

**Regulatory Impact Analysis
Codification of and/or changes to filing requirements**

Agency: North Carolina Industrial Commission
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Proposed New Rule Title:
Rules proposed for amendment: Rule 11 NCAC 23B .0302
Rule 11 NCAC 23B .0310
Rule 11 NCAC 23B .0501
(See proposed rule text in Appendix 1)

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

Statutory Authority: G.S. §§ 143-292, 143-296, 143-300.

Introduction/Background:

Rule 11 NCAC 23B .0302 governs appeals of trial-level decisions to the Full Commission of the Industrial Commission. The proposed rule amendments for Rule 11 NCAC 23B .0302 are intended to reorganize and update the provisions contained in 11 NCAC 23B .0302, .0303, and .0305, including merging them all into 11 NCAC 23B .0302 and repealing 11 NCAC 23B .0303 and .0305. The amendments also re-word some provisions, provide some clarifications, and add new provisions codifying common practices related to appeals.

Rule 11 NCAC 23B .0310 governs oral argument in a case on appeal before the Full Commission. The current rule addresses only waiver of oral argument. The proposed amendments for Rule 11 NCAC 23B .0310 are intended to provide guidance for oral argument by codifying several current practices of the Full Commission and providing specific procedures for requesting additional time for oral argument.

Rule 11 NCAC 23B .0501 addresses the procedure for a waiver of the rules. The proposed amendments remove the requirement that a request be submitted in writing and correct the rule by replacing “employee” with “plaintiff.”

Proposed Rule Changes and Their Estimated Impact:

1. *Amendment of Rule 11 NCAC 23B .0302*
 - a. The proposed changes to Rule 11 NCAC 23B .0302(a) other than the new last sentence added to the Paragraph are all intended to re-word the rule or provide clarification to improve compliance and should not have any fiscal impact. The

new last sentence is intended to require that the party filing the notice of appeal include in the notice a statement that it has been copied to the opposing party. The effect of this requirement is also to require that the filing party actually provide a copy to the opposing party. This requirement is extremely common for court filings in most venues. There is no data on this point, but, in the experience of the Commission, most appellants do copy the opposing party on notices of appeal to the Commission. The rule is intended to improve compliance for the small number of appellants who fail to do so. By including this requirement in the rule, it will improve the Commission's ability to enforce the requirement.

The time and expense of copying the other side and providing the written statement required by the proposed rule amendment is approximately 15 minutes of a paralegal or attorney's time. In FY 2016-17, there were 119 appeals of tort claims to the Full Commission. The rule change is expected to have an effect in only a very small number of the 119 cases. Therefore, any fiscal effect of this rule change will be very minimal.

- b. The proposed Paragraph (b) for Rule 11 NCAC 23B .0302 is a new provision which addresses the Commission's acknowledgement of a notice of appeal and the Commission's procedure for sending the Form T-44 *Application for Review* and official transcript and exhibits to the parties. While the provision is new to the tort claim rules, it is essentially a codification of the current practice. The primary effect of the rule is to require the Commission to use the same procedure in every case, which it already does, and to provide information to the parties about what to expect.

The acknowledgement and provision of the transcript and exhibits to the parties in a case takes approximately 30-45 minutes for Commission staff. Some postage may be required in a few cases where the plaintiff is not represented by counsel. The Commission has a contract for court reporting services, which includes the preparation of the transcript and exhibits. These modest costs will apply in about 119 cases a year. This number may be lower as some portion of the appeals will be interlocutory appeals which may or may not be allowed to proceed.¹ The Commission expects no to minimal impact from this rule change.

