designate a judge to resolve applications brought pursuant to Section 52-5-11 NMSA 1978 when other matters are pending before the judge.

(2) Designation of recipient.

(a) An application to the director and request for setting shall be filed and accompanied by a summons if one has not previously been issued in the case.

(b) The application shall have attached any applicable marriage certificate, birth certificates for all known minor children, or a record reflecting worker's incompetency.

(c) The proposed recipient shall provide a copy of a driver's license or other state issued identification at the hearing.

(d) When it is in the best interests of the minor child or incompetent worker, the director may designate a recipient who does not have care, custody, and control of a minor or incompetent worker.

(e) When it is in the best interests of a minor child or incompetent worker, the director may designate a professional or corporate recipient for a minor or incompetent worker. The employer shall pay reasonable administrative fees requested by the alternative recipient and approved by the director.

(f) As a condition of appointment, the recipient must agree to manage and protect benefit payments for the benefit of the minor child or incompetent worker.

(g) A minor child who has reached the age of 16 may apply to the director to receive benefit payments directly.

(3) Accounting of benefits.

(a) The director may require an accounting of how benefits were used on behalf of a minor child or incompetent worker. Unless otherwise ordered by the director, accountings shall be submitted on the approved form and shall be submitted quarterly for the first year and annually thereafter.

(b) The director may suspend benefit payments, in whole or in part, for failure to provide the ordered accounting of benefits or failure to comply with any other condition placed on the recipient.

[11.4.4.11 NMAC - Rp, 11.4.4.11 NMAC, 1/1/18]

11.4.4.12 HCP RULES:

A. HCP general provisions:

- (1) These rules apply to claims governed by the 1990 amendments to the act.
- (2) The assigned judge shall decide HCP choice disputes. If no judge has been assigned, a judge shall be appointed by the clerk solely to resolve the HCP dispute.
- (3) The HCP judge appointed by the clerk is not assigned pursuant to Subsection C of Section 52-5-5 NMSA 1978 (Repl. Pamp. 1991). The peremptory right to disqualify a judge allowed by Subsection D of Section 52-5-5 NMSA 1978 (Repl. Pamp. 1991), does not apply to the appointment of the HCP judge.

B. HCP choice:

- (1) Emergency care: The provision of emergency medical care shall not be considered a choice of a treating HCP by the employer or worker.
- (2) Selection of HCP:
 - (a) The employer shall decide either to select the initial HCP or to permit the worker to select the initial HCP. The decision made by the employer shall be made in writing to the worker. Employer may communicate the decision to select the initial HCP or to permit the worker the selection by any method reasonably calculated to notify workers. The employer may use a wallet card, a poster stating the decision posted with the WCA poster, a flyer inserted semi-annually with pay checks, or any other method employer reasonably believes will be successful in alerting the worker.
 - (b) If the decision of the employer is not communicated in writing to the worker, then the medical care received by the worker prior to written notification shall not be considered a choice of treating HCP by either party.
 - (c) Medical treatment provided to the worker prior to the employer's written communicated decision to either select the HCP, or to permit the worker to select the HCP, shall be considered authorized health care, the cost of which shall be borne by the employer.
 - (d) If a provider not licensed in New Mexico treats a worker, the employer must, upon receipt of the initial billing from that provider, either request approval of the out-of-state HCP pursuant to the act, or immediately notify the worker in writing that the provider is not acceptable pursuant to Section 52-4-1 NMSA 1978 (Repl. Pamp. 1991).

C. Referrals by an authorized HCP:

- (1) A referral by an authorized HCP to another HCP shall be deemed a continuation of the selection of the referring HCP.
- (2) The 60 day effective period allowed in Subsection B of Section 52-1-49 NMSA 1978 (Repl. Pamp. 1991), is not enlarged by the HCP's referral.

D. Notice of change of HCP:

- (1) The 60 day period of initial HCP choice shall run from the date of first treatment or examination by, or consultation with, the initial HCP.
- (2) The notice of change of HCP shall provide:
 - (a) name, address and telephone number of worker, employer and insurance carrier, if any;
 - (b) date and county of accident;
 - (c) nature of injury;
 - (d) the names, addresses and telephone numbers of the current and proposed HCPs;
 - (e) the signature of the party requesting the change of HCP; and
 - (f) the following text: "your rights may be affected by your failure to respond to this notice; if you need assistance and are not represented by an attorney, contact an ombudsman of the WCA."
- (3) After 50 days of the initial 60 day period, the party denied the initial selection may give notice of change of HCP.

