

# NMAC

## Transmittal Form



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Volume:  Issue:  Publication date:  Number of pages:  (ALD Use Only)  Sequence No.

Issuing agency name and address:  Agency DFA code:

Contact person's name:  Phone number:  E-mail address:

Type of rule action: New  Amendment  Repeal  Emergency  Renumber  (ALD Use) Recent filing date:

Title number:  Title name:

Chapter number:  Chapter name:

Part number:  Part name:

Amendment description (If filing an amendment):  Amendment's NMAC citation (If filing an amendment):

Are there any materials incorporated by reference? Yes  No  Please list attachments or Internet sites if applicable.

If materials are attached, has copyright permission been received? Yes  No  Public domain

### Specific statutory or other authority authorizing rulemaking:

Notice date(s):  Hearing date(s):  Rule adoption date:  Rule effective date:

# Concise Explanatory Statement For Rulemaking Adoption:

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## Findings required for rulemaking adoption:

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### Findings MUST include:

- Reasons for adopting rule, including any findings otherwise required by law of the agency, and a summary of any independent analysis done by the agency;
- Reasons for any change between the published proposed rule and the final rule; and
- Reasons for not accepting substantive arguments made through public comment.

See concise explanatory statement attached.

Issuing authority (If delegated, authority letter must be on file with ALD):

Name:

Check if authority has been delegated

Title:

Signature: (BLACK ink only OR Digital Signature)

*Heather Jordan*  
Heather Jordan (Mar 25, 2026 10:49:35 MDT)

Date signed:

3/25/26  
Mar 25 2026



State of New Mexico  
**Workers'  
 Compensation  
 Administration**

**Michelle Lujan Grisham**  
 Governor

**Heather Jordan**  
 Director

March 25, 2026

IN RE:

RULEMAKING PROCEEDING FOR THE  
 AMENDMENT OF 11.4.4 NMAC (CLAIMS RESOLUTION)

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**CONCISE EXPLANATORY STATEMENT**

The New Mexico Workers' Compensation Administration (hereinafter the "WCA") hereby adopts rules that amend the WCA's Part 4, 11.4.4.15 - Approval of Attorney Fees and Liens:

(1) WCA's Statutory Authority for Rule Promulgation:

Section 52-5-4 NMSA 1978 authorizes the director of the WCA to adopt reasonable rules and regulations for effecting the purposes of the Workers' Compensation Act.

(2) Effective Date of Rule:

April 7, 2026

(3) Date of Adoption of Rule:

March 25, 2026

(4) Date of Meeting Approving Rule:

A public comment hearing concerning the proposed rule was held on February 27, 2026. Otherwise, no meeting was held to adopt the rule as such a meeting is not required.

(5) Reasons for Adopting Rule:

The purposes of the amendment to Part 4, 11.4.4.15 - Approval of Attorney Fees and Liens, are as follows:

To prescribe with greater particularity by agency rule the elements required to be pled in an attorney fee petition, which is pursued on behalf of a worker, when the fee amount sought is contested or equal to or greater than the statutory attorney fee cap (\$30,000 currently). The rule amendment increases protection for an injured worker at the point of an attorney fee award while also providing a workers'

compensation judge with a stronger record upon which to exercise judicial discretion when awarding a reasonable attorney fee.

The current rule states that contested applications for attorney's fees "should" include the date and terms of any settlement offers; the present value of benefits awarded the worker including medical expenses and past and future weekly benefits; the total number of hours reasonably expended by counsel to secure benefits for the worker; the worker attorney's billing rate; and "any other relevant information."

The amendment rewrites, reorganizes and adds more precise language to require an attorney to plead specific factors in support of an application for attorney's fees when the fee application is (1) contested, (2) seeks an award equal to or greater than the statutory attorney fee cap (\$30,000 currently), or (3) the worker's compensation judge otherwise orders. Each case is different and the pleading requirement must include a substantive discussion of the delineated factors relevant to that particular case unless otherwise required by the judge. In case of an appeal of the attorney fee award, the more particularized pleading requirements will aid the appellate court in its review of the attorney fee award.

