STATE OF NORTH CAROLINA

BEFORE THE NORTH CAROLINA INDUSTRIAL COMMISSION

JUNE 25, 2020

PUBLIC HEARING BEFORE THE FULL COMMISSION

REGARDING

PROPOSED TEMPORARY RULEMAKING IN

SUBCHAPTER 11 NCAC 23G .0104
APPEARANCES

COMMISSIONERS:
Philip A. Baddour, III, Chair
Myra L. Griffin, Vice-Chair
Charlton L. Allen, Commissioner
James C. Gillen, Commissioner
Christopher C. Loutit, Commissioner
Kenneth L. Goodman, Commissioner

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Full Commission Public Hearing, June 25, 2020

PROCEEDINGS

CHAIR BADDOUR: Good afternoon. We are on the record. Today is June 25th, 2020, and it is 2:03 PM. I’m Philip Baddour, Chair of the North Carolina Industrial Commission. In compliance with the requirements of Chapter 138A-15(e) of the State Government Ethics Act, I remind all members of the Commission of their duty to avoid conflicts of interest under Chapter 138A. I also inquire - I also inquire as to whether there’s any known conflict of interest in the matter coming before the Commission at this time. Hearing none, we will proceed. This is an Industrial Commission public - this is an Industrial Commission public hearing on proposed temporary rulemaking. Today’s public hearing is being held via teleconference only, due to the COVID-19 pandemic and in light of public health and safety concerns. The purpose of this hearing is to receive comments from the public regarding the proposed temporary amendment of one rule as published on the Office of Administrative Hearings’ website on June 8, 2020. Our written comment period began June 15th, 2020, and continues to be open through the close of business on July 8th, 2020. I would ask each of the other Commissioners to please identify himself or herself by
name beginning with Vice-Chair Griffin, and then proceeding to Commissioner Allen, Commissioner Loutit, Commissioner Goodman and Commissioner Gillen.

VICE-CHAIR GRIFFIN: Good afternoon, Vice-Chair Myra Griffin.

COMMISSIONER ALLEN: Good afternoon. This is Commissioner Charlton Allen appearing by telephone.

COMMISSIONER LOUTIT: Good afternoon, it’s Commissioner Christopher Loutit.

COMMISSIONER GOODMAN: Good afternoon, it’s Commissioner Kenneth Goodman.

COMMISSIONER GILLEN: Commissioner Jim Gillen is present.

CHAIR BADDOUR: Thank you. The first speaker at today’s public hearing will be Gina Cammarano, followed by any other members of the public who wish to speak.

GINA CAMMARANO

CHAIR BADDOUR: Will you please state your name, position and for whom you work?

MS. CAMMARANO: Yes. My name is Gina Cammarano. I’m the rulemaking coordinator for the North Carolina Industrial Commission.

CHAIR BADDOUR: Do you have any prepared exhibits that you would like to place into the record?
MS. CAMMARANO: Yes. I have Exhibit 1, which is a copy of the notice of proposed temporary rulemaking and the proposed text of the rule that’s the subject of this proposed rulemaking as published on the Office of Administrative Hearings’ website on June 12th, 2020, and this is the only exhibit that I’d ask be attached to the transcript today. I do want to mention, on our agenda it also mentions the written comments, and in the past, we have attached written comments received before the public hearing to the public hearing transcript. However, there’s no requirement to do so under the Administrative Procedure Act and because some of the written comments contain personal medical information, we will not be attaching an exhibit of the written comments to this hearing transcript, nor will we be publishing any written comments at a later date on the website.

(Exhibit Number 1 is identified for the record and admitted.)

