STATE OF NORTH CAROLINA

BEFORE THE NORTH CAROLINA INDUSTRIAL COMMISSION

DECEMBER 10, 2020

PUBLIC HEARING BEFORE THE FULL COMMISSION

REGARDING

PROPOSED PERMANENT RULEMAKING IN

SUBCHAPTER 11 NCAC 23A, 11 NCAC 23B, AND NCAC 23G

AND

PROPOSED TEMPORARY RULEMAKING IN

SUBCHAPER 11 NCAC 23 E

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A P P E A R A N C E S

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

I N D E X

E X H I B I T S

(Note: Due to the hearing being recorded remotely, audio quality may be affected.)

P R O C E E D I N G S

CHAIR BADDOUR: All right. Good afternoon. We are on the record. Today is December 10th, 2020 and it is 2:00 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 conflict of interest under Chapter 138A. And I'll also inquire as to whether there's any known conflict of interest to the matter coming before the Commission at this time. Hearing none, we will proceed. This is the North Carolina Industrial Commission public hearing on proposed permanent and 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 permanent amendment of three rules as published in the November 2nd, 2020 *North Carolina Register* and a proposed temporary new rule as published on the Office of Administrative Hearings' website on November 3rd, 2020. A written comment

period for the three proposed permanent rule amendments continues to be open through the close of business on January 4th, 2021. Our written comment period for the proposed temporary new rule continues to be open through the close of business tomorrow, December 11th, 2020. Please – please note that sending an email to Gina Cammarano, Rulemaking Coordinator, is a preferred method of submitting written comments to the Commission. I would ask that each of the other Commissioners please identify himself or herself by name beginning with Vice-Chair Griffin and followed by Commissioner Allen, Commissioner Loutit, Commissioner Goodman and Commissioner Gillen.

VICE-CHAIR GRIFFIN: Myra Griffin appearing via telephone.

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

COMMISSIONER LOUTIT: This is Commissioner Christopher Loutit appearing via telephone.

COMMISSIONER GOODMAN: This is Commissioner Kenneth Goodman appearing via telephone.

COMMISSIONER GILLEN: Commissioner Gillen appearing via telephone.

CHAIR BADDOUR: Thank you all. The first speaker at today's public hearing will be Gina Cammarano,

followed by any members of the public who wish to speak.

GINA CAMMARANO

CHAIR BADDOUR: Ms. Cammarano, if you could 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: And do you have any exhibits that you would like to place in the record of today's public hearing?

MS. CAMMARANO: Yes, I do. I have four exhibits. So the first is Exhibit 1 and that's a copy of the notice of text of three proposed permanent rule amendments published in the November 2nd, 2020 *North Carolina Register*. Next, I have Exhibit 2 which is a copy of the approved fiscal note for 11 NCAC 23A.0109 and 11 NCAC 23B.0105. Then I have Exhibit 3 which is a copy of the approved fiscal note for 11 NCAC 23G.0104. And finally, I have Exhibit 4 which is a copy of the notice of proposed temporary rulemaking and proposed text of the temporary rule published on the OAH website on November 3rd of 2020.

(Exhibit Numbers 1 through 4 are identified for the record and

admitted.)

CHAIR BADDOUR: All right. Thank you, Ms. Cammarano. Would you please give us a brief overview of the proposed rulemaking and any other information that you deem to be relevant?

MS. CAMMARANO: Sure. So starting with the permanent rules, the rules affected by the proposed permanent rulemaking are three. Number 1, 11 NCAC 23A.0109, 11 NCAC 23B.0105 and 11 NCAC 23G.0104. And the first of these two rules has to do with contact information provided to the Commission by the parties. And the rules are being amended to help further streamline the provision of contact information by the parties to the Commission to make it easier for the Commission to be able to reach the parties, if needed. Then a third rule that's being proposed for a permanent amendment is the mediation rule that was amended initially under emergency rulemaking procedures. And then under temporary rulemaking procedures, in response to the public health and safety concerns associated with the COVID-19 pandemic and in response to the fact that the Supreme Court rules for use in Superior Court mediations were amended in June of this year to make remote mediations the default manner of mediations due

to the pandemic, and the fact that our statute says that our mediation rules have to be substantially similar to the Superior Court rules. So this permanent mediation rule change essentially provides that whenever remote attendance is the default manner of attention – attendance in Superior Court cases, then remote is the default manner of attendance in our cases. And then whenever in-person attendance is the default manner of attendance in Superior Court cases, then in-person would be the default manner of attendance in our cases. And then we have one new rule proposed under temporary rulemaking. And this rule is Rule 11 NCAC 23E.0302, and this is a new rule in our administrative rules. And the temporary rulemaking was initiated under the North Carolina Administrative Procedure Act simultaneous with emergency rulemaking that was also initiated under the APA. And the emergency rule is approved by the Codifier of Rules and went into effect November 6th, 2020 and remains in effect at this time. And the reason for this rulemaking is that we have a recent order of the Chief Justice of the North Carolina Supreme Court which extends emergency directives, including Emergency Directive 5, which allows affirmations and representations that are not attested

to before a notary public so long as the subscriber affirms the truth of the matter to be verified in specific language that's set forth by the Chief Justice. And, you know, we wanted to make sure that we, the Industrial Commission, can accept affirmations and representations not attested to before a notary public so long as they're verified in substantially the same language as that allowed by the emergency directive during any period of time that the emergency directive is in effect. And because some of our rules, as well as the Rules of Appellate Procedure which are invoked in some of our cases that are under our jurisdiction require affidavits, you know, we wanted to make sure we could do this. And then we also included in this rule the ability to waive or vary the requirements of our rules if they're not in conformity with an existing emergency order or directive of the Chief Justice of the North Carolina Supreme Court. So this proposed rule allows us to do that on our own motion in all cases within our jurisdiction. And then finally, just – I'll briefly go through the relevant timelines and APA requirements, which we met. For the permanent rulemaking, we – the proposed rules for permanent amendment were filed with a notice of text of the

Office of Administrative Hearings on October 5th of 2020. They were published in the November 2nd, 2020 issue of the *North Carolina Register*. And on that same date, November 2nd, 2020, we published a notice of this proposed rulemaking on our website with a link to the proposed rules and physical notes, and we also emailed a notice of this proposed permanent rulemaking with the proposed rules of fiscal notes to the I.C. Rules Listserv, and copies of the proposed permanent rule amendments and physical notes also were provided to the North Carolina League of Municipalities, the North Carolina Association of County Commissioners, and the Fiscal Research Division of the General Assembly. And, as you said, the public written comment period for the proposed permanent rule amendments began on November 2nd, 2020 and ends January 4th, 2021. And then for the temporary rulemaking, we filed the temporary rulemaking procedures of the APA. The proposed temporary rule was filed with OAH on October 28th, 2020. The proposed temporary rule was published on our website on that same date, October 28th, 2020, and also emailed to our Rules Listserv on October 28th, 2020. And then the proposed temporary rule was published on the OAH website on November 3rd, 2020, and the public written

comment period for this temporary rule began on October 28th, 2020 and ends tomorrow, December 11th, 2020.

