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James B. Hunt Jr., Governor
J. Howard Bunn Jr., Chairman

North Carolina Industrial Commission

JULY 29, 1994

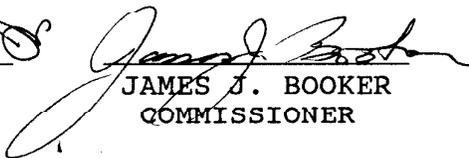
MINUTES OF THE N.C. INDUSTRIAL COMMISSION

ADOPTION OF RULES FOR MEDIATED SETTLEMENT CONFERENCES

Pursuant to the authority vested in the Commission by the amendment (H.B. 658) to N.C.C.S. §97-80(a), which became effective October 1, 1993, the North Carolina Industrial Commission hereby adopts the attached rules for the conduct of Mediation in contested cases within the jurisdiction of the Commission, substantially similar to those rules adopted by the N.C. Supreme Court governing mediation of Civil Superior Court cases, except as to the payment of costs.



J. HOWARD BUNN
CHAIRMAN



JAMES J. BOOKER
COMMISSIONER



J. RANDOLPH WARD
COMMISSIONER



RULES FOR MEDIATED SETTLEMENT CONFERENCES
of the
NORTH CAROLINA INDUSTRIAL COMMISSION

RULE 1A. MEDIATION UPON AGREEMENT OF THE PARTIES

Parties to a worker's compensation claim or state tort claim may submit a consent order to the Commission if they agree to attempt to settle the matter through mediation. The order may specify the mediator or provide that the Commission will select one from among mediators on one or more specified lists maintained by the Commission per Rule 8(b) or (c). The consent order may specify other arrangements for the mediation, including time, place, persons to attend, documents to be exchanged, and use of binding arbitration or other method to finally resolve the case should mediation fail to result in an agreement.

RULE 1B. ORDER FOR MEDIATED SETTLEMENT CONFERENCE

(a) Order of the Commission. No order from or notice to the Commission is necessary if the parties mutually agree to mediate, but the Mediator will file a report of mediation with the Commission when required by Rule 6(b)(4). Commissioners, Deputy Commissioners, the Commission's Mediation Coordinator, and such other employees as the Commission Chairman may designate from time to time may, by written order, require the parties and their representatives to attend a mediated settlement conference concerning a dispute within the tort and workers' compensation jurisdiction of the Commission, subject to subsection (e). Requests to dispense with or defer a mediation conference shall be addressed to the Chairman or his designee. Unless the context otherwise requires, references to the "Commission" in these Rules shall mean the Mediation Coordinator.

(b) Timing of the Order. The order requiring mediation may be issued whenever it appears that the parties have a dispute arising under the Workers' Compensation Act or Tort Claims Act.

(c) Content of Order. The Commission's order shall (1) require the mediated settlement conference be held in the case, and that pertinent documents be exchanged and any specified discovery completed prior to the conference; (2) establish a deadline for the pre-conference exchange of documents and other discovery, and for the completion of the conference; (3) provide a period within which the parties

may select a mediator by mutual agreement (see Rule 2); (4) state the rate of compensation of the Commission-appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to Rule 2; (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the Commission (see Rule 7); and, (6) may specify a date for an Industrial Commission hearing should the parties fail to reach a settlement.

(d) Motion to Dispense With or Defer Mediated Settlement Conference. A party may move, within 21 days after receipt of the Commission's order, to dispense with or defer the conference. Such motion shall state the reasons the relief is sought. For good cause shown, the Commission may grant the motion.

(e) Petition for Commission Ordered Mediated Settlement Conference. If a case is not ordered to a mediated settlement conference, and the parties do not mutually agree to mediation, a party may move the Commission to order such a conference. Such motion shall state the reasons why the order should be allowed and, if the case is pending on the hearing docket, whether the party prefers for the case to be set for hearing on the next docket, for it to not be heard until further notice from the parties, or for it to not be set before a specified date. The motion shall be served on non-moving parties. Objections may be filed in writing with the Commission within 10 days after the date of the service of the motion. Thereafter, the Commission may rule upon the motion without further hearing and notify the parties or their attorneys of the ruling. The Commission may require that any motion for a mediation order be submitted on a form prepared and distributed by the Commission.