E. Issuance of notice of change: The party seeking the change of HCP shall issue a notice of change of HCP. A copy of the notice shall be provided to the other party 10 days prior to provision of any medical treatment by the proposed HCP.

F. Effective date of notice of change:

- (1) The notice of change shall be effective, unless an objection is filed with the clerk within three days from receipt of the notice of change. A copy of the notice of change shall be attached to any objection filed with the clerk. If no objection is filed, the HCP declared on the notice of change form shall be designated as the authorized treating HCP and may begin treating the worker 11 days after issuance of the notice of change.

(2) An objection can be filed after the three day period, but any bills incurred for medical treatment rendered after the effective date of the notice of change and prior to a ruling by the judge on the objection shall be paid by the employer. A party required to pay for medical treatment pursuant to this rule shall not be deemed to have waived any objections to the reasonableness or necessity of the treatment provided.

G. Responsibility for payment of HCP services:

(1) The employer shall be responsible for all reasonable and necessary medical services provided by an authorized HCP from the date the notice of change is effective.

(2) The worker shall be responsible for any medical services rendered by an unauthorized HCP.

(3) The designation of an authorized HCP shall remain in effect until modified by agreement of the parties or by order of the judge.

(4) Effective July 1, 2013, all medical services rendered pursuant to recommended treatment contained in the most recent edition of the official disability guidelines™ (ODG) is presumed reasonable and necessary; there is no presumption regarding any other treatment.

H. Reasonable and necessary disputes: Disputes concerning the reasonableness and necessity of prescribed treatment may be brought before the administration pursuant to Section 11 of 11.4.7 NMAC.

I. Hearing on objection to notice of change: If an objection to notice of change of HCP is filed with the clerk, the objection shall be heard by the judge within seven days from the filing of the objection. The judge may issue a minute order at the conclusion of the hearing on the objection.

J. Request for change of HCP: If a disagreement arises over the selection of a HCP, and the parties cannot otherwise agree, a request for change of HCP must be submitted to the clerk. The request for change of HCP may be submitted at any time, including the initial 60 day period.

K. Request for change of HCP form:

(1) The request for change of HCP must state the specific reasons for the requested change.

(2) The request for change of HCP may suggest an alternative HCP's name.

L. Burden of proof: The applicant requesting a change of HCP must prove the authorized HCP is not providing the worker reasonable and necessary medical care. If the applicant fails to establish the provision of medical care is not reasonable, the request for change shall be denied.

M. Hearing on request for change of HCP: The request for change of HCP disagreement shall be heard by the judge within seven days from the filing of the request for change of HCP. The judge may issue a minute order at the conclusion of the hearing on the request for change.

[11.4.4.12 NMAC - Rp, 11.4.4.12 NMAC, 10/1/2014; Rp, 1/1/18]

11.4.4.13 ADJUDICATION PROCESS:

A. Assignment of judge:

(1) Upon receipt of a timely rejection of a recommended resolution, an application to judge or petition for lump sum payment, the clerk shall assign a judge to the case and shall serve notice on all parties. Pro se parties shall be served by certified mail unless registered with My E-File. This notice shall be considered the initial notice of judge assignment.

(2) Each party shall have the right to disqualify a judge by filing a notice of disqualification of judge no later than 10 days from the date of filing of the notice of assignment of judge. The clerk shall assign a new judge to the case and notify all registered parties. A party who has not exercised the right of disqualification may do so no later than 10 days from the filing of the notice of reassignment of judge.

(3) No action may be taken by any judge on a case until the expiration of the time for all parties to exercise the peremptory right to disqualify a judge. To expedite the adjudication process, the parties may file a joint waiver of the right to disqualify a judge. Such waiver shall forever bar the parties' right to disqualify a judge in that case.

(4) Disputes related to the assignment, re-assignment, or disqualification of a judge shall be raised by written application to the director, which shall be filed with the clerk.

(5) The director may designate an on-call judge for the limited purpose of reviewing and approving lump sum payment petitions on a voluntary walk-in basis. The director shall provide notice to the public about the schedule for any on-call judge availability. Such designation shall not be considered a judge assignment or reassignment under this section if further adjudication action is needed.