CHAIR BADDOUR: Thank you. Would you please state the rule that would be affected by the proposed temporary rulemaking, give us some - give us a brief background of the rule, state the purpose of the proposed temporary rule amendment, and state any timeline that would be relevant.
MS. CAMMARANO: Yes. So we have one rule for amendment under temporary rulemaking, and this is Rule 11 NCAC 23G .0104, and temporary rulemaking was initiated under the North Carolina Administrative Procedure Act simultaneous with emergency rulemaking that also was initiated under the APA. And just to give some history on the emergency rule, it was approved by the Codifier of Rules effective June 16th, 2020, and it will be published in the July 1st, 2020 Edition of the North Carolina Register. Since the emergency rule will be published in the July 1st, 2020 North Carolina Register, July 1st, 2020, starts a sixty-day count under the APA for the Industrial Commission to submit an adopted temporary rule to replace the emergency rule. So - and the reason for this proposed temporary rulemaking is - is twofold. So first, we have a recent court order of the North Carolina Supreme Court, namely, the Order amending the Rules for Mediated Settlement Conferences and other settlement procedures and Superior Court civil actions. That was ordered by the court in conference on June 3rd, 2020, and this Order amended Rule 4(a)(2) of the Superior Court mediation rule as effective June 10th, 2020, and it made remote mediation the default method of mediation in Superior Court cases.
And under the North Carolina Workers’ Comp Act, specifically G.S. 97-80(c), the Industrial Commission’s mediation rules must be substantially similar to the rules approved by the Supreme Court for use in the Superior Court division. So - and if we had just approached this rulemaking under the normal, permanent rulemaking procedures of the APA, we would have had a very long period of time where the Commission’s mediation rule would not be in compliance with the statute because it would not be substantially similar to the Superior Court mediation rule in terms of the default method by which mediations are conducted. And then, second, we have a serious and unforeseen threat to the public health, safety or welfare, namely the COVID-19 pandemic and how that affects the safety of the participants in workers’ comp mediations that are held in person. In-person mediations are generally held inside offices where air does not circulate freely, where there’s not adequate space to stay six feet apart. They also often require the attendance of people who fall into high-risk categories for complications from COVID-19, and some mediations do have more than ten participants. For example, mediations of cases with multiple defendants. And mediators often do two mediations a day, five days
a week, and the nature of their job requires close and
prolonged contact with the other mediation
participants, which could end up, you know, turning
them into sort of super-spreaders, so to speak, if
they’re exposed to and contract COVID-19. So those
were the two reasons for which we undertook temporary
rulemaking under the APA. And then finally, with
regard to relevant timelines and APA requirements, the
Commission has followed the temporary rulemaking
procedures of the APA in proposing this rulemaking.
The proposed temporary rule for amendment was filed
with the Office of Administrative Hearings on June 8th,
2020. This proposed temporary rule for amendment also
was published on the Industrial Commission’s website
on June 8th, 2020, and it was emailed to the Industrial
Commission Rules Listserv on June 8th, 2020. And I
hope I - did I say 18th or 8th, Terry?

CHAIR BADDOUR: Well, he’s just recording. I
don’t know that he can replay---

MS. CAMMARANO: Okay. Well anyway, just in case I
said 18th in one of those dates, the proposed rule for
amendment was filed with the Office of Administrative
Hearings, published on the Industrial Commission’s
website and emailed to the Rules Listserv all on
June 8th, 2020. And then the proposed temporary rule
for amendment was published on the OAH website on June 12th, 2020. The public written comment period for this rule began on June 15th, 2020, and ends July 8, 2020, and that – that’s all I have, unless you have any more questions for me.

CHAIR BADDOUR: All right. Thank you. I don’t have any. Let me see if any members of the Commission have any questions for Ms. Cammarano. All right. Hearing none, thank you very much.

(SPEAKER DISMISSED)

CHAIR BADDOUR: We’ll now hear from members of the public who wish to address the Commission. It’s my understanding that we have at least one member of the public, Virginia Adams, who’s a mediator from Raleigh and who has asked to speak. I’ll let Ms. Adams be first today because she’s informed us that she has a mediation that was scheduled to start at 2:00 PM, but she’s arranged with the parties to start a little later to give her time to speak at today’s public hearing. So, Ms. Adams, thank you for – for making time to be with us today.

VIRGINIA ADAMS

CHAIR BADDOUR: If you could, just state your name, tell us your profession and your employer. We have received your written comments, so you don’t need
to submit that today, but if there’s anything else you want to submit today, such as a summary of your remarks to be included in the transcript, just let us know. Otherwise, the Commission is happy to hear from you at this time, Ms. Adams.