- c. The proposed Paragraph (c) for Rule 11 NCAC 23B .0302 is the current Rule 11 NCAC 23B .0303 with some amendments. Rule 11 NCAC 23B .0303 is proposed for repeal. This rule addresses the submission by the appellant of the Form T-44 *Application for Review* or a written statement stating the assignments of error and grounds for review that are the basis of the appeal. The rule provides the timeframe for submission and the potential consequences for failure to file the Form T-44 *Application for Review* or a written statement. The differences between the new Rule 11 NCAC 23B .0302(c) and the similar provisions of the current Rule 11 NCAC 23B .0303 and their fiscal impact are outlined below:

¹ For example, in FY 2016-17, 31 of the 119 cases appealed were appeals of Orders that may not have been allowed to proceed if they were interlocutory and there was no right of immediate appeal.

- i. The current Rule 11 NCAC 23B .0303 required that an appellant file a “written statement of the proposed issues on appeal that the appellant intends to present on appeal.” The new Rule 11 NCAC 23B .0302(c) requires “a Form T-44 *Application for Review* or written statement stating with particularity all assignments of error and grounds for review, including, where applicable, the pages in the transcript or the record on which the alleged errors are recorded.”
 - The Form T-44 *Application for Review* is a form that already exists and is generally used by appellants to provide the written statement currently required by Rule 11 NCAC 23B .0303. Because the rule still allows a written statement and the Form T-44 *Application for Review* is essentially a written statement, this change has no fiscal impact.
 - Proposed issues on appeal are essentially the same as assignments of error or grounds for review. However, the proposed rule seeks to require additional particularity or specificity in the description of the basis of the appeal, including corresponding page numbers in the record. The benefit of the rule is that the parties and the Commission will have a better understanding of the grounds for review. It will make it easier for the appellee to address the issues raised and easier for the Commission to review and analyze the appeal. There will be a cost to appellants if compliance with the rule requires additional drafting time. It is difficult to know how much additional time might be required or saved, as each case is different. Some have one assignment of error, while others may have 20. In addition, many appellants already state their grounds with particularity and provide page numbers. The rule change is aimed at the few appellants who do not, which is likely to be a very small portion of approximately 119 appeals per year. Therefore, the Commission expects minimal impact from this rule change.
 - The remaining changes to the language moved from the current 11 NCAC 23B .0303 are re-wordings or clarifications of the rule language that do not change meaning and will have no fiscal impact.
- d. The proposed new Paragraphs (d), (e), and (f) for Rule 11 NCAC 23B .0302 are taken from the current Rule 11 NCAC 23B .0305 with some small amendments. Rule 11 NCAC 23B .0305 is proposed for repeal. Most of the changes to the relocated rule language are matters of rewording or clarification that do not change meaning or have a fiscal impact. The change stating that an appellant “may” file a brief instead of the former “shall” may have an impact on party behavior. The intent of this change is not to encourage fewer briefs, but rather to make the rule consistent. Current Rule 11 NCAC 23B .0305 and the new Rule 11 NCAC 23B .0302(d) indicate that failure to file a brief will result in not being

allowed to present oral argument to the Full Commission. The former rule was inconsistent because it implied that a brief was required but that the consequence of noncompliance was a loss of the right to oral argument. However, it also created an opportunity for the appellee to move for dismissal of the appeal for failure to file a brief.

Most appeals to the Full Commission involve attorneys and it is highly unlikely that any of them would not file a brief as a result of the proposed rule change. The real effect of the rule is likely to be incrementally fewer motions to dismiss for failure to file a brief in cases where the appellant is not represented by counsel. It is not possible to know whether unrepresented litigants who would have complied with the former rule and filed a brief would choose not to do so when the rule becomes permissive. In any case, the number of cases affected out of 119 a year is likely to be very low. Therefore, the Commission expects no to minimal impact from this rule change.

- e. The proposed new Paragraph (g) for Rule 11 NCAC 23B .0302 is a new provision to the tort claim rules which addresses the review of orders made during the pendency of a case.