B. Application to judge:

(1) Unless otherwise provided, all claims under the act shall be initiated by filing a complaint form, and the clerk shall schedule the claim for mediation. A party may file an application to judge, and the clerk shall assign the case to a judge to adjudicate the following limited forms of relief only:

- (a) physical examination pursuant to Section 52-1-51 NMSA 1978;
- (b) independent medical examination pursuant to Section 52-1-51 NMSA 1978;
- (c) determination of bad faith, unfair claims processing, fraud or retaliation;
- (d) supplemental compensation order;
- (e) award of attorney fees;
- (f) stipulated reimbursement agreement pursuant to Section 52-5-17 NMSA 1978;
- (g) consolidation of payments into quarterly payments (not a lump sum under

Section 52-5-12 NMSA 1978);

(h) approval of limited discovery where no complaint is pending before the agency, including but not limited to approval of a communication to a treating health care provider when the parties cannot otherwise agree on the form or content; or

- (i) request for release of medical records.

(2) If any claim not enumerated above is raised on an application to judge, the application shall be deemed a complaint and the clerk shall refer it for mediation.

(3) Except for an application seeking relief for the claims enumerated above, an application to judge may not be filed if a complaint has been filed in the same case and the time period for acceptance or rejection of the recommended resolution has not yet expired. Any other claim for relief arising during that time period shall be raised in the mediation process.

(4) Following the rejection of a recommended resolution and during the pendency of a complaint, those claims for forms of relief set forth above shall be sought through motion rather than an application.

(5) Responses to an application to a judge, if any, shall be filed within 15 days of service. A response to application to judge may not raise new claims or issues.

(6) All applications to a judge shall be accompanied by a summons, if one has not previously been issued in the case, and a request for setting. Hearings as necessary may be scheduled by the assigned judge.

C. Petition for lump sum payment:

(1) Parties may request approval of a lump sum payment by filing the WCA mandatory petition form, which shall be signed and verified by the worker or the worker's dependents.

(2) Petitions under Subsection D of Section 52-5-12 shall also be signed by the employer or its representative or, where applicable, the UEF.

(3) Parties to lump sum payment petitions filed pursuant to Subsection D of Section 52-5-12 NMSA 1978 shall attend a lump sum payment approval hearing for a determination that the agreement is voluntary, that the worker understands the terms, conditions and consequences of the settlement agreement or any release, and that the settlement is fair, equitable and provides substantial justice to the parties. For all other joint lump sum payment petitions, a hearing may be held at the discretion of a judge pursuant to Sections 52-5-12 and 13 NMSA 1978.

(4) Any lump sum payment petition filed pursuant to this rule shall comply with Section 52-1-54 NMSA 1978 and counsel for the parties may concurrently seek approval or award of attorney fees, if appropriate, to be heard in the context of the lump sum payment hearing.

(5) Written responses to the petition, if any, shall be filed within 10 days of service of a petition.

(6) All petitions shall be accompanied by a request for setting, and a summons, if one has not previously been issued in the case. Such hearings will be promptly scheduled by the assigned judge.

D. The adjudication process for complaints shall commence upon the clerk's receipt of a timely rejection of a recommended resolution. An answer to complaint shall be filed within 20 days of the filing of the initial notice of assignment of judge unless already filed in lieu of the informal response. The answer shall admit or deny each claim asserted in the complaint. Any affirmative defenses to the complaint shall be stated in the answer.

E. Amended complaints may be filed during the adjudication process only by leave of the assigned judge or by written consent of the adverse party. Leave shall be freely given when justice so requires. Amended complaints filed during the adjudication process shall not be referred back to the mediation process nor shall a new recommended resolution be issued.

F. The judge may hold pre-trial conferences as necessary, establish appropriate deadlines, mandate evidentiary disclosures between the parties, approve formal discovery, and otherwise control all other aspects of the adjudication process in order to enable the prompt adjudication of the case.

G. Discovery: Authorized interrogatories, requests for production or inspection, requests for admissions, depositions, and subpoenas shall be governed by the rules of civil procedure of the district courts of New Mexico.

H. Depositions: Upon the filing of a complaint and by written stipulation of the parties, good cause is presumed and depositions may be taken of the worker, employer representative, authorized HCP, and any provider of an independent medical examination.