CHAIR BADDOUR: All right. Thank you, Ms. Cammarano. Do any members of the Commission have questions for Ms. Cammarano? Hearing none, we'll now hear from any members of the public who wish to address the Commission.

(SPEAKER DISMISSED)

CHAIR BADDOUR: I understand that Joey Barnes is present and wishes to – to speak. Is there anyone else that wishes to speak after Mr. Barnes? All right. Mr. Barnes, let me just ask you. Are you speaking on your own behalf or are you – are you representing any organization today?

MR. BARNES: I'm speaking on my own behalf.

CHAIR BADDOUR: Okay. All right. Well thank you. I'm glad you're with us and you'll – you'll have five minutes to address the Commission and we'll hear from you whenever you're ready.

MR. BARNES: Okay. Thanks. I appreciate it.

JOEY BARNES

MR. BARNES: Good afternoon. I appreciate you guys letting me – letting me speak. What I wanted to share with the Industrial Commission is the

information that I've garnered from the attorneys and participants with whom I've mediated over the past ten months, information that I think is relevant about the potential rule change and the COVID situation in general, and I'll – I'll try to be quick. I spoke at a CLE last Friday – well here I said I was going to be quick and I started off with a story – the - and the last thing that – the first thing that I said was, "My, how things have changed." I was a Deputy Commissioner over a quarter of a century ago and I remember when we got a fax machine and that machine just chugged and chugged away, like all day long. It could barely catch its electronic breath and now we've moved on to Zoom and - and WebEx. So I guess I think the rule change is a good idea because it gives us the flexibility to remain substantially similar to the Supreme Court rule. And - and I wanted to mention locally, here in Mecklenburg County, that our Chief District Court Judge Elizabeth Trosch was diagnosed this week with COVID and it has affected some court cases currently pending in Mecklenburg County. And also, our police chief just tested positive as well. They were on a trip together to Wilmington with our district attorney about a meeting in – just to go to a meeting about initiative, to learn about impacts of

childhood exposure to violence and adverse childhood experiences. And also, a fellow mediator defense attorney was diagnosed a couple of weeks ago with COVID and is doing well, but I know that he had a hard time the first – the first few days of his illness, that - he got it from one of his partners at a partners' meeting and they were socially distanced and had masks on. I believe that that partner gave it – got it from a district court judge in Gaston County. So despite the fact that everybody was masked and socially distanced, all the partners, unfortunately, became positive with COVID. So it kind of seems like when we try to take a step forward, you know, we get kicked back. I just believe that as a society when – when we can, that we need to take the opportunity to continue to move forward against the spread of this disease. And, fortunately, we do have a way to do that here, to conduct mediations remotely until it's safe to return to in-person mediations and trust me, I really want in-person back as the main option. I think all of the mediators do. I mean, we're basically people-persons who are missing the in-person contact and are really tired of staring at our computers all day long, but the safety of all mediation participants certainly trumps that and most

- all the other facts as well. While we look – all look forward to the opportunity to be back mediating in person, it just makes sense to do that when it's – it's safe, especially in light of the fact that we have a tool that is working so well, the Zoom. So what I can contribute today is the information that I've gleaned just from my own experience with remote mediations and the comments from both defense attorneys and plaintiffs' attorneys that they've made to me, and also the plaintiffs themselves and some employer representatives. As far as the attorneys and participants, I've heard from quite a few as I mediate seventeen (phonetic) cases a week, and the overwhelming consensus is that people like mediating remotely under the current circumstances. And while it's not perfect by any means, Zoom is more than acceptable. I've seen plaintiffs be more comfortable when they're in their own environment and when they're at home, which I think actually helps the success rate. And, honestly, from a mediator's standpoint, it give me something else over which to bond with the plaintiff when I can see their homes, their pets, their children, et cetera. Also, I have actually had more employer participation lately because it's so easy for them to pop onto mediation from their office,

in state or out of state, where they might not have been able to attend in person before and they really seem to like that option. The comments that I hear from the attorneys are based just mainly in gratitude that we actually have this opportunity or else we'd kind of be dead in the water with - with mediations. When I'm in private breakout sessions on Zoom, I encourage the parties to – if they want to, to cut their video and audio off when I'm not with them so - when they're not discussing a case. I think the plaintiffs are better if they can get a quick break from the process and catch their breath. And also, some plaintiffs' attorneys have told me that they actually can be more productive this way because they can address things outside of mediation that may come up because they're not having to sit with their clients the entire time. I've also heard various comments from defense attorneys, from they're delighted to not have to travel from Raleigh to Charlotte for mediation, to some attorneys expressing concern they might be losing some billable driving time. The attorneys that like not having to travel have told me that they can use that travel time – some - which I believe is only paid about half the price – to being able to do full-time billable work on many of

the cases that make up their workload. As far as the remote situation affecting me personally on a fiscal level, the lack of billable travel time has shifted to more opportunity to actually mediate. So in terms of income for me, it seems to be about the same, and I honestly feel better about spending more time on the important work of getting cases settled than on traveling. I mean, I do have the cost of DocuSign and Zoom but those costs are minimal and certainly offset by the savings from fuel expenses, and not to mention the benefits of less driving on our roadways and the positive impacts on the environment in general of not traveling. And as far as any impact of the success at mediations, personally, I've not had any decline in settlements because of mediations being conducted remotely, and I've spoken to several other mediators who concur with this. And, honestly, I was a bit surprised by this at first, but the - the numbers really just do speak for themselves. So I'm just really concerned that the epidemic situation is unfortunately getting worse. I'm thankful that there's now a light at the end of the tunnel with this vaccine that was not there six months ago. So just in summary, I guess the bottom line is that I think the rule change is good. It gives us the flexibility to

adapt to move more quickly to what is going on with the pandemic and other things that might come up in the future, and the flexibility for our rules to stay substantially similar to the Supreme Court. It just makes sense. And, also, it allows us to put the health and safety of all mediation participants first, which for me is the number one priority. So thanks for letting me share my information from my personal experience.