New paragraph (g) first states orders made during the pendency of a case may be reviewed by the Full Commission. The concept of interlocutory decisions or orders is established and familiar to attorneys and utilized by a variety of tribunals. Next, the provision states that request for review of such orders will be reviewed by the Chair of the Commission to determine whether there is a right of immediate review. The parties are to address the grounds for immediate review in the request for review for the Chair's consideration. The practice of reviewing and analyzing appeals of interlocutory decisions to determine whether they should proceed or wait until the entire matter is decided is common to many tribunals, with a primary goal of judicial efficiency. The grounds presented are analyzed according to the existing body of case law addressing interlocutory orders. The first and last sentences of the rule reflect the current practice of the Commission. They are included in the new provision to codify the current practice, but also to provide context for the second sentence of the paragraph, which involves a procedural change.

Currently, all requests for review go to the Chair to determine if they should go immediately to a Full Commission panel. Paragraph (g) changes the current practice slightly by allowing orders that constitute a final judgement as to one or more issues or parties and contain a certification by the Commissioner or Deputy Commissioner that there is no just reason for delay to proceed directly to a Full commission panel for review. This provision is modeled after a similar provision in Rule 54 of the North Carolina Rules of Civil Procedure.

The fiscal impact of the proposed subsection (g) is described below:

- In Fiscal Year 2016-17, the Full Commission received 31 requests for review in tort claims. In 2017-18, the number increased to 169. The large increase is due to a specific legal issue currently being regularly appealed. Once that legal issue is settled, it is estimated the number of annual requests for review will decrease to a number near the 31 requests for Fiscal Year 2016-17. However, the Commission does not know how long that will continue to be an issue. For the purpose of this analysis, the average number of interlocutory requests for review over the past two fiscal years is 100.
- For those requests for review where there is no certification, the rule does not contemplate a change in procedure. There may be a small benefit to the Commission and litigants from having a rule on the subject that outlines the procedure.
- For those cases in which the second sentence of the rule applies, the commission will have a cost savings of approximately three hours of law clerk time and 30 minutes of the Chairman's time which would have been spent reviewing the request for review. Because the certification option is a new procedure, the Commission cannot estimate with accuracy how often a request for review will be certified. However, it is believed less than 25% of requests will be certified. If that is the case, 25 or fewer requests for review will go directly to the Full Commission. Based on the average law clerk salary² of \$47.73 per hour, one certification saves \$143.19 in opportunity cost for a law clerk. Based on the Chairman's salary of \$91.07 per hour,³ one certification saves \$45.54 in opportunity cost. Therefore, the savings for one certification would be \$188.73 and the savings for 25 certifications would be \$4,718.25.
- There is unlikely to be a corresponding savings to the litigants in not having to draft arguments for the Chair's review because they will most likely include them in their briefs and arguments before the Full Commission panel. It is anticipated the Full Commission panel will review the issue of whether the decision should be immediately reviewed as well as the merits of the request for review.
- When an administrative decision is reviewed pursuant to this procedure, the case before the Deputy Commissioner is placed on hold. If the administrative decision is not a final judgment and the request for review is reviewed by the Chair, there can be a delay of up to 45 days before it is known whether the appeal will be referred to a Full Commission panel. There is a chance in such cases that a Full Commission panel may find that the request for review is not proper and should not be allowed, in which case the matter will have been delayed an extra 4-6 months, but this

² The Commission generally has 6 full-time permanent Agency Legal Consultants that serve as law clerks to the Commissioners. Currently, the Commission has 3 full-time permanent Agency Legal Consultants/law clerks. Their average annual compensation including benefits is \$99,278.40. Therefore, their average hourly compensation is \$47.73.

³ The Chairman's annual compensation including benefits is \$189,425.35. Therefore, his hourly compensation rate is \$91.07.

situation is equivalent to situations that already occur if the Chair allows a request for review to go forward and the Full Commission later disagrees or the Chair disallows a request for review and it is reviewed by the Full Commission.

f. Summary of Rule 11 NCAC 23B .0302 Impact:

Overall, the proposed amendments to 11 NCAC 23B .0302 will require the time and expense of copying the opposing party and providing the written statement, 30 to 45 minutes for Commission staff to acknowledge each notice of appeal, and additional time for appellants to draft all assignments of error with particularity. The proposed amendments will result in a savings to the Commission of \$188.73 per certified request for review as well as the potential for fewer delays for requests for review.