- (1) Reasonable notice shall be deemed to be not less than five days prior to the date set for the deposition.
- (2) The original deposition transcript shall be kept by the party who noticed the deposition.
- (3) The parties shall make a good faith effort to obtain a completed and signed form letter to HCP prior to setting the deposition of the HCP.
- (4) Deposition testimony of authorized HCPs shall be admissible in lieu of live testimony.
- (5) Depositions of other witnesses identified by the parties may be admissible, if noticed for use at trial, provided that nothing prohibits either party from issuing a subpoena to order the deposed witness to testify at trial.
- (6) A party intending to use a deposition shall notify the other party of the intended use at least 10 days prior to trial. Any objection to the use of the deposition shall be determined at the adjudication hearing.
- (7) The party that notices a deposition may request the return of the original transcript after final disposition of the case. The clerk may return a transcript or any exhibits tendered to the submitting party or its attorney. If no request for the deposition or exhibits is received, the deposition or exhibits will be destroyed. Notice of intent to destroy exhibits is published in the New Mexico bar bulletin.

I. Subpoenas: The clerk may issue a subpoena, signed but otherwise blank, to a party requesting it, who shall complete it before service. An attorney authorized to practice law in New Mexico who represents a party before the WCA may also issue and sign a subpoena as an officer of the court on behalf of the WCA.

J. Appointment of interpreter:

- (1) It is the responsibility of the parties to determine if interpretive services are necessary.
- (2) An interpreter may be appointed by the judge, director, or mediator. The interpreter shall be court-certified, except that a non-certified interpreter may serve at mediation conferences.
- (3) The employer shall be responsible for the cost and arrangement of a qualified interpreter for the hearing or mediation conference. This responsibility may fall to the uninsured employers' fund when named as a party.

K. Motions: All motions, except those made in open court, shall be written and comply with the New Mexico district court rules of civil procedure.

L. Settlement/pre-trial conferences: The judge shall have discretion to schedule settlement conferences. A settlement conference facilitated by the assigned judge shall require the consent of all parties either on the record or in writing.

M. Orders: Proposed orders or other documents requiring a judge's signature shall not be filed with the clerk but shall be submitted directly to the judge.

N. Admissibility of evidence:

- (1) Live medical testimony shall not be permitted, except by an order of the judge.
- (2) A judge may admit the following documentary evidence, including hearsay evidence, provided that the evidence is relevant, has sufficient indicia of reliability and authenticity, and will assist the judge in determining a fact or issue in dispute:
 - (a) personnel records, payroll records, or other employment files for worker;
 - (b) pre-injury medical records of treatment received for a period of 10 years prior to the date of injury through the time of hearing on the merits;
 - (c) form letters approved by the WCA;
 - (d) records of authorized health care providers and their referrals, including functional capacity evaluations;
 - (e) reports of independent medical examinations ("IMEs") performed pursuant to the act or as otherwise agreed by the parties;
 - (f) toxicology or drug and alcohol test reports;
 - (g) records of the office of medical examiner, including autopsy and toxicology reports; or
 - (h) records of the New Mexico board of pharmacy prescription monitoring program.

O. Continuance of hearing: A judge may continue an adjudication hearing for good cause shown. All discovery, disclosure, and exchange deadlines shall be extended by a continuance unless otherwise ordered.

P. Trials and other hearings:

(1) Parties shall appear personally at the adjudication hearing, without the necessity of a subpoena. Parties shall appear personally or through their legal representatives at all other hearings properly noticed, unless excused by a judge.

(2) Failure to appear at a hearing after proper notice and without good cause may result in the imposition of sanctions.

(3) The employer shall make all necessary arrangements and pay all costs incurred for telephonic conference calls. The director or judge may appear telephonically for the conference call.

(4) All hearings shall be recorded by audio tape recording or by any other method approved by the director.

(5) Prior to commencement of the adjudication hearing, the parties shall confer with the court monitor to ensure that all exhibits are properly marked. Any exhibit to be jointly tendered shall be marked and offered as a joint exhibit. All other exhibits shall be marked by party and exhibit number or letter. Depositions shall be marked as exhibits.

(6) Under exceptional circumstances and in the interest of justice, a judge has discretion to direct or allow supplementation of evidence within 10 days of the close of the adjudication hearing.

Q. Consolidated cases:

(1) A judge may order the consolidation of cases when the issues or facts in dispute in the cases are common or when consolidation will expedite resolution of the issues or facts in dispute.