The delineated factors in the amended rule substantially tract what is commonly known as the "Fryar" factors prescribed in *Fryar v. Johnsen*, 93 N.M. 485 (1979). The factors listed in the amended rule will provide better guidance to the parties and judges and provide greater protection to the worker when the fee petition is contested or seeks an award equal to or greater than the statutory fee cap.

In *Hanrahan v. State of New Mexico, Human Service Department and Risk Management Division*, 2025-NMSC-044, the New Mexico Supreme Court opened the door to a gross attorney fee award in favor of a worker that exceeds the single statutory attorney fee cap. The WCA believes that, in light of this decision, more particularized pleadings requirements were necessary.

(6) Reasons for Changes from Published Rule:

Of its own accord, the WCA revised a portion of 11.4.4.15(A). The original published rule read: "All contested applications and any petition seeking an attorney fee equal to or greater than the attorney fee cap . . ." The final amended rule will read: "All contested and any other applications which seek an attorney fee equal to or greater than the attorney fee cap . . ." This change was made for the sake of clarity and grammar.

**After receiving public comments, the WCA made three changes:**

(1) Reinserting the following language from the current rule: "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 amendment as originally published deleted this language. The change from the

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published rule draft reinserts this language as part of the larger itemized list of factors that should be pled (as relevant to the case) in support of a fee petition. The WCA in short agreed with the public comment which argued that this language should be included in the rule amendment.

(2) Deleting from the published rule draft the following language which was to be a pleading element: “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.” While this language came from the *Fryar* case itself, the WCA agrees with the public comment that this factor places an undue burden and could generate unnecessary litigation and delay. Of note, the amended rule includes a “catch all” provision permitting the fee petition to address “any other relevant information for the determination of the attorney fee award in question.” Thus, if a party seeks to address this specific *Fryar* factor, nothing in the amended rule will prevent its discussion by a party or so ordered by the WCJ.

(3) Revising the final clause of the amendment. The original language of the amendment read:

- “include as applicable a supporting discussion of the statutory requirements and the following factors.”

The revised final rule will read:

- “include a supporting discussion of statutory requirements, and the following factors as applicable to the application:”

This revision is to reflect that any discussion of statutory requirements is required in all applications to the extent a statute, *e.g.*, §52-1-54 NMSA 1978, mandates what must be pled. As changed, the phrase “as applicable” refers to the factors listed in 11.4.4.15(A)(1)-(12). The WCA is not intending by rule to contradict statutory requirements but supplement same with a required discussion of the enumerated factors, if those factors are applicable in support of the fee petition. Again, the workers’ compensation judge (WCJ) has discretion to order further briefing on a fee petition if warranted.

(7) Reasons for Not Accepting Substantive Arguments from Public Comment:

The WCA received comments opposing the amendment for the following reasons:

Comment: The amendments are unnecessary because case law already provides the factors a WCJ should consider so including them in the rule is unnecessary. Similarly, adding additional factors that should be pled is unnecessary because the current rule already instructs attorneys to “include any other relevant information for the determination of fees.”

WCA Response: The WCA as noted believed a rule amendment was necessary considering the New Mexico Supreme Court’s decision in the *Hanrahan* case cited above. With the potential now existing for larger fee awards beyond a single statutory

cap (*i.e.*, in excess of the current \$30,000 cap), the WCA believed greater protections for the worker were needed not to mention creating a better record for a WCJ to make the fee award. The more particularized pleading requirement in the amended rule will ensure over time greater uniformity and consistency of attorney fee awards on behalf of the worker. In short, the WCA is seeking to create a stronger pleading baseline in contested and “fee cap” cases by strengthening its attorney fee pleading rule. Further, rules promulgated by the WCA must be “definite and certain so the parties know what is expected of them.” *Rodriguez v. El Paso Elec. Co.*, 113 N.M. 672, 675. Including a more detailed list of factors in the rules, even if repetitive of pertinent case law, accomplishes this purpose.