2. *Amendment of Rule 11 NCAC 23B .0310*

- a. The new Paragraph (a) of Rule 11 NCAC 23B .0310 is a re-wording of the current rule without any significant change in meaning. This rule is not expected to have any fiscal impact.
- b. The new Paragraph (b) allows 20 minutes for each party for oral argument and describes when time may be reserved for rebuttal. It is very common in most courts for oral argument to have time limits. The rule codifies the time limits and rebuttal procedure the Commission has used for many years. The Commission does not expect to incur any costs or benefits on behalf of the State based on the rule. Litigating parties could experience a cost in that their time is now limited through regulation. They may also experience a benefit from the certainty provided by having a rule.
- c. The new Paragraph (c) provides a procedure for requesting additional time for oral argument beyond that allowed in Paragraph (b). There is no data on the number of requests for additional time. Based on the Commission's experience, they are known to be rare.
 - i. The Commission expects to experience a small cost from receiving written requests that must be processed and reviewed. However, the Commission also expects a small benefit from no longer receiving such requests in various forms or at the last minute prior to hearing.
 - ii. Litigating parties may experience a cost from the regulation because it imposes limits on how and when they can request additional time. There is likely to be a small cost in staff and attorney time to prepare and file written requests, as opposed to oral requests. Parties may receive a benefit from the existence of a rule allowing them to request additional time if they believe they need it. Parties may also benefit from not being surprised close to the hearing with a request from the other party for more time.
 - iii. As stated above, additional time for oral argument is not a common request, usually reserved only for cases involving multiple parties, very

complicated facts or arguments, or cases involving more than one injury claim. Therefore, the impact of this rule provision is expected to be minimal.

- d. The new Paragraph (d) addresses what happens if a party or parties do not appear for scheduled oral argument. If one party fails to appear at the call of the case, the Full Commission may disallow their right to present oral argument. If both parties fail to appear, the matter may be decided on the record and briefs alone. There is nothing unusual about this rule provision in terms of how most courts operate. The Commission will benefit from having this rule in the Code so that a decision to disallow oral argument for failure to appear at the call of the case may not be challenged. Litigating parties may incur a corresponding cost if they lose the right to argue because they are late or fail to appear and want to appeal the decision to disallow their arguments. It is very rare that attorneys do not appear on time for oral argument without reasonable excuse, such that their arguments would be disallowed. This may occur slightly more frequently with unrepresented parties, but is still rare. The fiscal impact of this rule is expected to be minimal.
- e. New Paragraph (e) indicates that parties may not discuss matters outside the record, use personal opinions or experiences, or make negative statements about opposing counsel or members of the Commission during oral argument. This rule reflects and allows enforcement of a best practice. It is rare that litigants try to go outside the record, mention personal opinions, or make disparaging comments during oral argument, so the impact will be minimal. However, the Commission and other parties will benefit from being able to point to the rule if a party does behave in such a manner. A party restrained by the rule may experience a cost due to limitations placed on its oral argument. These costs and benefits are relatively intangible and cannot be monetized with any accuracy.

3. *Amendment of Rule 11 NCAC 23B .0501*

The amendment proposed in Rule 11 NCAC 23B .0501 is intended to clarify the existing language and encourage compliance with the requirements of the rule. Under the current baseline rule, the Commission may waive or vary the requirements or provisions of any of the 23B Rules upon written application of a party. The proposed rule amendment removes the requirement that the request for waiver be made in writing. There may be a minor savings to the system because it could result in less paper being submitted to the Commission. However, most requests will still be communicated to the Commission in writing despite the rule change. The rule change is intended to address waivers requested where all parties are present before the Commission for a hearing. The Commission does not expect oral waivers at hearing to happen very often. The change may result in a savings, but it would be minor and unquantifiable. No fiscal impact to state or local government and no substantial economic impact to the overall workers' compensation system is anticipated.