CHAIR BADDOUR: Thank you, Mr. Barnes. All right. Commissioners, do you have any questions for Mr. Barnes? All right. If – if not, again, Mr. Barnes for joining us today and for offering your perspective as a mediator. I certainly consider all of your – your comments. Let me just check again. Are there any other members of the public who wish to address the Commission? All right. If – if not, I want to thank everyone for participating in today's public hearing. Again, our written comment period for the three proposed permanent rule amendments continues to be open through the close of business on January 4th, 2021, and our written comment period for the proposed temporary new rule continues to be open through the close of business tomorrow, December 11th, 2020. Written comments should be submitted to

Gina Cammarano by email, if possible. Mr. Dover, please include in the transcript of this public hearing the materials submitted by Ms. Cammarano as Exhibits 1, 2, 3 and 4. The hearing is now adjourned. The time is 2:18. Let's go off the record.

(WHEREUPON, THE HEARING WAS ADJOURNED.)

RECORDED BY MACHINE

TRANSCRIBED BY: Kelly K. Patterson, Graham Erlacher and Associates

STATE OF NORTH CAROLINA

COUNTY OF GUILFORD

C E R T I F I C A T E

I, Kelly K. Patterson, Notary Public, in and for the State of North Carolina, County of Guilford, do hereby certify that the foregoing fifteen (15) 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 17th day of December 2020.

My commission expires on December 3, 2023.

NOTARY PUBLIC

Kelly K. Patterson
Notary Public
Guilford County
North Carolina
My Commission Expires 12/3/2023

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 rules cited as 11 NCAC 23A .0109; 23B .0105; and 23G .0104.*

Link to agency website pursuant to G.S. 150B-19.1(c): *https://www.ic.nc.gov/A109B105G104.html*

Proposed Effective Date: *March 1, 2021*

Public Hearing:
Date: *December 10, 2020*
Time: *2 p.m.*
Location: *Via Teleconference only. Teleconference Line#: 1-888-363-4735; Access Code#: 4465746*

Reason for Proposed Action: *The Industrial Commission (hereinafter "Commission") has deemed it necessary to permanently amend the rules cited as 11 NCAC 23A .0109 and 11 NCAC 23B.0105 in order to enable the most efficient processing and maintenance of the contact information of the regulated parties who are involved in cases before the Industrial Commission. The Commission has deemed it necessary to permanently amend the rule cited as 11 NCAC 23G .0104 to ensure that this mediation rule of the Commission is "substantially similar" to the mediation rules approved by the North Carolina Supreme Court for use in the Superior Court division, as required by G.S. 97-80(c). Please note that the text in italics in 11 NCAC 23A .0109 and 11 NCAC 23B .0105 is pending approval by the Rules Review Commission at its November 19, 2020 meeting.*

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. Please submit written comments via email to gina.cammarano@ic.nc.gov, if possible.*

Comment period ends: *January 4, 2021*

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 919-431-3000.

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 (>= $1,000,000)**
☒ **Approved by OSBM**
☐ **No fiscal note required**

CHAPTER 23 - INDUSTRIAL COMMISSION

SUBCHAPTER 23A - WORKERS' COMPENSATION RULES

SECTION .0100 – ADMINISTRATION

Note: The text in italics is pending approval by the Rules Review Commission at its November 19, 2020 meeting.

11 NCAC 23A .0109 CONTACT INFORMATION

(a) "Contact information" for purposes of this Rule shall include telephone number, facsimile number, email address, and mailing address.

(b) All attorneys of record with matters before the Commission shall ~~inform the Commission *in writing* of any change in the attorney's contact information via *email to dockets@ic.nc.gov.*~~ provide and maintain current contact information for the Commission's records via *the Commission's Electronic Document Filing Portal ("EDFP").*

(c) All unrepresented persons or entities with matters before the Commission shall inform the Commission upon any change to their contact information in the following manner:

(1) All employees who are not represented by counsel shall inform the Commission of any change in contact information by filing a written notice via *EDFP*, ~~*the Commission's Electronic Document Filing Portal ("EDFP"),*~~ email to ~~forms@ic.nc.gov,~~ contactinfo@ic.nc.gov, ~~facsimile,~~ facsimile to (919) 715-0282, ~~U.S. Mail,~~ U.S. mail sent to Office of the Clerk, 1236 Mail Service Center, Raleigh North Carolina 27699-1236, ~~private courier service,~~ private courier service in accordance with Rule .0101 of this Section, or ~~hand delivery.~~ hand delivery in accordance with Rule .0101 of this Section.

(2) All non-insured employers that are not represented by counsel shall inform the Commission of any change in contact information by filing a written notice via EDFP, email to ~~dockets@ic.nc.gov,~~ contactinfo@ic.nc.gov, ~~facsimile,~~ facsimile to (919) 715-0282, ~~U.S. Mail,~~ U.S. mail sent to Office of the Clerk, 1236 Mail Service Center, Raleigh North Carolina 27699-1236, ~~private courier service,~~ private courier service in accordance with Rule .0101 of this Section, or ~~hand delivery.~~ hand delivery in accordance with Rule .0101 of this Section.

(d) All carriers, third party administrators, and self-insured employers shall provide the Commission, by sending an email to contactinfo@ic.nc.gov, with an email address for service of claim-related documents in cases where the Commission does not have email contact information for a specific representative assigned to the claim.

(e) Instructions on how to provide and update contact information via EDFP are available at https://www.ic.nc.gov/docfiling.html.

History Note: *Authority G.S. 97-80;*
Eff. January 1, 2019;
Amended Eff. _____.

SUBCHAPTER 23B – TORT CLAIMS RULES

SECTION .0100 – ADMINISTRATION

Note: The text in italics is pending approval by the Rules Review Commission at its November 19, 2020 meeting.

11 NCAC 23B .0105 CONTACT INFORMATION

(a) "Contact information" for purposes of this Rule shall include telephone number, facsimile number, email address, and mailing address.

(b) All persons or entities without legal representation who have matters pending before the Commission shall advise the Commission upon any change in contact information by filing a written notice via the Commission's Electronic Document Filing Portal ("EDFP"), electronic ~~*mail,*~~ *~~[mail (dockets@ic.nc.gov),]~~ mail (contactinfo@ic.nc.gov),* ~~facsimile,~~ facsimile to (919) 715-0282, ~~U.S. Mail,~~ U.S. mail sent to Office of the Clerk, 1236 Mail Service Center, Raleigh, North Carolina 27699-1236, ~~private courier service,~~ private courier service in accordance with Rule .0101 of this Section, or ~~hand delivery.~~ hand delivery in accordance with Rule .0101 of this Section.

(c) A plaintiff without legal representation who was an inmate in the North Carolina Division of Adult Corrections at the time of filing his or her tort claim, shall, within thirty (30) days of release, provide the Commission with written notice of his or her post-release contact information in any manner authorized in Paragraph (b) of this Rule. Following the initial written notice of post-release contact information, the previously incarcerated plaintiff shall continue to advise the Commission upon all changes in contact information in accordance with Paragraph (b) of this Rule.