(2) A party may request an order for consolidation of cases by filing a motion requesting consolidation in each case sought to be consolidated and serving each party and their counsel, if any, for each case sought to be consolidated.

(3) Motions to consolidate cases will be adjudicated by the final judge assigned to the case with the lowest case number.

(4) A judge's order of consolidation shall be filed in each consolidated case.

(5) After consolidation, all pleadings shall only be filed in the case with the lowest case number and the case number of each consolidated case shall appear in the caption of all pleadings.

(6) All parties of record and their counsel shall have access to view the filed pleadings for each case.

(7) In the event of an appeal, the notice of appeal shall include the case number for each consolidated case and shall be filed in the case with the lowest case number. The record proper on appeal shall include all pleadings in each of the consolidated cases.

R. Release of medical records:

(1) A judge shall decide medical record disputes. If no judge has been assigned, the clerk shall appoint a judge upon a party filing an application to judge for release of medical records.

(2) An application to judge for the release of medical records shall be allowed notwithstanding the provisions of any other rule, and shall be disposed of separate and apart from all rule provisions and procedures pertaining to resolution of other disputes arising from a claim for benefits.

(3) The judge will determine whether the protected health information in controversy is material to the resolution of any matter presently at issue or likely to be at issue in the administration of the claim and shall order the release of protected health information upon agreement of the parties or a finding of materiality by a preponderance of evidence.

(4) A bench order or formal order of release of medical records shall have the force of law with respect to the parties and to the HCP or medical facility.

(5) If an HCP or medical facility fails to provide records after a judge has ordered the release of records pursuant to this rule, then the party to receive the records may notify the HCP or medical facility through My E-File of the obligation to produce the records and an endorsed copy of the order. If the records are not produced within five days of service of the notice, the payer's obligation to timely pay shall be tolled until the actual production of the records.

(6) If any judge involved in the adjudication of the case finds that the withholding of records of health information after an order to produce has obstructed the efficient administration or adjudication of a case, then the judge may schedule a hearing to determine if the withholding of records was unreasonable. If the judge finds after notice and an opportunity to be heard that the withholding of records by the HCP or medical facility is

unreasonable, the director may find the HCP or medical facility in violation of this rule and assess a penalty pursuant to Section 52-1-61 NMSA 1978 (1990).
[11.4.4.13 NMAC - Rp, 11.4.4.13 NMAC, 1/1/18]

11.4.4.14 WITHDRAWAL AND SUBSTITUTION OF COUNSEL:

A. The entry of appearance of an attorney or a firm for a party in a pending case shall not be withdrawn without permission of the judge or by the director if no judge has been assigned to the case. A motion to the judge or application to director requesting withdrawal shall be filed with the clerk and shall indicate whether the client concurs with the withdrawal.

B. A motion to the judge or application to director seeking withdrawal of counsel shall clearly state whether the withdrawing attorney is asserting a request for attorneys' fees for services rendered. If no statement is made, and if the motion or application to withdraw is granted, the withdrawing attorney is barred from thereafter seeking attorneys' fees for services rendered on the case. A statement asserting a request for attorneys' fees shall serve as notice to the parties and new legal counsel, if any.

C. When a new attorney assumes a case, a notice of substitution of counsel shall be filed and served on each party. The notice shall contain the new attorney's mailing address, phone number, and e-mail address.

D. The attorney of record shall be subject to notice of hearings or other proceedings until permitted to withdrawal from the case.

[11.4.4.14 NMAC - N, 1/1/18]

11.4.4.15 APPROVAL OF ATTORNEY FEES AND LIENS:

A. Parties may request the award of attorney fees by application to a judge. The application must contain sufficient information to determine if the fee requested is appropriate. The contested application should indicate the date and terms of any offers of settlement made; the present value of the benefits awarded the worker, including, but not limited to medical expenses and past and future weekly benefits; the total number of hours reasonably expended by counsel to secure benefits for the worker; the hourly billing rate of counsel; and any other relevant information for the determination of fees.

B. No attorney fees shall be paid until the case has been settled or adjudged. For purposes of the act, settled or adjudged includes:

- (1) the entry of a compensation order; or
- (2) the acceptance by both parties of a recommended resolution; or
- (3) an order granting or denying any petition or application when no other cases are pending before the administration; or
- (4) the WCA has administratively closed the file; or
- (5) when there is a good faith belief that all pending issues or questions have been resolved, whether or not the jurisdiction of the administration has been invoked.