Comment: Not all the factors in the amended rule will apply in every case.

WCA Response: The amended rule does not require an application to address all of the enumerated factors in the amended rule. Rather, the language requires an application to include a discussion of the factors “as applicable.” This language recognizes that not all factors are relevant to each case. Further, a WCJ will have discretion to order further pleading in support of a fee petition that is not adequately pled initially.

Comment: The proposed inclusion of 11.4.4.15(A)(10) regarding consideration of subsequent injuries to justify a fee cap multiple award is unnecessary because it is already required by case law.

WCA Response: The WCA believed it necessary to require a discussion of this factor in a fee petition which seeks a fee beyond the single statutory cap considering the *Hanrahan* case discussed above. Now that a fee petition might seek an attorney fee award equal to or in excess of a single attorney fee cap, it is reasonable for the petitioning attorney to submit a pleading with a particularized discussion of why a “fee cap” or fee award beyond the statutory cap is warranted.

Comment: WCJs should be free to use their discretion and not be constrained by the factors in the amended rule.

WCA Response: The amended rule does not constrain a WCJ’s discretion when making an award of a reasonable attorney fee. In any specific case, it will be up to the WCJ to determine: whether the attorney fee petition is adequately supported; what factors are relevant in support of the attorney fee awarded; and the amount of the attorney fee to be awarded.

Comment: The rule interprets case law, which is the judiciary’s exclusive function. The comment cites to *Pub. Serv. Co. of N.M. Pub. Serv. Comm’n*, 112 N.M. 379, 382-83, 815 P.2d 1169, 1172-73, for this proposition.

WCA Response: The cited case is distinguishable and fails to account for the New Mexico Supreme Court’s more recent recognition of the WCA’s authority to control the content of pleadings in proceedings before the WCA. See *Pena v. State*, 2025-

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NMSC-041, ¶42 (“[i]n conclusion, we hold that regulation of attorney fees generally falls within the purview of this Court’s inherent powers and power of superintending control, but regulation of attorney fees specifically within the workers’ compensation context does not.”) Moreover, the director has statutory authority to promulgate reasonable rules and regulations for effecting the purposes of the Workers’ Compensation Act. See §52-5-4 NMSA 1978.

Comment: The amendment is contrary to WCA’s purpose to promote the quick and efficient administration of benefits.

WCA Response: The amendment will not interfere with the Act’s intent that the WCA ensure the quick and efficient delivery of indemnity and medical benefits. See §52-5-1 NMSA 1978. Applications for attorney fees and orders on such applications are usually considered separate from awards of indemnity and medical benefits. Further, additional attorney work at the point of an attorney fee award is reasonable given the worker’s interests and the greater amounts of money at now stake. The WCA does not see the rule’s amendment as placing an undue burden on an attorney.

Comment: The term “miserly fees” is subjective whereas fee awards should be based on “an objective evidence-driven analysis.”

WCA Response: The phrase “miserly fees” as a factor in a fee award determination was established by the New Mexico Supreme Court in *Fryar v. Johnsen*. 93 N.M. 485, 488 (1979). The concept of miserly fees has been part of the attorney fee discussion in New Mexico workers’ compensation for years.

The WCA also received the following proposed amendments that it has chosen not to accept:

Proposed amendment: A provision requiring WCJs to approve fees paid to employer/insurer attorneys, not just worker attorneys.

WCA Response: This suggested change would not be authorized by the controlling attorney fee statute. Specifically, a WCJ need only approve fees paid to a worker’s attorney. See 52-1-54(C) NMSA 1978: (“The workers compensation judge shall determine and fix a reasonable fee for the claimant’s attorney.”) If WCJ approval of an attorney fee for an employer/insurer is to be required, it will take a legislative change. Considering that the legislature recently increased the attorney fee cap, the legislature could have further amended section 52-1-54 to require WCJ approval of attorney fees on behalf of the employer/insurer. It did not do so.