(d) All attorneys of record with matters before the Commission shall ~~inform the Commission in writing of any change in the attorney's or the represented party's contact information~~ provide and maintain current contact information for the Commission's records via ~~*email to dockets@ic.nc.gov.*~~ *EDFP.*

(e) Instructions on how to provide and update contact information via EDFP are available at https://www.ic.nc.gov/docfiling.html.

History Note: *Authority G.S. 143-291; 143-300;*
Eff. March 1, 2019;
Amended Eff. _____.

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~~ employee, or agent of any party that is not a natural person or a governmental entity who is not ~~such~~ the party's outside counsel and who has the authority to decide on behalf of ~~such~~ 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 ~~such~~ the party's outside counsel or Attorney General's counsel responsible for the case and who has the authority to decide on behalf of ~~such~~ 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 ~~such~~ 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. ~~Because G.S. 143-295 provides the Attorney General with settlement authority on behalf of governmental entities and agencies for state tort claims,~~ 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;~~ conference. The ~~the~~ Attorney General shall attempt to make an employee or agent of the named governmental entity or agency in a ~~state~~ 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~~ 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~~ employee, or agent who is not ~~such~~ 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 ~~such~~ the carrier or self-insured and can communicate during the conference with persons who have ~~such~~ the decision making authority; and

(8) by order of the Commission, other representatives of parties, ~~employers~~ 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,~~ 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 ~~physically~~ attend the mediated settlement conference pursuant to Subparagraphs (1) through (6) of this ~~Rule~~ 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 ~~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 (e) of this Rule, or until an impasse has been declared. ~~Any such party or person may have the physical attendance requirement excused or modified by agreement of all parties and persons required to attend the conference and 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.~~ "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. 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~~ 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 in person under this Rule to attend the conference by telephone, conference call, speaker ~~telephone~~ telephone, or videoconferencing; ~~provided that, the party or representative so attending~~ the attending party or representative shall bear all costs of ~~such~~ the telephone calls or videoconferencing. ~~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 ~~physically attend.~~ attend the mediated settlement conference in person, subject to the requirements and provisions of Paragraph (b) of this Rule. 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 tort feasor 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~~ 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~~ 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.

History Note: *Authority G.S. ~~97-80(a), (c);~~ 97-80; ~~143-295;~~ 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. _____.

Regulatory Impact Analysis
Contact Information (11 NCAC 23A .0109 and 11 NCAC 23B .0105)

Agency:	North Carolina Industrial Commission
Contact:	Gina Cammarano – (919) 807-2524
Rules Proposed for Amendment:	11 NCAC 23A .0109 and 11 NCAC 23B .0105 (see proposed rule text in Appendix 1)
State Impact:	Yes (for Industrial Commission); None or *de minimus* otherwise
Local Impact:	None or *de minimus*
Private Impact:	None or *de minimus*
Substantial Economic Impact:	No
Statutory Authority:	*G.S. § 97-80(a), G.S. § 143-300.*

Background and Purpose of Proposed Rule Changes:

One of the purposes of these rule changes is to require attorneys not only to update their contact information with the Industrial Commission via EDFP, the Commission's secure electronic document filing portal, but also to initially provide their contact information to the Industrial Commission via EDFP.

The other purpose of the changes, which applies only to 11 NCAC 23A .0109, is to require carriers, third party administrators, and self-insured employers to provide the Industrial Commission with an email address to which the Commission can send claim-related documents in cases where the Commission does not have email contact information for a specific representative assigned to the claim. This situation arises when, for example, a carrier, third party administrator, or self-insured employer has not yet assigned a specific representative to a claim because the claim has very recently been filed by and employee and/or the carrier, third party administrator, or self-insured employer may not yet know that the employee has filed a claim. In these cases, if the Industrial Commission does not have a general email address for the carrier, third party administrator, or self-insured employer to which claim-related documents can be sent, then the Commission must resort to sending a copy of its acknowledgement of the filing of the employee's claim to the carrier, third party administrator, or self-insured employer via U.S. mail. This is more expensive to the Industrial Commission than sending the copy of the acknowledgement via email and it also increases the amount of time within which the carrier, third party administrator, or self-insured employer becomes aware of the employee's claim.

It should be noted that this fiscal note does not address the proposed changes to these two rules that were published in the April 15, 2020 North Carolina Register because these proposed changes are addressed in an earlier fiscal note.

Summary of Aggregate Impact:

Requiring attorneys to not only update their contact information with the Commission via EDFP but to also to make sure that they have initially provided the Commission with their contact information via EDFP benefits both the Industrial Commission and the attorneys who practice before the Commission because it facilitates prompt communication between the Commission and attorneys, which makes the system more efficient.

The requirement for an attorney to provide the Commission with his or her contact information is a one-time requirement; it will not have to be done for each case in which the attorney is counsel of record. Since this is a one-time requirement, and since it can be done electronically via EDFP, the time cost per attorney of this requirement is *de minimus*. This requirement will result in a time savings to the Commission because the Commission will not have to spend time trying to locate an attorney's contact information via the internet or otherwise. The time savings to the Commission, while non-quantifiable, is important.

Requiring carriers, third party administrators, and self-insured employers to provide the Commission with an email address for service of claim-related documents in cases where the Commission does not have email contact information for a specific representative benefits both the Industrial Commission and the carriers, third party administrators, and self-insured employers because it facilitates the prompt receipt of documents by carriers, third party administrators, and self-insured employers and it saves the Commission postage, office supplies, and time in sending these documents, both of which make the system more efficient and less expensive.

The requirement for carriers, third party administrators, and self-insured employers to provide the Commission with this email address is a one-time requirement. In light of this, and given that it can be done by sending an email to forms@ic.nc.gov, the time cost per carrier, third party administrator, and self-insured employer is *de minimus*. And this requirement will result in a savings to the Commission that includes a savings on postage, paper, envelopes, and time because when the Commission does not have an email address that it can send documents to, it has to mail the documents via U.S. mail. This savings on postage, paper, envelopes, and time, while non-quantifiable, is important.

11 NCAC 23B .0105 is proposed for amendment as follows:

Note: The text in italics is pending approval by the Rules Review Commission at its November 19, 2020 meeting.

11 NCAC 23B .0105 CONTACT INFORMATION

(a) "Contact information" for purposes of this Rule shall include telephone number, facsimile number, email address, and mailing address.

