



February 26, 2026

Via Email Only to gc.clerk@wca.nm.gov

WCA Office of General Counsel

Attn: Michael Holt, Esq.

**RE: Opposition to Proposed Rule Changes to 11.4.4.15(A) and 11.4.7.12(C)(2)(c)
NMAC**

Dear Mr. Holt,

I am writing to express my opposition to the proposed rule changes to 11.4.4.15 and 11.4.7.12(C)(2)(c) NMAC.

I. OPPOSITION TO 11.4.4.15 NMAC PROPOSED CHANGES

First, regarding 11.4.4.15 NMAC, it is not clear why the Workers' Compensation Administration (hereinafter "Administration") wants to reopen this Rule. Further, it is unclear why the Administration would reopen this Rule without considering the fundamental fairness required by the Workers' Compensation Act (hereinafter "Act"): If the Rule is re-opened, the Administration should require Workers' Compensation Judges (hereinafter "judges") should consider and approve an employer/insurer's attorney's fee to determine, "the impact of an excessive fees award paid to attorneys upon the prices paid by consumers and employers for goods and services, including workers' compensation insurance premiums." Adding this requirement will require of an actuarial determination of how a specific attorney fee would impact a multimillion-dollar (hundreds of millions) company such as New Mexico Mutual, or a multibillion-dollar company such as Traveler's. Each case would require inquiry into the financial assets of the company, how the attorney's fee will affect the assets of the company, and how that, in turn, would affect the prices consumers (employers) pay in workers' compensation insurance premiums. Each case would require a comparison analysis, under fundamental fairness, of the fee paid to the insurer and the fee being sought by the worker's

attorney because both will influence the prices paid by employers for workers' compensation insurance and the market.

Regarding the other proposed changes to this Rule, they are unnecessary and will likely lead to confusion, arguments amongst the parties, and more litigation. New Mexico has decades of law regarding how a judge determines a fair fee for workers' counsel. Whether the proposed Rule changes would affect a judge's application of prior case law is unclear. For instance, the proposed Rule change removes language that a judge should evaluate settlement offers and the present value of all benefits obtained, for example. These changes contradict case law and NMSA 1978, § 52-1-54(E). The proposed added change to include 11.4.4.15(A)(10), regarding consideration of whether there were multiple accidents, is unnecessary as that is already required by case law. Judges should be free to apply the case law to fairly determine the amount of fees that a worker's attorney should receive. It seems like this proposed Rule change is attempting to interpret case law, which is the judiciary's exclusive function. See *generally Pub. Serv. Co. of N.M. Pub. Serv. Comm'n*, 1991-NMSC-083.

II. OPPOSITION TO 11.4.7.12(C)(2)(c) Proposed Changes

First, a worker or her or his counsel should be given an opportunity to be present during any conversations about them. Fundamental fairness to the worker requires that a worker know what is being said about him or her by an agent of the state to a healthcare provider and to that agent by the healthcare provider. That information should not be filtered through the agent. A worker or their counsel should have the right to know what is being said about the worker and be given a fair opportunity to respond to what is being said.

At its heart, *Church's Fried Chicken No. 1040 v. Hansen*, 1992-NMCA-115 is a case warning against ex-parte communication because of the patient's expectation of a right of privacy with her or his physician and concern that an adversarial party may seek to improperly influence the worker's physician. See, e.g., *Church's* at ¶ 16. *Church's* was especially concerned about ex-parte communications without prior notice to the worker or worker's attorney permitting ex parte interviews by an adversarial party without prior notice to the plaintiff or his attorney, ". . . eliminates any safeguards against revelation of matters irrelevant to the action and gives rise to situations permitting breaches in confidentiality between a patient and his treating physician." See *id.* at ¶ 17. In reaching its conclusion, *Church's* relied upon the reasoning of *Smith v. Ashby*, 1987-NMSC-08, for the propositions that, ". . . public policy strongly favors the confidentiality of the physician-patient relationship and thereby prohibits, because of the threat posed to the sanctity of that relationship, extra-judicial ex parte discussion of a patient's medical confidences." *Ashby* at, ¶ 5. Further, *Church's* quoted *Ashby* as approving language from an out-of-state case stating, "we find it difficult to believe that a physician can engage in an ex parte conference with the legal adversary of his patient without endangering the trust and faith invested in him by his patient." *Church's* at ¶ 19 (citations omitted). *Church's* found that even though there was no physician-privilege in existence at the time, unlike there is now, *Smith's* decision was founded on public policy reasons, and adopted those public policy considerations

