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March 17, 2026

via email to gc.clerk@wca.nm.gov

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(A) 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, I strongly oppose the proposed changes which creates an impossibility for all workers' attorneys seeking an attorney fee. What possible evidence could a worker present and a workers' compensation Judge consider in determining "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." 11.4.4.15 A (11) Despite representing injured workers in New Mexico since 1981, I have no information as to how a specific attorney fee would impact a multimillion-dollar company such as New Mexico Mutual, or a multibillion-dollar company such as Traveler's or other smaller companies we frequently see. Certainly those companies would not allow my 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 in New Mexico. First, the fee paid to the insurer's lawyer and the fee being sought by the worker's attorney would both have to be considered for any meaningful discussion of how attorney fees would influence the prices paid by employers for workers' compensation insurance and the market.

Having employer/insurer's lawyers share their fees charged would be a sea change that has never yet been required and always vigorously challenged when suggested.

The appellate courts have developed decades of law regarding how a judge determines a fair fee for workers' counsel. Any proposed Rule changes could not affect a judge's application of prior case law or NMSA 1978, § 52-1-54. 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 either interpret or overrule case law, which is the judiciary's exclusive function. See generally Pub. Serv. Co. of N.M. Pub. Serv. Comm., 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 whether by a nurse case manager or others with his/her HCP. Fundamental fairness to the worker requires that a worker know that are what is being said about him or her to a healthcare provider to insure accurate information is given to the healthcare provider. 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.

Over twenty years ago I spent several years clarifying the law in this area, resulting in my representation of the worker in Church's Fried Chicken No. 1040 v. Hansen, 1992-NMCA-115. This case sets the law in New Mexico that is clearly 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, Church's at ¶16. Church's does not allow ex-parte communications without prior notice to the worker or worker's attorney permitting ex parte interviews by an adversarial party which breaches 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 clean the land in this does not confidences." Ashby at, ¶15. Further, Church's quoted Ashby "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

I was also worker's attorney in Gomez v. Nelson Corp., 1995-NMCA-043, in which the court found that ex-parte communication by a nurse case manager, an agent of the employer/insurer, violates Church's. See id. ¶1. Gomez reasoned that, "as an agent of Insurer, (the nurse case manager) 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 that 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, so this proposed change can only be seen as an assault on Church's and Gomez.

The courts have already stated 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. In my cases I do not normally agree to a nurse case manager, as they are generally advocating positions at the request of an employer/insurer. The nurse case manager who is gathering information for and at the request of the adjuster (who still has the right to approve and deny care) or to set up appointments is always allowed without our permission. But, 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 . What other purpose would Insurer be paying for? In my experience, the four areas that a nurse case manager seeks concessions from the HCP are:

- 1) Return to work as quickly and with as few restrictions as possible ;
- 2) For maximum medical improvement to be reached as quickly as possible;
- 3) To limit costly tests, procedures or medications.; and/or
- 4) Unfortunately many nurse case managers try to influence causation issues by introducing to the HCP additional "facts" about pre existing conditions or other factors, at the time of the accident, or since, sometimes even giving "legal advice as to what a workers comp Judge would do." Each and everyone of these areas of influence are not of any benefit to the Worker, but to save costs to the Insurer, or perhaps create reasons to deny a claim.

Why the Administration believes an end run to avoid the clear case law of Church's and Gomez or redefine the strong public policy stated in these cases is not justified, nor needed, is not stated.

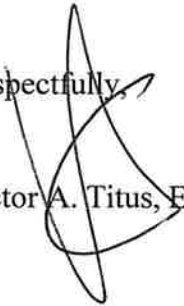
The case law still allows the worker and her or his counsel to be present during any conversations can be helpful to the worker and protect the worker's right to privacy, protect the sanctity of the physician-patient relationship, protect the trust in faith needed between a patient and their doctor, and make sure that the nurse case manager's request for information is reasonable. No rule should be adopted to overrule these cases which set clear public policy.

Conclusion

I agree with the public comment filed, and strongly agree with the comments made by George Weeth and Michael Doyle both who have dedicated most of their life to representing thousands of injured workers in New Mexico. All three point out the flaws in the proposed rules. As of my last check on 3-17-26 before the 5 PM deadline for comment, no comments in support of these proposed rules were submitted. With no support, why does the WCA propose a solution without a problem? And with no argument how these proposed rules address a problem in the system, they should be summarily rejected, even without the conflicts they create with clearly established case law, which rules should not be proposed to over turn the Court decisions. I urge the proposed rules be rejected.

Respectfully,

Victor A. Titus, Esq.

A handwritten signature in black ink, appearing to read "Victor A. Titus, Esq.", written over the typed name.