(b) All persons or entities without legal representation who have matters pending before the Commission shall advise the Commission upon any change in contact information by filing a written notice via the Commission's Electronic Document Filing Portal ("EDFP"), electronic ~~*mail,* *[mail (dockets@ic.nc.gov),]*~~ *mail (contactinfo@ic.nc.gov),* ~~facsimile,~~ facsimile to (919) 715-0282, ~~U.S. Mail,~~ U.S. mail sent to Office of the Clerk, 1236 Mail Service Center, Raleigh, North Carolina 27699-1236, ~~private courier service,~~ private courier service in accordance with Rule .0101 of this Section, or ~~hand delivery.~~ hand delivery in accordance with Rule .0101 of this Section.

(c) A plaintiff without legal representation who was an inmate in the North Carolina Division of Adult Corrections at the time of filing his or her tort claim, shall, within thirty (30) days of release, provide the Commission with written notice of his or her post-release contact information in any manner authorized in Paragraph (b) of this Rule. Following the initial written notice of post-release contact information, the previously incarcerated plaintiff shall continue to advise the Commission upon all changes in contact information in accordance with Paragraph (b) of this Rule.

(d) All attorneys of record with matters before the Commission shall ~~inform the Commission in writing of any change in the attorney's or the represented party's contact information~~ provide and maintain current contact information for the Commission's records via ~~*email to dockets@ic.nc.gov.*~~ *EDFP.*

(e) Instructions on how to provide and update contact information via EDFP are available at https://www.ic.nc.gov/docfiling.html.

History Note: *Authority G.S. 143-291; 143-300;*
Eff. March 1, 2019;
Amended Eff. _____;
Amended Eff. _____

11 NCAC 23A .0109 is proposed for amendment as follows:

Note: The text in italics is pending approval by the Rules Review Commission at its November 19, 2020 meeting.

11 NCAC 23A .0109 CONTACT INFORMATION

(a) "Contact information" for purposes of this Rule shall include telephone number, facsimile number, email address, and mailing address.

(b) All attorneys of record with matters before the Commission shall ~~inform the Commission *in writing* of any change in the attorney's contact information via *email to dockets@ic.nc.gov.*~~ provide and maintain current contact information for the Commission's records via *the Commission's Electronic Document Filing Portal ("EDFP").*

(c) All unrepresented persons or entities with matters before the Commission shall inform the Commission upon any change to their contact information in the following manner:

(1) All employees who are not represented by counsel shall inform the Commission of any change in contact information by filing a written notice via *EDFP, ~~the Commission's Electronic Document Filing Portal ("EDFP"),~~* email to ~~forms@ic.nc.gov,~~ contactinfo@ic.nc.gov, ~~facsimile,~~ facsimile to (919) 715-0282, ~~U.S. Mail,~~ U.S. mail sent to Office of the Clerk, 1236 Mail Service Center, Raleigh North Carolina 27699-1236, ~~private courier service,~~ private courier service in accordance with Rule .0101 of this Section, or ~~hand delivery.~~ hand delivery in accordance with Rule .0101 of this Section.

(2) All non-insured employers that are not represented by counsel shall inform the Commission of any change in contact information by filing a written notice via EDFP, email to ~~dockets@ic.nc.gov,~~ contactinfo@ic.nc.gov, ~~facsimile,~~ facsimile to (919) 715-0282, ~~U.S. Mail,~~ U.S. mail sent to Office of the Clerk, 1236 Mail Service Center, Raleigh North Carolina 27699-1236, ~~private courier service,~~ private courier service in accordance with Rule .0101 of this Section, or ~~hand delivery.~~ hand delivery in accordance with Rule .0101 of this Section.

(d) All carriers, third party administrators, and self-insured employers shall provide the Commission, by sending an email to contactinfo@ic.nc.gov, with an email address for service of claim-related documents in cases where the Commission does not have email contact information for a specific representative assigned to the claim.

(e) Instructions on how to provide and update contact information via EDFP are available at https://www.ic.nc.gov/docfiling.html.

History Note: *Authority G.S. 97-80;*
Eff. January 1, 2019;
Amended Eff. ;
Amended Eff. .

Regulatory Impact Analysis

***Duties of Parties, Representatives, and Attorneys* (*11 NCAC 23G .0104*)**

Agency:	North Carolina Industrial Commission
Contact:	Gina Cammarano – (919) 807-2524
Rule proposed for amendment:	11 NCAC 23G .0104 (see Appendix 1)
State Impact:	Yes
Local Impact:	Yes
Private Impact:	Yes
Substantial Economic Impact:	No
Statutory 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.*

A. Background and Purpose of Proposed Rule Amendment:

This proposed rule amendment is necessitated by a recent North Carolina Supreme Court Order amending the *Rules for Mediated Settlement Conferences and other Settlement Procedures in Superior Court Civil Actions* and by the North Carolina Workers' Compensation Act which mandates, in G.S. §97-80(c), 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.

The recent North Carolina Supreme Court Order (ordered by the Court in Conference on June 3, 2020) changed the presumptive attendance requirement for mediations in Superior Court civil actions from presumptive in-person attendance to presumptive remote attendance. This change to the Supreme Court's rule was prompted by public health and safety concerns due to the COVID-19 pandemic.

The Industrial Commission's permanent Rule 11 NCAC 23G .0104, in its current form, makes in-person attendance at mediations the presumptive requirement. Therefore, the Industrial Commission's current permanent rule is not substantially similar to the current rule approved by the North Carolina Supreme Court for use in the Superior Court division regarding the manner of attendance (in-person versus remote).[1]

[1] The Industrial Commission undertook emergency and temporary rulemaking to amend Rule 11 NCAC 23G .0104 to make remote mediation attendance the presumptive requirement due to the serious and unforeseen threat to the public health and safety that would result from in-person attendance being presumptively required during the COVID-19 pandemic and in order to make the Industrial Commission's rule substantially similar to the rule approved by the Supreme Court for use in the Superior Court division regarding the manner of attendance. The emergency rule was approved by the Codifier of Rules and went into effect June 16, 2020. The temporary rule was approved by the Rules Review Commission and went into effect August 28, 2020.

B. Proposed Rule Amendment and Its Estimated Economic Impact:

While there are economic impacts due to the proposed rule amendment, which are discussed below starting with Subsection B(2), there also are some areas where little or no economic impact has been seen or is expected.

1. Public Health Benefits to All Mediation Participants

Protecting the health and safety of all mediation participants is the primary benefit of remote mediations. Several mediators relayed anecdotes about actual cases where one of the mediation participants was diagnosed with COVID-19 shortly after the scheduled mediation. They pointed out that had the mediation taken place in person, all of the mediation participants likely would have been exposed to the virus for the following reasons: (1) mediations often take place in offices where the air does not circulate freely; (2) mediations require multiple extended conversations between the mediator and the other mediation participants while the mediator is attempting to help the opposing parties reach a resolution in the case; and (3) mediations usually last for several hours.