to prevent ex-parte communications. *See id. at ¶¶ 20-21.* *Church's* concluded by recognizing that even though the workers' compensation system is designed to minimize litigation costs and delays, and to encourage informal methods of discovery and dispute resolution, those considerations were not enough to overcome the public policy interests advanced by *Smith*. *See id. at ¶ 22.*

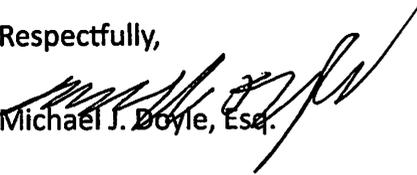
In *Gomez v. Nelson Corp.*, 1995-NMCA-043, the court found that ex-parte communication by a nurse case manager, an agent of the employer/insurer, violates *Church's*. *See id. ¶ 1.* In *Gomez*, the employer/insurer argued, ". . . that Crawford was not a party to the proceedings leading to the compensation order. Additionally, Insurer states that Crawford has no financial interest in Worker's claim or its outcome. On this basis, Insurer argues that Crawford and its employees are not Worker's adversaries, and, therefore, the strong policy concerns articulated in *Smith* do not apply. *See id. at ¶ 12.* *Gomez* dismissed this claim, reasoning that, "s an agent of Insurer, Crawford has a duty to disclose to Insurer any fact that might affect Insurer's interests. . . . *Church's Fried Chicken* clearly established that insurers may not engage in ex parte contacts with a worker's treating physician. . . We decline to hold at the proscribed conduct becomes permissible if it is delegated to an agent." *See id. at ¶ 13.* *Gomez* recognized a distinction between Administration appointed independent case management and an employer/insurer's case management. *See id. at ¶ 15, 16.* In discussing the differences between the two systems, *Gomez* recognized that one important aspect of the Administration's system was that it, ". . . create[d] a mechanism to resolve disputes concerning the reasonableness of any request for information by the Contractor. WCA 93.8.5(B)(2)(d)." *See id. at ¶ 16.* No case has ever arisen challenging the Administration's case management regulations.

The proposed Rule change taking away the right of a worker or their counsel to have notice of ex-parte communication and attend any communications between the Administration's contracted nurse case manager is against public policy and undermines the importance of a worker's interest in having a mechanism to resolve disputes concerning the reasonableness of any request from the Administration's nurse case manager. Despite contentions otherwise, workers do not normally agree to a nurse case manager, do not want a nurse case manager assigned, and the Administration is not assigning a nurse case manager of its own volition, but rather at the request of an employer/insurer. It is an adversarial relationship: the nurse case manager is gathering information for and at the request of the adjuster who still has the right to approve and deny care and direct what information the insurance company wants; the nurse case manager's job is cost containment and saving the insurance company money, not making sure the worker's voice is heard, especially if the worker or her counsel are not allowed to be present to prevent or object to any improper questions or areas of inquiries that are not reasonable. The rule change is especially adversarial as it takes away the right of a worker to consult with her or his attorney before answering questions asked by the nurse case manager that may not be reasonable given the situation. Many workers suffer from secondary mental impairments and cognitive problems that may, if they are not protected by counsel, cause them to mistakenly say things that undermine their case, can be taken out of context, or misused by an insurance company if it is included in a report. An Administration nurse case management

system that still allows the worker and her or his counsel to be present during any conversations can be helpful to the worker and protect the worker's right to privacy, protect the sanctity of the physician-patient relationship, protect the trust in faith needed between a patient and their doctor, and make sure that the Administration's nurse case manager's request for information is reasonable.

The fundamental fairness required of the workers' compensation system will be undermined if the Administration's proposed rule change to 11.4.7.12(C)(2)(c). I therefore urge the Administration not to move forward with the proposed rule change.

Respectfully,


Michael J. Doyle, Esq.