(f) Exemption From Mediated Settlement Conference. In order to provide for the most efficacious use of mediation and its resources, the Commission may specify, by type or kind, those cases to be ordered into mediation. The State shall not be compelled to participate in mediation with a prison inmate.

RULE 2. SELECTION OF MEDIATOR

(a) By Agreement of Parties. The parties may choose a mediator by agreement within 21 days after the Commission's order, unless otherwise specified therein, subject to removal by the Commission for specific reasonable cause. The mediator selected shall either meet the qualifications specified in Rule 8, or be a person who, in the opinion of the parties, is otherwise qualified by training or experience to mediate all or some of the issues in the

action. Such stipulation shall be filed within 21 days of the mediation order by the defendant or counsel for the defendant, and shall include the name, address and telephone number of the mediator selected by agreement, whether the mediator is certified by the Administrative Office of the Courts to mediate Superior Court cases, and if not, whether the mediator is a member of the Bar and/or has any other certification, training or experience pertinent to his or her ability to mediate a case.

(b) **Appointment by Commission.** If the parties cannot agree upon the selection of a mediator, the defendant or defendant's attorney shall so notify the Commission's Mediation Coordinator and request, on behalf of the parties, that the Commission appoint a mediator. The motion must be filed within 21 days after the Commission's order and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. The Commission shall appoint mediators from lists maintained by the Commission of those who attain the qualifications in Rule 8 and request inclusion on such lists. Mediators shall be selected for specific cases by rote or random order, unless the Commission determines that, because of unusual circumstances, a particular mediator should be chosen.

(c) To assist parties in the selection of mediators by agreement, the Commission shall maintain lists of mediators eligible for appointment by the Commission in compensation and tort cases. The Commission shall provide copies to parties on request, and may charge a reasonable fee for maintaining and distributing this list.

(d) **Disqualification of Mediator.** Any party may move the Commission for an order disqualifying a mediator. For good cause, such order shall be entered. If the mediator is disqualified, an order shall be entered for the selection of a replacement mediator pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED CONFERENCE

(a) **Where Conference Is to Be Held.** Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the county where the case is pending. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice to all attorneys and unrepresented parties of the time and location of the conference.

(b) When Conference Is to Be Held. Subject to the Commission's orders, the conference shall be held at the time agreed to by the parties and the mediator, or if the parties do not agree, at the time specified by the mediator.

(c) Request to Extend Date of Completion. A party, or the mediator, may request the Commission to extend the deadline for completion of the conference. Such request shall state the reasons the continuance is sought and shall be served by the moving party upon the other parties and the mediator. The Commission may grant the request and enter an order setting a new date for the completion of the conference, which date may be set at any time prior to a calendared hearing. Said order shall be served upon the parties and the mediator.

(d) Recesses. The mediator may recess the conference at any time and may set times for reconvening. No further notification is required for persons present at the recessed conference.

(e) The Mediated Settlement Conference Is Not to Delay Other Proceedings. A mediated settlement conference shall not be cause for the delay of other proceedings in the case, including completion of discovery, and the filing or hearing of motions except by order of the Commission. However, no depositions shall be taken following a Commission order requiring mediation until mediation is concluded, except by agreement of the parties or order of the Commission.

RULE 4. DUTIES OF PARTIES, REPRESENTATIVES, AND ATTORNEYS

(a) Attendance. The following persons shall physically attend a mediated settlement conference, unless the Mediation Coordinator, on motion of one or more parties or the mediator, determines that their presence is not necessary to resolve the issues to be negotiated:

(1) The claimant; a representative of the carrier/servicing agent; uninsured employer, or an insured or self-insured employer if its servicing agent/carrier does not have full settlement authority; or in the case of a governmental agency without a carrier, a representative of that agency with full authority to negotiate on behalf of the agency and to recommend settlement to the appropriate decision-making body of the agency;

(2) The parties' counsel of record; provided, that appearance by counsel does not dispense with or waive the required attendance of the parties listed above;

(3) For any insured party against whom a claim is made, a representative of the insurance carrier who has full authority to settle the claim;

(4) In a workers' compensation case, a representative of the employer at the time of injury if it is offering the claimant employment and the suitability of that employment is in issue, or if it and the claimant have agreed to simultaneously mediate non-compensation issues arising from the injury; and

(5) In a workers' compensation case, with the agreement of the compensation parties, the representative of a carrier liable for acts of a third-party tortfeasor.