Due to these factors that are characteristic of most, if not all, mediations, participants are concerned about in-person mediations turning into super-spreader events and about the mediators themselves (some of whom do two mediations a day, five days a week) becoming super-spreaders of the virus as they move from mediation participant to mediation participant, from office to office, and from mediation to mediation. Conducting mediations remotely reduces the risk of spreading communicable diseases such as COVID-19.

2. Areas of Little or No Observed or Expected Economic Impact

Unrepresented Plaintiffs

The proposed rule amendment is expected to have little or no economic impact on unrepresented plaintiffs because Rule 11 NCAC 23G .0101(j) states: "Unless an unrepresented plaintiff requests that the plaintiff's case be mediated, the Commission shall enter an order dispensing with mediation." According to the Commission's Dispute Resolution Coordinator, it is very rare for an unrepresented plaintiff to request a mediation. Further, even if a mediation is requested by an unrepresented plaintiff, the case will not proceed to mediation unless the Dispute Resolution Coordinator is satisfied, following a careful inquiry, that the unrepresented plaintiff fully understands the mediation process and that the case is appropriate for mediation. According to the Dispute Resolution Coordinator, this process results in an extremely small number of cases, if any, going to mediation in a given year where the plaintiff is unrepresented. Therefore, the proposed rule amendment should have little or no economic impact on unrepresented plaintiffs.

Outcome of Mediation Process (Number of Cases Referred to Mediation and Mediation Settlement Rate)

The proposed rule amendment also is expected to have little or no effect on the outcome of the mediation process in terms of the number of cases referred to mediation and the mediation settlement rate, based on the available data.

The data shows that in Fiscal Year 2019-2020 (which included nearly four months during which nearly all mediations took place remotely instead of in person due to the COVID-19 pandemic), the number of cases referred to mediation was 9,671 and the mediation settlement rate was 73.19%.

As a comparison, in Fiscal Year 2018-19 (when nearly all mediations took place in person), the number of cases referred to mediation was 9,275 and the mediation settlement rate was 73.04%, and in Fiscal Year 2017-18 (again, when nearly all mediations took place in person), the number of cases referred to mediation was 9,677 and the mediation settlement rate was 72.9%.

Further, 2,454 mediations were convened in the last four months of Fiscal Year 2019-20 (March 1, 2020 through June 30, 2020) as compared to an average of 2,445 mediations convened in the last four months of the two prior fiscal years.

There are no known factors in Fiscal Year 2019-20 that would have resulted in the Fiscal Year 2019-20 data being so close to the data in the previous two fiscal years if the switch to remote mediations had caused any appreciable decrease in the number of cases referred to mediation and/or the mediation settlement rate.

Therefore, it can be inferred that having remote instead of in-person attendance at Industrial Commission mediations since the start of the COVID-19 pandemic has not had an appreciable effect on the outcome of the mediation process in terms of the number of cases referred to mediation and the mediation settlement rate. This inference is supported by the information provided by mediators and other mediation participants. By and large, in their experience so far, conducting mediations remotely during the COVID-19 pandemic has not had any noteworthy effect on the number of cases mediated or on the mediation settlement rate.

Length of Mediation (Includes Travel Time and Time in Mediation Conference)

The proposed rule amendment is expected to have little or no effect on the total length of each mediation (which includes travel time plus the time in the mediation conference).

While there is a travel time savings for remote mediations because travel generally is not necessary, all mediation participants interviewed for this fiscal note reported that in their experience remote mediations are taking, on average, up to 25% more time than in-person mediations in terms of the amount of time spent in the

mediation conference. The mediation participants attributed this extra time to the fact that it takes longer to sign a Mediated Settlement Agreement remotely than in person due to the logistics of circulating the document remotely.

Therefore, it appears that, on average, the total length of time attributable to a mediation (travel time plus the time in the mediation conference) is approximately the same whether the mediation is held remotely or in person. As a result, the amount of money that is saved by some mediation participants[2] and lost by other mediation participants[3] as a result of the general elimination of travel time associated with conducting a mediation remotely would appear to be offset by the longer period of time spent in the remote mediation conference when an agreement is reached and signed.

3. Areas of Observed or Expected Economic Impact

Industrial Commission

Costs

For every case referred to mediation, a Report of Mediator must be filed with the Industrial Commission by the mediator. The filing of this Report of Mediator generates a filing fee for the Industrial Commission.

Because the data indicates that the manner of attendance at mediation (in-person versus remote) has had no appreciable effect on the number of cases referred to mediation and because there is no reason to think that this will change in the future, the proposed rule amendment should result in no appreciable costs to the Industrial Commission in terms of any loss in form filing fees. There are no other known potential costs to the Industrial Commission resulting from the proposed rule amendment.

Benefits

There also is a benefit in having a rule that is flexible in terms of ensuring that the rule always remains "substantially similar" to the Supreme Court rule regarding the presumptive manner of attendance at mediations, as required by statute. The proposed rule amendment achieves this flexibility by creating a definition of "attendance" for mediations that tracks the way "attendance" is defined in the *Rules for Mediated Settlement Conferences and other Settlement Procedures in Superior Court Civil Actions*.

Under the proposed rule amendment, if the North Carolina Supreme Court amends its rules for use in the Superior Court division after the pandemic is over to make in-person attendance the presumptive mediation attendance requirement, the Industrial Commission

[2] The typical mediation participants saving money would be private sector entities who would have been billed by their attorneys for travel time.

[3] The typical mediation participants losing money would be private sector defense attorneys who would have been able to bill their clients for travel time.

rule automatically will revert back to presumptive in-person attendance. This will ensure that the Industrial Commission rule always remains "substantially similar" to the Supreme Court rule and it will help the Industrial Commission avoid the need for future rulemaking whenever the Supreme Court changes the presumptive manner of attendance requirement.

Mediators

Costs

The remote mediations taking place since the pandemic began have, almost exclusively, been taking place via Zoom. The mediators and other mediation participants like the Zoom platform, and they find that Zoom mediations are easy to access via all devices (laptops, smart phones, and tablets).

Across the board, mediators report having purchased a Zoom membership, which costs $15 per month, for a yearly cost of $180. While Zoom offers a free service, the free service only allows the Zoom calls to last 40 minutes when there is a group of people participating. It would be extremely rare for a mediation to be completed within 40 minutes, so the free service is not a feasible option.

All of the mediators also have reported purchasing a DocuSign membership, which costs $25 per month, for a yearly cost of $300. DocuSign is used by the parties at the end of the mediation to sign any Mediated Settlement Agreement that has been reached.