APPENDIX 1

Proposed Rule Text

11 NCAC 23B .0302 NOTICE OF APPEAL APPEALS TO THE FULL COMMISSION

(a) A letter expressing an intent to Notice of appeal shall be considered notice of appeal to the Full made to the Commission within the meaning of G.S. 143-292, 15 days from the date when notice of the Deputy Commissioner's Order or Decision and Order has been received. The notice of appeal shall specify, provided that the letter specifies by tort claim number and filing date, the Order, Opinion and Award, Order or Decision and Order from which appeal is taken. The notice of appeal shall include a written statement confirming that a copy of the notice of appeal has been sent to the opposing party or parties.

(b) After receipt of the notice of appeal, the Commission shall acknowledge the notice of appeal in writing. Within 30 days of the acknowledgement, the Commission shall prepare and provide, at no charge to the parties, electronic copies of any official transcript and exhibits, along with a Form T-44 *Application for Review*. In cases where it is not possible to provide a party with the official transcript and exhibits electronically, the Commission shall provide the official transcript and exhibits and a Form T-44 *Application for Review* via any class of U.S. mail that is fully prepaid.

(c) Within 25 days of receipt of the official transcript and exhibits, or receipt of notice that there will be no official transcript and exhibits, the appellant shall submit a Form T-44 *Application for Review* or written statement stating with particularity all assignments of error and grounds for review, including, where applicable, the pages in the transcript or the record on which the alleged errors are recorded. The Form T-44 *Application for Review* or the written statement shall include confirmation that a copy of the document has been sent to the opposing party or parties. Failure to file the proposed issues on appeal, either by Form T-44 *Application for Review* or by written statement, may result in the dismissal of the appeal either upon the motion of the non-appealing party or upon the Full Commission's own motion.

(d) An appellant may file a brief in support of the grounds for appeal with the Commission, with a written statement confirming that a copy of the brief has been sent to the opposing party or parties, within 25 days after receipt of the official transcript and exhibits or receipt of notice that there will be no official transcript and exhibits. The appellee shall have 25 days from service of the appellant's brief to file a reply brief with the Commission, with a written statement confirming that a copy of the brief has been sent to the opposing party or parties. When the appellant fails to file a brief, the appellee shall file a brief within 25 days after the appellant's time for filing a brief has expired. If multiple parties appeal, each party may file an appellant's brief and appellee's brief on the schedule set forth in this Rule. If the matter has not been calendared for hearing, any party may file a written stipulation to a single extension of time not to exceed 15 days with the Office of the Clerk. In no event shall the cumulative extensions of time exceed 30 days. A party who fails to file a brief shall not be allowed oral argument before the Full Commission.

(e) Cases shall be cited to the North Carolina Reports, the North Carolina Court of Appeals Reports, or the North Carolina Reporter, and when possible, to the South Eastern Reporter. Counsel shall not discuss matters outside the

record, assert personal opinions or relate personal experiences, or attribute wrongful acts or motives to opposing counsel or members of the Commission.

(f) Briefs to the Full Commission shall not exceed 35 pages, excluding attachments. No page limit applies to the length of attachments. Typed briefs shall be prepared using 12-point proportional type, shall be double spaced, and shall be prepared with non-justified right margins. Each page of the brief shall be numbered at the bottom right of the page. When a party quotes or paraphrases testimony or evidence from the official transcript or exhibits in a brief, the party shall include, at the end of the sentence, a parenthetical entry that designates the source and page number of the quoted or paraphrased material. The party shall use "T" for transcript and "Ex" for exhibit. For example, (1) if a party quotes or paraphrases material located in the transcript on page 11, the party shall use the following format "(T 11)" and (2) if a party quotes or paraphrases material located in an exhibit on page 12, the party shall use the following format "(Ex 12)". When a party quotes or paraphrases testimony or other evidence in the transcript of a deposition, the party shall include, at the end of the sentence, a parenthetical entry that contains the name of the person deposed and the page number location within the transcript of the deposition. For example, if a party quotes or paraphrases the testimony of John Smith, located on page 11 of the transcript of the deposition, the party shall use the following format "(Smith 11)".

