

TITLE 11 – DEPARTMENT OF INSURANCE

Notice is hereby given in accordance with G.S. 150B-21.2 that the Industrial Commission intends to amend the rule cited as 11 NCAC 23G .0104.

Link to agency website pursuant to G.S. 150B-19.1(c): <https://www.ic.nc.gov/proposedpermG104.html>

Proposed Effective Date: January 1, 2023

Public Hearing:

Date: October 17, 2022

Time: 2:00 p.m.

Location: Room 2115 (Utilities Commission Hearing Room), 2nd floor Dobbs Building, 430 N. Salisbury St., Raleigh NC 27603

Reason for Proposed Action: *This proposed rule amendment is necessitated by an anticipated change to the Rules for Mediated Settlement Conferences and other Settlement Procedures in Superior Court Civil Actions with regard to how the attendance method is determined in Superior Court mediations. Paragraph (b) of 11 NCAC 23G .0104, in its current form, is premised on the assumption that the approved method of attendance in the Superior Court division will be either presumptively in-person or presumptively remote. However, the anticipated change to the mediation rules for Superior Court cases will create a framework for determining mediation attendance that allows the parties and mediator to agree on one of three methods of attendance (in-person, remote, or hybrid) in each case and does not presumptively require either in-person attendance or remote attendance as the default method of attendance in all Superior Court mediations. Since G.S. §97-80(c) mandates that the Industrial Commission's mediation rules shall be "substantially similar" to the rules approved by the North Carolina Supreme Court for use in the Superior Court division, and in order to avoid confusion on the part of the regulated public regarding how to interpret Paragraph (b) of Rule 11 NCAC 23G .0104 following the anticipated amendment to the Rules for Mediated Settlement Conferences and other Settlement Procedures in Superior Court Civil Actions, it is necessary for the Industrial Commission to amend its rule as proposed. The proposed rule amendment will provide clarity to the regulated public and will better align the Industrial Commission's mediation rule with the Superior Court mediation rule.*

Comments may be submitted to: Gina Cammarano, 1240 Mail Service Center, Raleigh, NC 27699-1240; phone (919) 807-2524; email gina.cammarano@ic.nc.gov (Emailing written comments to Gina Cammarano is strongly suggested and preferred.)

Comment period ends: November 14, 2022

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 984-236-1850.

Fiscal impact. Does any rule or combination of rules in this notice create an economic impact? Check all that apply.

- State funds affected
- Local funds affected
- Substantial economic impact (\geq \$1,000,000)
- Approved by OSBM
- No fiscal note required

CHAPTER 23 - INDUSTRIAL COMMISSION

SUBCHAPTER 23G – NORTH CAROLINA INDUSTRIAL COMMISSION RULES FOR MEDIATED SETTLEMENT AND NEUTRAL EVALUATION CONFERENCES

SECTION .0100 – MEDIATION AND SETTLEMENT

11 NCAC 23G .0104 DUTIES OF PARTIES, REPRESENTATIVES, AND ATTORNEYS

(a) Attendance. The following persons shall attend the mediated settlement conference:

- (1) all individual parties;
- (2) in a workers' compensation case, a representative of the employer at the time of injury if:
 - (A) the employer, instead of or in addition to the insurance company or administrator, has decision-making authority with respect to settlement;
 - (B) the employer is offering the claimant employment and the suitability of that employment is in issue;
 - (C) the employer and the claimant have agreed to simultaneously mediate non-compensation issues arising from the injury; or

- (D) the Commission orders the employer representative to attend the conference if the representative's attendance is necessary to resolve matters in dispute in the subject action;
- (3) an officer, employee, or agent of any party that is not a natural person or a governmental entity who is not the party's outside counsel and who has the authority to decide on behalf of the party whether and on what terms to settle the action;
 - (4) in a workers' compensation case, an employee or agent of any party that is a governmental entity who is not the party's outside counsel or Attorney General's counsel responsible for the case and who has the authority to decide on behalf of the party and on what terms to settle the action;
 - (5) when the governing law prescribes that the terms of a proposed settlement may be approved only by a Board, an employee or agent who is not the party's outside counsel or Attorney General's counsel responsible for the case and who has the authority to negotiate on behalf of and to make a recommendation to the Board. Pursuant to G.S. 143-295, an employee or agent of the named governmental entity or agency is not required to attend the mediated settlement conference. The Attorney General shall attempt to make an employee or agent of the named governmental entity or agency in a State tort claim available via telecommunication, and mediation shall not be delayed due to the absence or unavailability of the employee or agent of the named governmental entity or agency;
 - (6) the counsels of record. Appearance by counsel does not dispense with or waive the required attendance of the parties listed in Subparagraphs (1) through (4);
 - (7) a representative of each defendant's primary workers' compensation or liability insurance carrier or self-insured that may be obligated to pay all or part of any claim presented in the action. Each carrier or self-insured shall be represented at the conference by an officer, employee, or agent who is not the party's outside counsel and who has the authority to decide on behalf of the carrier or self-insured whether and on what terms to settle the action, or who has been authorized to negotiate on behalf of the carrier or self-insured and can communicate during the conference with persons who have the decision making authority; and
 - (8) by order of the Commission, other representatives of parties, employers, or carriers, who may be obligated to pay all or part of any claim presented in the action and who are not required to attend the conference pursuant to Subparagraphs (1) through (6) of this Paragraph, if the Commission determines that the representative's attendance is necessary for purposes of resolving the matters in dispute in the subject action. Any employer or carrier who may be obligated to pay all or part of any claim presented in the action and who is not required to attend the mediated settlement conference pursuant to Subparagraphs (1) through (6) of this Paragraph or by Commission orders, may attend the conference if the employer or carrier elects to attend. If, during the conference, the mediator determines that the attendance of one or more additional persons is necessary to resolve the matters in dispute in the subject action, the mediator may recess the conference and reconvene the conference at a later date and time to allow the additional person or persons to attend.