According to the Industrial Commission's Dispute Resolution Coordinator, there currently are about 170 mediators who mediate Industrial Commission cases. Assuming all of these mediators purchase both a Zoom membership and a DocuSign membership, the yearly cost to all of these mediators as a whole for Zoom and DocuSign memberships would be $81,600 ($480 x. 170).

However, many of these mediators also mediate cases outside of the Industrial Commission mediation program in venues such as Superior Court, District Court, the federal courts, and administrative agencies (such as the Office of Administrative Hearings).

Because these mediators can use the Zoom and DocuSign memberships to mediate cases in these other venues, the entire cost of these memberships should not be attributed to Industrial Commission mediations.

Benefits

When mediations are held remotely, mediators also benefit from travel time and travel expense savings. While travel time savings are offset by longer mediations, avoiding travel is a quality-of-life benefit which has value to the mediators.

State and Local Government

Costs

The representatives of State and Local Government who were interviewed for this fiscal note indicated that all attorneys who represent them[4] in mediations already had employer-issued laptops equipped with cameras and microphones before the pandemic began, enabling them to participate in mediations remotely on their existing laptops.

In some cases, State and Local Government will also have an adjuster or other risk management or human resources representative attend a mediation. While it is possible that a particular adjuster or other representative may have only had a desktop when the pandemic began (or still may only have a desktop), and while desktops are normally not equipped with a camera and microphone, no specific examples were given where State or Local Government had to purchase a laptop for a remote mediation. Therefore, remote mediations do not appear to present appreciable cost to State or Local Government with regard to computer equipment, and there are no other known potential costs.

Benefits

The savings of mileage reimbursement expenses when mediations are held remotely is a potential benefit to State and Local Government. Because the mileage varies so much from mediation to mediation, however, it is not possible to reliably quantify the mileage reimbursement savings.

Private Sector Attorneys and Private Sector Carriers, Third-Party Administrators, and Self-Insured Employers

Plaintiff Attorneys

Costs

Most plaintiff attorneys already had multiple laptops equipped with cameras and microphones in their offices before the pandemic. A very small number of plaintiff attorneys only had desktops in their offices before the pandemic, but this is the exception and not the rule.

These attorneys had to make a one-time purchase of desktop webcam(s) at a cost of about $50 per webcam. However, due to the small number of plaintiff attorneys who did not already have laptops, due to the relatively low cost of a webcam, and because it is likely that the attorneys use and benefit from the desktop webcams for other work-related remote activities (such as law firm meetings, client meetings, hearings, and depositions, many of which currently are being held remotely due to the pandemic), this does not

[4] The attorneys who represent State Government work for the North Carolina Department of Justice Attorney General's Office. The attorneys who represent Local Government can be private sector attorneys or attorneys who work for Local Government (such as the City of Raleigh).

appear to be a quantifiable or appreciable cost associated with this proposed rule amendment.

Benefits

When mediations are conducted in person, they take place almost exclusively in the office of the plaintiff attorney. Therefore, there are no travel time or mileage savings for the plaintiff attorney when mediations are held remotely.

Plaintiff attorneys did, however, mention some non-quantifiable yet important benefits of being able to mediate remotely, including the health and safety benefit of avoiding or reducing in-person contact during the pandemic and the benefit of their clients having the opportunity to participate in the mediation from the comfort of their own homes, which can put the clients at ease and which accommodates clients who suffer from mobility and/or other issues that make it difficult for them to travel to a mediation.

Defense Attorneys

Costs

Every defense attorney interviewed for this fiscal note already had an office laptop before the pandemic began, so they already had the equipment needed to participate in remote mediations and did not have to incur any costs to do so.

The defense attorneys mentioned that not having to travel to and from mediations means, in some cases, that they are not paid the travel time by their clients that they otherwise would have been paid in the case. The rate that defense attorneys bill for mediation travel time varies greatly from law firm to law firm and from client to client. And the travel time itself varies greatly from case to case. Also, the attorneys noted that the time saved traveling to and from the mediation may be used to do other billable work.

Therefore, not only is it difficult, if not impossible, to quantify this potential cost, but it appears that the potential cost is likely to be offset, in whole or part, by additional time gained that can be used to do other billable work.

Insurance Carriers, Third-Party Administrators, and Self-Insured Employers

Costs

In practice, adjusters who work for carriers and third-party administrators and representatives of self-insured employers usually obtain permission under Paragraph (c) of 11 NCAC 23G .0104 to be excused from having to attend a mediation in person, though the rule states that they must be available to their attorneys and the mediator by telephone, conference call, speaker phone, or videoconference. Therefore, when the mediations are being held remotely, nothing changes for these adjusters and employer representatives. They continue to be available by the same means that they would have

been available by had the mediation been held in person. As a result, there are no known computer costs for these adjusters and employer representatives when the mediations are being held remotely, nor are there any other known potential costs.

Individual Private Citizens

Represented Plaintiffs

Costs

No costs to plaintiffs represented by legal counsel have been observed and none are expected since represented plaintiffs who are not able to participate in a remote mediation from home may travel to their attorneys' offices for remote mediations (just like they do for in-person mediations) and then participate in the mediation remotely from their attorneys' offices.

Benefits

Having the option of participating in a mediation from home when the mediation is being held remotely has non-quantifiable, but still important, benefits for plaintiffs. Some plaintiffs feel more comfortable in their own homes, especially those who have mobility issues or may be experiencing pain that is exacerbated by travel.

Not having to travel to and from mediations at attorneys' offices also saves plaintiffs travel expenses. Because this savings varies from case to case, depending on how far the plaintiff lives from the attorney's office, however, and because any travel time savings may be offset by a longer mediation process, it does not appear to be an appreciable cost savings associated with this proposed rule amendment.

C. Summary of Aggregate Impact:

Non-Quantifiable Benefits

The proposed rule amendment has several non-quantifiable but important benefits. The first is the benefit of having a rule that is flexible enough to allow the Industrial Commission to stay in compliance with the statutory mandate that its mediation rules be "substantially similar" to the rules approved by the North Carolina Supreme Court for use in the Superior Court division.

Another important, non-quantifiable benefit during the current pandemic is the public health and safety benefit resulting from the presumption that mediations be held remotely at this time to eliminate or reduce extended in-person contact between individuals that could contribute to the spread of the novel coronavirus.

There also is a cost savings of mileage reimbursement that accrues to the benefit of State and Local Government when attorneys and other representatives for State and Local Government do not have to travel to and from mediations. This cost savings is not quantifiable in any

reliable way, however, because the mileage to and from mediations varies greatly from case to case.