MS. ADAMS: Thank you. Thank you, Chairman. Yeah. I’m Virginia Adams, some of y’all may know me as Ginger. Sorry for any confusion that may raise. I am a mediator, like – like it was said, here in Raleigh, and I’ve been doing mediation since 1999. Before that, I was a defense attorney but I’m self-employed at this point. One of the reasons that I have been asked to be involved in this is to kind of share what has happened in some of my mediations since we’ve had to go under COVID, and it particularly happened in June. I had the unfortunate situation where I had to encounter two plaintiffs who were to be in my mediation, suffer from COVID-19. One was a twenty-year-old male who was told his sister had brought it home to the house and infected the entire family. The day before the mediation, his attorney had told me that he felt fine enough to participate in the mediation but then the next day when it was actually time to do so, he was too sick to participate. Obviously, we did not go forward. My
concern is with individuals like this, had he shown up, who knows how much exposure all of us could have had, particularly with him being young and twenty and that age group can often, as we all know, not exhibit symptoms. Then we had another one with a forty-two-year-old CNA who worked in an Alzheimer’s unit, she contracted COVID-19 and died. They tried to actually settle the case prior to our scheduled mediation, not because of the COVID-19 infection, but to you know - that happens in - in the world that I live in, people try to be as judicious as possible with everyone’s time. Before the agreement could be signed, she passed away, and that was just a shock to everyone as to how fast and furious this came on. Which, again, had we been in public and we were (unintelligible) during times where we could have gone public, we could have all been exposed unknowingly. Furthermore, as we’re going into where we’re supposed to all be wearing masks more, I am Zooming quite frequently. I – I’ve done over seventy, eighty Zoom mediations, I have found them to be - be surprisingly effective. Only one I can say probably did not settle because we were on Zoom. I am noticing people are trying to wear masks but they’re not wearing them correctly. I have seen plaintiffs’ attorneys in the
room with their clients. Their clients don’t wear them, refuse to wear them, and the plaintiff’s attorney has been forced to be in the same room with— So I do think we have a situation with politicizing the whole situation. As a neutral, I don’t – I am concerned with seeing plaintiffs in the situation where I have to navigate and enforce public health measures to an extent where I think it could actually affect the neutrality and our effectiveness. I don’t believe – I will say – I have found attorneys share with me how much they need a rule in place. One attorney shared with me a situation where someone who is not involved in workers’ comp or was a liability attorney refused to allow it to be remote, and they didn’t have a rule to fall back on, and so they were forced to participate in person despite their best judgment. And they are really – they wanted me to share with you with the hope that they could have a rule they could fall back on. I know of a defense attorney who has unfortunately tested positive for COVID-19, and I know of a – of another law firm who’s had staff test positive and have to shut down. So with those comments, I would say and respectively request that the Commission adopt the temporary rule. I am
grateful that it only will be temporary, placing remote as the default and allowing for in-person, should everybody agree. So that’s about all I have to add, unless anyone has any questions for me.

CHAIR BADDOUR: All right. Let me see if any of the Commissioners – for you. All right. If not, Ms. Adams, thank you for your input, and we’ll – we’ll consider your comments. We appreciate you---

MS. ADAMS: Thank you very much.

CHAIR BADDOUR: All right. Thank you.

(SPEAKER DISMISSED)

CHAIR BADDOUR: Are there any other members of the public who wish to address the Commission? All right. Seeing none, I want to thank everyone for participating in this public hearing. The period for written comments will be held open through the close of business on July 8, 2020. So if you have further comments, please send them to Gina Cammarano as directed in the hearing notice published on the OAH website and on the Commission website. Email is the preferred method of communication. The hearing is now adjourned. The time is 2:17 PM. Thank you very much for – for coming today. Let’s go off the record.

(WHEREUPON, THE HEARING WAS ADJOURNED.)

RECORDED BY MACHINE
STATE OF NORTH CAROLINA
COUNTY OF GUILFORD

CERTIFICATE

I, Kelly K. Patterson, Notary Public, in and for the State of North Carolina, County of Guilford, do hereby certify that the foregoing twelve (12) pages prepared under my supervision are a true and accurate transcription of the testimony of this trial which was recorded by Graham Erlacher & Associates.

I further certify that I have no financial interest in the outcome of this action. Nor am I a relative, employee, attorney or counsel for any of the parties.

WITNESS my Hand and Seal on this 1st day of July 2020.

My commission expires on December 3, 2023.

__________________________
Kelly K. Patterson
NOTARY PUBLIC

Graham Erlacher & Associates
3504 Vest Mill Road - Suite 22
Winston-Salem, North Carolina 27103
336/728-1152
Note from the Codifier: The OAH website includes notices and the text of proposed temporary rules as required by G.S. 150B-21.1(a1). Prior to the agency adopting the temporary rule, the agency must hold a public hearing no less than five days after the rule and notice have been published and must accept comments for at least 15 business days. For questions, you may contact the Office of Administrative Hearings at 984-236-1850 or email oah.postmaster@oah.nc.gov.