Proposed Amendment: Remove the amended language “equal to or greater than” in reference to the attorney fee cap because that phrase implies that an attorney fee award may exceed the statutory cap, which by definition is the maximum allowable amount.

WCA Response: This language is included in the rule amendment to recognize the change in the law regarding fee caps as decided in *Hanrahan v. State*. 2025-NMSC-044, 580 P3d 173, 180 (2025). The *Hanrahan* court held that a “single accidental injury” can include a subsequent injury that is separate from but “flows from a primary workplace injury,” and such subsequent injury would be subject to a separate award with a separate fee cap. *Id.* Based on this, a fee petition post-*Hanrahan* can request a total attorney fee that is greater than the single statutory fee cap. The amendment reflects this development in the law.

Proposed Amendment: Revise the current amended language in 11.4.4.15(A)(10), which currently says “whether the worker suffered a subsequent injury or injuries that flow from the primary workplace injury thereby justifying a fee cap multiple award.” The comment suggests a revision which would say: “The extent to which additional injuries or medical conditions arising from the primary workplace injury increased the complexity, scope, or level of legal work required in the claim.”

WCA Response: The amendment already enumerates as a factor the complexity, novelty and time expended in 11.4.4.15(A)(2) & (4). The WCA does not believe it necessary to adopt the suggested amendment to the proposed rule as the suggested concepts are already enumerated. The WCJ has discretion to require additional briefing in complex fact patterns.

IT IS SO ORDERED.

Heather Jordan

Heather Jordan (Mar 25, 2026 10:49:35 MDT)

Heather Jordan, Director  
New Mexico Workers'  
Compensation Administration

Mar 25, 2026

Date

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# Transmittal Form & CES Combined - Part 4

Final Audit Report

2026-03-25

Created:	2026-03-25
By:	Stephanie Brown-Woods (stephanie.brown-woods@wca.nm.gov)
Status:	Signed
Transaction ID:	CBJCHBCAABAA0a0tA1RoSTJg7BV8XcbOjXfec6BgFrS9

## "Transmittal Form & CES Combined - Part 4" History

-  Document created by Stephanie Brown-Woods (stephanie.brown-woods@wca.nm.gov)  
2026-03-25 - 3:57:29 PM GMT
-  Document emailed to heather.jordan@wca.nm.gov for signature  
2026-03-25 - 3:58:24 PM GMT
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2026-03-25 - 4:48:33 PM GMT
-  Signer heather.jordan@wca.nm.gov entered name at signing as Heather Jordan  
2026-03-25 - 4:49:33 PM GMT
-  Document e-signed by Heather Jordan (heather.jordan@wca.nm.gov)  
Signature Date: 2026-03-25 - 4:49:35 PM GMT - Time Source: server
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2026-03-25 - 4:49:35 PM GMT

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**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] All~~ 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.] and any other applications which seek an attorney fee equal to or greater than the attorney fee cap prescribed by Section 52-1-54 NMSA 1978 or 52-3-47 NMSA 1978, or as the judge may order, shall include a supporting discussion of statutory requirements, and the following factors as applicable to the application:

- (1) the chilling effect of miserly fees upon the ability of an injured worker to obtain adequate representation;
- (2) the time and effort expended by the attorney in the particular case;
- (3) the extent to which the issues were contested;
- (4) the novelty and complexity of the issues involved;
- (5) the fees normally charged in the locality for similar legal services;
- (6) the ability, experience, skill and reputation of the attorney;
- (7) the relative success of the workman in the court proceeding;
- (8) the amount involved;
- (9) the rise in the cost of living;
- (10) whether the worker suffered a subsequent injury or injuries that flowed from the primary workplace injury thereby justifying a fee cap multiple award;
- (11) the date and terms of any offers of settlement made, as well as the present value of the benefits awarded the worker, including but not limited to medical expenses and past and future weekly benefits; and
- (12) any other relevant information for the determination of the attorney fee award in question.

**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, 11.4.4.15 NMAC, 1/1/2023; A, 4/7/2026]