Likewise, there is a cost savings of avoided travel time for all mediation participants. However, in practice, remote mediations are taking up to 25% more time on average than in-person mediations, due to document review and signing logistics. Therefore, it appears that, on average, the additional time spent in mediation offsets the travel time savings.

Quantifiable Costs and Benefits

The proposed rule amendment results in a yearly cost to all 170 mediators who currently mediate Industrial Commission cases for both Zoom and DocuSign memberships. These memberships currently cost each mediator $480 per year, for a total cost of $81,600 ($480 x. 170). Because many of these mediators also mediate cases outside of the Industrial Commission mediation program in venues such as Superior Court, District Court, the federal courts, and administrative agencies (such as the Office of Administrative Hearings) and because these mediators can use the Zoom and DocuSign memberships to mediate cases in these other venues, the entire cost of these memberships should not be attributed to Industrial Commission mediations. Therefore, the proposed rule amendment's impact is only a portion of the $81,600 total.

It is expected that mediators will continue to pay for their Zoom and DocuSign memberships, even if the attendance requirement reverts back to presumptive in-person attendance. The reason is twofold: (1) these memberships are not very expensive; and (2) having these memberships gives mediators the ability to easily conduct a remote mediation, should all parties agree to mediate remotely or should the Industrial Commission enter an order granting a party's motion for a remote mediation.

APPENDIX 1

11 NCAC 23G .0104 is proposed for amendment as follows:

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~~ employee, or agent of any party that is not a natural person or a governmental entity who is not ~~such~~ the party's outside counsel and who has the authority to decide on behalf of ~~such~~ 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 ~~such~~ the party's outside counsel or Attorney General's counsel responsible for the case and who has the authority to decide on behalf of ~~such~~ 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 ~~such~~ 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. ~~Because G.S. 143-295 provides the Attorney General with settlement authority on behalf of governmental entities and agencies for state tort claims,~~ 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;~~ conference. The ~~the~~Attorney General shall attempt to make an employee or agent of the named governmental entity or agency in a ~~state~~ 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~~ 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~~ employee, or agent who is not ~~such~~ 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 ~~such~~ the carrier or self-insured and can communicate during the conference with persons who have ~~such~~ the decision making authority; and

(8) by order of the Commission, other representatives of parties, ~~employers~~ 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,~~ 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 ~~physically~~ attend the mediated settlement conference pursuant to Subparagraphs (1) through (6) of this ~~Rule~~ 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 ~~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 (e) of this Rule, or until an impasse has been declared. ~~Any such party or person may have the physical attendance requirement excused or modified by agreement of all parties and persons required to attend the conference and 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.~~ "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. 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~~ 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 in person under this Rule to attend the conference by telephone, conference call, speaker ~~telephone~~ telephone, or videoconferencing; ~~provided that, the party or representative so attending~~ the attending party or representative shall bear all costs of ~~such~~ the telephone calls or videoconferencing. ~~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 ~~physically attend.~~ attend the mediated settlement conference in person, subject to the requirements and provisions of Paragraph (b) of this Rule. 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~~ 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~~ 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.

History Note: *Authority G.S. ~~97-80(a), (c);~~ 97-80; ~~143-295;~~ 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. _____.

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 adopt the rule cited as 11 NCAC 23E .0302.*

Codifier of Rules *approved this rule as an emergency rule effective November 6, 2020 and received for publication the following notice and proposed temporary rule on October 28, 2020.*

Public Hearing:
Date: *December 10, 2020*
Time: *2:00 p.m.*
Location: *By Teleconference Only. Teleconference Line#: 1-888-363-4735; Access Code#: 4465746*

Reason for Proposed Temporary Action: *Adhering to the notice and hearing requirements in G.S. 150B-21.2 would result in a long period of time where the regulated parties would be required by the Commission's rules, and by other rules that apply to cases within the Commission's jurisdiction, to engage in activities involving in-person contacts that put them at risk for contracting or spreading the COVID-19 virus, even when the rule requirements are not in conformity with an emergency Order or directive of the Chief Justice of the North Carolina Supreme Court that is in effect.*
Adhering to the notice and hearing requirements in G.S. 150B-21.2 also would result in a long period of time where the Commission's requirements regarding oaths and verifications are not in conformity with the Chief Justice's October 15, 2020 Order Extending Emergency Directives, specifically Emergency Directive 5.

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. NOTE: IT IS STRONGLY ENCOURAGED TO SUBMIT WRITTEN COMMENTS VIA EMAIL TO GINA CAMMARANO AT gina.cammarano@ic.nc.gov. The comment period begins October 28, 2020 and ends December 11, 2020.*

CHAPTER 23 - INDUSTRIAL COMMISSION

SUBCHAPTER 23E – ADMINISTRATIVE RULES OF THE INDUSTRIAL COMMISSION

SECTION .0300 – RULES OF THE COMMISSION

11 NCAC 23E .0302 EMERGENCY ORDERS AND DIRECTIVES OF THE CHIEF JUSTICE OF THE NORTH CAROLINA SUPREME COURT

(a) This Rule applies to all matters within the authority and jurisdiction of the Commission and to all Subchapters of the Commission's rules.
(b) In the interests of justice or to protect the public health or safety, the Commission may waive or vary the requirements or provisions of any of its rules in order to bring these requirements or provisions in conformity with an emergency Order or directive of the Chief Justice of the North Carolina Supreme Court that is in effect. Factors the Commission shall use in determining whether to waive or vary the requirements or provisions of any of its rules in order to bring these requirements or provisions in conformity with any emergency Order or directive of the Chief Justice of the North Carolina Supreme Court that is in effect are:
(1) the necessity of waiving or varying the rule requirements or provisions; and
(2) the impact of waiving or varying the rule requirements or provisions on the regulated parties and on the Commission.
If the Commission waives or varies the requirements or provisions of a rule to bring the rule in conformity with any emergency Order or directive of the Chief Justice of the North Carolina Supreme Court, the Commission shall post a notice of the waiver or variance of the rule on its website unless the waiver or variance is case-specific and not generally applicable to the regulated public.
(c) During any period that an emergency Order or directive of the Chief Justice of the North Carolina Supreme Court authorizes the taking of oaths and verifications outside the presence of a notary public, the Commission may accept any pleading, motion, petition, supporting affidavit, or other document with an affirmation or representation not attested to before a notary public so long as the subscriber affirms the truth of the matter to be verified by an affirmation or representation in substantially the same language as that allowed by the emergency Order or directive of the Chief Justice of the North Carolina Supreme Court.

History Note: *Authority G.S. 97-80; 130A-425(d); 143-166.4; 143-296; 143-300;*
Emergency Rule Eff. November 6, 2020;
Temporary Rule Eff. _____.