TITLE 11 – DEPARTMENT OF INSURANCE

Notice is hereby given in accordance with G.S. 150B-21.1 that the Industrial Commission intends to amend the rule cited as 11 NCAC 23G .0104.

Codifier of Rules approved this rule as an emergency rule effective June 16, 2020 and received for publication the following notice and proposed temporary rule on June 8, 2020.

Public Hearing:
Date: Thursday, June 25, 2020
Time: 2:00 p.m.
Location: By Teleconference Only. Teleconference Line #: 1-888-363-4735; Access Code#: 4465746

Reason for Proposed Temporary Action: A serious and unforeseen threat to the public health, safety, or welfare; a recent court order: North Carolina Supreme Court Order Amending the Rules for Mediated Settlement Conferences and other Settlement Procedures in Superior Court Civil Actions ordered by the Court in Conference on June 3, 2020. Adhering to the notice and hearing requirements in G.S. 150B-21.2 would result in a very long period of time where stakeholders in the workers’ compensation system will be at risk for having to participate in-person at a mediation under circumstances that put them at risk for contracting and spreading COVID-19. Mediators could become “super spreaders” because many do two mediations a day, five days a week and the nature of their job requires close and prolonged contact with the other mediation participants inside offices where air does not circulate freely and where there is not adequate space to stay 6 feet apart. Mediations also often require the attendance of people who fall into a high-risk category for complications from COVID-19, and some mediations have more than 10 participants. For these reasons, amendment of the rule under temporary action is required by a serious and unforeseen threat to the public health, safety, or welfare. Adhering to the notice and hearing requirements in G.S. 150B-21.2 also would result in a significant period of time where the Commission’s mediation rule is not in compliance with the statute (G.S. 97-80(c)) because it will not be “substantially similar” to Rule 4(a)(2) of the Rules for Mediated Settlement Conferences and other Settlement Procedures in Superior Court Civil Actions, which was amended by Order dated June 3, 2020.

Comment Procedures: Comments from the public shall be directed to: Gina Cammarano, 1240 Mail Service Center, Raleigh, NC 27699-1240; phone 919-807-2524; email gina.cammarano@ic.nc.gov. The comment period begins June 15, 2020 and ends July 8, 2020. NOTE: It is strongly encouraged to submit written comments via email to Gina Cammarano at gina.cammarano@ic.nc.gov.

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 physically 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 physical 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 such party's outside counsel and who has the authority to decide on behalf of such 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 such party's outside counsel or Attorney General's counsel responsible for the case and who has the authority to decide on behalf of such 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 such 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. Because G.S. 143-295
provides the Attorney General with settlement authority on behalf of governmental entities and agencies for state tort
claims, 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; provided, that 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 attorney of record who is not such 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 such carrier or self-insured and can communicate during the conference with
persons who have such 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 Rule, 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 physically attend the
mediated settlement conference pursuant to Subparagraphs (1) through (6) of this Rule 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 physical 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 physically attend.

(b) Any party or person required to attend a mediated settlement conference shall physically attend the conference until an agreement
is reduced to writing and signed as provided in Paragraph (f) of this Rule, or until an impasse has been declared. Attendance shall mean
physical in-person attendance whenever the mediation rules approved by the North Carolina Supreme Court that are in effect, either
temporarily or permanently, for use in the Superior Court division require physical in-person attendance. During any time that attendance
means physical in-person attendance, any Any such party or person, including the mediator, may have the physical in-person
attendance requirement excused or modified by agreement of all parties and persons, including the mediator, required to attend
the conference, or by order of the Commission 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 par-

(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 physically attend a mediated settlement conference under this Rule to attend the conference by
telephone, conference call, speaker telephone or videoconferencing; provided that, the party or representative so attending shall bear all
costs of such telephone calls or videoconferencing, 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 physically attend. The failure to properly 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 that may be 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 in which the related case is pending, provided that all parties in the Commission case consent to the requested attendance.

Authority G.S. 97-80(a),(c); 143-295; 143-296; 143-300; Rule 4 of Rules Implementing Statewide Mediated Settlement Conference in Superior Court Civil Actions;