C. An attorney withdrawing from representation during the pendency of a case and before the case has been settled or adjudged shall assert a request for attorney fees, if any, within the motion to judge or application to director seeking to withdraw as counsel. The request for attorney fees shall not be decided until the case is settled or adjudged.

D. When a subsequent attorney requests attorney fees, the attorney shall give notice to the withdrawn attorney by serving on the withdrawn attorney a copy of all relevant pleadings at the time of filing.

E. No attorney fee lien shall be filed in a case until a judge has awarded fees pursuant to Section 52-1-54 NMSA 1978.

[11.4.4.15 NMAC - Rp, 11.4.4.14 NMAC, 1/1/18]

11.4.4.16 SANCTIONS:

A. The judge may sanction any party, attorney, or personal representative for conduct that interferes with the orderly administration of the court or a hearing, including, but not limited to:

- (1) rejecting a recommended resolution without reasonable basis, or without reasonable expectation of doing better at formal hearing;
- (2) failing to obey a lawful order of the court;
- (3) failing to appear for a hearing or deposition; or
- (4) advancing a meritless position in order to harass or vex the opposing party.

B. The judge will conduct a separate hearing on the imposition of sanctions according to the procedures in this part.

- C. As a sanction, the judge may do any or all of the following:
- (1) assess reasonable attorney's fees against a party pursuant to Section 52-1-54 NMSA 1978;
 - (2) reduce the fees of an attorney for a party;
 - (3) assess prejudgment interest from the date of the recommended resolution in the claim;
 - (4) strike a claim or defense;
 - (5) limit the evidence which may be introduced;
 - (6) dismiss an action;
 - (7) order the suspension or forfeiture of compensation benefits;
 - (8) assess expenses and costs against a party; or
 - (9) impose a civil penalty pursuant to Sections 52-1-28.1, 52-1-28.2, 52-3-45.1 or 52-3-45.2 NMSA 1978.

D. For patterns of misconduct beyond a single case, the judge may refer the matter to the WCA enforcement bureau for further investigation, administrative prosecution and imposition of penalties. [11.4.4.16 NMAC - Rp, 11.4.4.15 NMAC, 1/1/18]

11.4.4.17 SEALING OF PUBLIC COURT RECORDS:

A. Public court records filed with the clerk of court or offered as evidence in an administrative or adjudicative hearing shall not be sealed based solely on the agreement or stipulation of the parties.

B. The party requesting to seal court records subject to public inspection shall establish the same requirements for sealing court records as set forth in the rules of civil procedure for the district courts of New Mexico.

C. The order sealing the court records may seal the records from public inspection but shall not prohibit WCA staff from accessing the court record as necessary to enforce the provisions of the act. [11.4.4.17 NMAC - Rp, 11.4.4.17 NMAC, 1/1/18]

HISTORY OF 11.4.4 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center: WCA 86-1, Informal Hearing Procedures, filed 5/26/87.
WCD 89-1, Mediation Rules, filed 6/20/89.
WCA 92-2, Workers' Compensation Administration Mediation Rules, filed 2/24/92.
WCA 92.2, Rules Governing Mediation, filed 10/30/92.
WCA 93.2, Rule Governing Mediation, filed 10/28/93.
WCA 86-2, Formal Hearing Procedures, filed 5/26/87.
WCD 89-2, Formal Hearing Rules, filed 6/20/89.
WCA 92.3, Rules Governing Formal Hearings, filed 10/30/92.
WCA 86-7, Attire, filed 5/26/87.
WCD 89-7, Attire, filed 6/20/89.
WCD 89-8, Workers' Compensation Division Forms, filed 6/20/89.
WCA 91-1, Miscellaneous Proceedings and Preliminary Questions of Fact, filed 1/24/91.
WCA 91-1, Miscellaneous Proceedings and Preliminary Questions of Fact, filed 5/29/91.
WCA 92.1, Rules Governing Miscellaneous Proceedings and Preliminary Questions of Fact, filed 10/30/92.
WCA 93.1, Rules Governing Miscellaneous Proceedings and Preliminary Questions of Fact, filed 10/28/93.

History of Repealed Material:

11.4.4 NMAC, Claims Resolution, filed 5/20/1996, repealed effective 10/1/2014.
11.4.4 NMAC, Claims Resolution, filed 10/1/2014, repealed effective 1/1/2018.