(b) Any party or person required to attend a mediated settlement conference shall attend the conference until an agreement is reduced to writing and signed as provided in Paragraph (e) of this Rule, or until an impasse has been declared. ~~"Attendance" shall mean in person attendance whenever the mediation rules approved by the North Carolina Supreme Court that are in effect at the time of the mediation for use in the Superior Court division require in person attendance. During any time that attendance means in person attendance, any party or person, including the mediator, may have the in person attendance requirement excused or modified by agreement of all the parties and persons required to attend the mediation conference, including the mediator, or by order of the Commission in the interests of justice upon motion of a party and notice to all parties and persons required to attend the conference, including the mediator.~~ "Attendance" shall mean attendance using remote technology whenever the mediation rules approved by the North Carolina Supreme Court that are in effect at the time of the mediation for use in the Superior Court division require attendance through the use of remote technology. ~~During any time that attendance means attendance through the use of remote technology, any party or person required to attend the conference, including the mediator, may have the remote technology attendance requirement excused or modified by agreement of all parties and persons required to attend the conference, including the mediator, or by order of the Commission in the interests of justice upon motion of a party and notice to all parties and persons required to attend the conference, including the mediator.~~ The attendance method for Industrial Commission mediations shall be the same as the attendance method set forth in the mediation rules approved by the North Carolina Supreme Court that are in effect at the time of the mediation for use in the Superior Court division. All parties and persons required to attend the conference, including the mediator, shall comply with all public health and safety requirements set forth in the mediation rules approved by the North Carolina Supreme Court that are in effect at the time of the mediation for use in the Superior Court division.

(c) In appropriate cases, the Commission or the mediator, with the consent of the parties, may allow a party or insurance carrier representative who is required to attend a mediated settlement conference in person under this Rule to attend the conference by telephone, conference call, speaker telephone, or videoconferencing; the attending party or representative shall bear all costs of the telephone calls or videoconferencing. In addition, the mediator may communicate directly with the insurance representative with regard to matters discussed in mediation, and the mediator may set a subsequent mediated settlement conference at which all parties and representatives shall attend the mediated settlement conference in person, subject to Paragraph (b) of this Rule. The failure to appear by telephone or videoconferencing in accordance with this Paragraph shall subject the responsible party(ies) or representative(s) to sanctions pursuant to Rule .0105 of this Subchapter.

(d) Notice of Mediation Order. Within seven days after the receipt of an order for a mediated settlement conference, the carrier or self-insured named in the order shall provide a copy of the order to the employer and all other carriers who may be obligated to pay all or part of any claim presented in the workers' compensation case or any related third-party tortfeasor claims, and shall provide the mediator and the other parties in the action with the name, address, and telephone number of all such carriers.

(e) Finalizing Agreement. If an agreement is reached in the mediated settlement conference, the parties shall reduce the agreement to writing, specifying all terms of the agreement that bear on the resolution of the dispute before the Commission, and shall sign the

agreement along with their counsel. The parties may use IC Form MSC8, Mediated Settlement Agreement, or MSC9, Mediated Settlement Agreement – Alternative Form, for this purpose. Execution by counsel of a mediated settlement agreement for an employer or carrier who does not physically attend the mediated settlement conference shall be deemed to be in compliance with this Rule and 11 NCAC 23A .0502. By stipulation of the parties and at the parties' expense, the agreement may be electronically or stenographically recorded. All agreements for payment of compensation shall be submitted for Commission approval in accordance with 11 NCAC 23A .0501 and .0502.

(f) Payment of Mediator's Fee. The mediator's fee shall be paid at the conclusion of the mediated settlement conference, unless otherwise provided by Rule .0107 of this Subchapter, or by agreement with the mediator.

(g) Related Cases. Upon application by any party or person and upon notice to all parties, the Commission may, in the interests of justice, order an attorney of record, party, or representative of an insurance carrier who may be liable for all or any part of a claim pending in a Commission case to attend a mediated settlement conference convened in another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the other pending case consent to the attendance ordered pursuant to this Paragraph. Any disputed issues concerning such an order shall be addressed to the Commission's Dispute Resolution Coordinator. Unless otherwise ordered, any attorney, party, or carrier representative who attends a mediated settlement conference pursuant to this Paragraph shall not be required to pay any of the mediation fees or costs related to that conference. Requests that a party, attorney of record, or insurance carrier representative in a related case attend a mediated settlement conference in a Commission case shall be addressed to the court or agency where the related case is pending, provided that all parties in the Commission case consent to the requested attendance.

History Note: Authority G.S. 97-80; 143-296; 143-300; Rule 4 of Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions; Eff. January 16, 1996; Amended Eff. October 1, 1998; Recodified from 04 NCAC 10A .0616; Amended Eff. July 1, 2014; January 1, 2011; June 1, 2000; Recodified from 04 NCAC 10G .0104 Eff. June 1, 2018; Emergency Amendment Eff. June 16, 2020; Amended Eff. August 1, 2020; Temporary Amendment Eff. August 28, 2020; Amended Eff. March 1, 2021; Amended Eff. January 1, 2023.