(g) Any request for review by the Full Commission of an order by a Commissioner or Deputy Commissioner made during the pendency of a case assigned to them shall be filed with the Office of the Clerk. If the order made by the authoring Commissioner or Deputy Commissioner is a final judgment as to one or more issues or parties and the order contains a certification that there is no just reason for delay, the request for review shall be referred directly to a panel of the Full Commission. If the order contains no certification, requests for review will be referred to the Chair of the Commission for a determination regarding the right to immediate review, and the parties shall address the grounds upon which immediate review shall be allowed.

History Note: Authority G.S. 143-292; 143-300;
Eff. January 1, 1989;
*Amended Eff. *** **, ****; July 1, 2014; May 1, 2000.*

11 NCAC 23B .0310 ~~WAIVER OF ORAL ARGUMENT~~

~~Upon the request of a party or its own motion, the Commission may waive oral argument in the interests of justice or to promote judicial economy. In the event of such waiver, the Full Commission shall file an award, based on the record and briefs.~~

(a) A party may waive oral argument at any time with approval of the Commission. Upon the request of a party or on its own initiative, the Commission may review the case and file an Order or Decision and Order without oral argument.

(b) When presenting oral argument, each appellant(s) shall have twenty minutes to present oral argument and may reserve any amount of the twenty-minute total allotment for rebuttal, unless otherwise specified by Order of the

Commission. Each appellee(s) shall also have twenty minutes to present oral argument, unless otherwise specified by Order of the Commission; however, the appellee(s) may not reserve rebuttal time. In the case of cross-appeals, each appealing party may reserve rebuttal time.

(c) Any party may request additional time to present oral argument in excess of the standard twenty-minute allowance. Such requests shall be made in writing and submitted to the Full Commission no less than ten days prior to the scheduled hearing date. The written request for additional time shall state with specificity the reason(s) for the request of additional time and the amount of additional time requested.

(d) If any party fails to appear before the Full Commission upon the call of the case, the Commission may disallow the party's right to present oral argument. If neither party appears upon the call of the case, the Full Commission may decide the case upon the record and briefs on appeal, unless otherwise ordered.

(e) Parties shall not discuss matters outside the record, assert personal opinions or relate personal experiences, or attribute wrongful acts or motives to opposing counsel or members of the Commission.

*History Note: Authority G.S. 143-292; 143-296; 143-300;
Eff. January 1, 1989;
Recodified from 04 NCAC 10B .0311 Eff. April 17, 2000;
Amended Eff. July 1, 2014; May 1, 2000.*

11 NCAC 23B .0501 WAIVER OF RULES

In the interests of justice or to promote judicial economy, the Commission may, except as otherwise provided by the rules in this Subchapter, waive or vary the requirements or provisions of any of the rules in this Subchapter in a case pending before the Commission upon ~~written application~~ request of a party or upon its own initiative only if the ~~employee~~ plaintiff is not represented by counsel. Factors the Commission shall use in determining whether to grant the waiver are:

- (1) the necessity of a waiver;
- (2) the party's responsibility for the conditions creating the need for a waiver;
- (3) the party's prior requests for a waiver;
- (4) the precedential value of such a waiver;
- (5) notice to and opposition by the opposing parties; and
- (6) the harm to the party if the waiver is not granted.

*History Note: Authority G.S. 143-291; 143-300;
Eff. January 1, 1989;
Amended Eff. **** *, ****; July 1, 2014; May 1, 2000.*