(b) Finalizing Agreement. Upon reaching agreement, the parties shall reduce the agreement to writing, specifying all the terms of their agreement bearing on the resolution of the dispute before the Industrial Commission, sign it along with their counsel, and file it with the Industrial Commission within 20 days of the conclusion of the mediation conference. All agreements for payment of compensation shall be submitted on proper forms or by clincher for Industrial Commission approval.

(c) Payment of Mediator's Fee. At the conclusion of the settlement conference, unless otherwise provided by Rule 7, or by agreement with the Mediator.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND

If a person fails to attend a duly ordered mediated settlement conference without good cause, the Commission may impose upon the party or his principal any lawful sanction, including but not limited to the payment of attorneys' fees, mediator fees and expenses incurred by persons attending the conference, contempt, or any other sanction authorized by Rule 37(b) of the Rules of Civil Procedure.

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

(a) Authority of Mediator.

(1) Control of Conference. The mediator shall at all times be in control of the conference and the procedures to be followed.

(2) Private Consultation. The mediator may meet and consult privately with any party or parties or their counsel during the conference.

(3) **Scheduling the Conference.** The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the parties, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

(b) Duties of Mediator.

(1) The mediator shall define and describe the following to the parties at the beginning of the conference:

- (a) The process of mediation;
- (b) The differences between mediation and other forms of conflict resolution;
- (c) The costs of the mediated settlement conference;
- (d) The facts that the mediated settlement conference is not a trial or hearing, the mediator is not a judge, and the parties retain their right to a hearing if they do not reach a settlement;
- (e) The circumstances under which the mediator may meet alone with either of the parties or with any other person;
- (f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;
- (g) The inadmissibility of conduct and statements as provided by Rule 408 of the Evidence Code;
- (h) The duties and responsibilities of the mediator and the parties; and,
- (i) The fact that any agreement reached will be reached by mutual consent of the parties.

(2) **Disclosure.** The mediator has a duty to be impartial and to advise all parties of any circumstances bearing on possible bias, prejudice or partiality.

(3) **Declaring Impasse.** It is the duty of the mediator to timely determine when mediation is not viable, that an impasse exists, or that mediation should end.

(4) Reporting Results of Conference. In all cases within the Commission's jurisdiction, whether mediated voluntarily or pursuant to an Order of the Commission, the mediator shall report the results of the conference on a form provided by the Commission; provided, that no report of a voluntary mediation is required if the case is not settled, and a party objects to reporting it. If an agreement was reached, the report shall state whether the issue or matter under mediation will be resolved by agreement, consent judgment or voluntary dismissal or removal from the trial docket, and shall identify the persons designated to file or submit for approval such agreement, consent judgment or dismissal. The Commission may require the mediator to provide statistical data for evaluation of the mediated settlement conference program on forms provided by it.

(5) Scheduling and Holding the Conference. It is the duty of the mediator to schedule the conference, in consultation with the parties, and conduct it prior to the conference completion deadline set out in the Commission's order. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the Commission.

RULE 7. COMPENSATION OF THE MEDIATOR

(a) By Agreement. When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator.

(b) By Commission Order. When the mediator is appointed by the Commission, the mediator shall be paid in accordance with this Rule, unless otherwise ordered by the Commission.

(c) Financial Ability. The Commission's mediation order may specify that a workers' compensation claimant reimburse other parties for one share of the cost of mediation when a contested matter is concluded or if an award is paid, and that other parties paying the mediator at the conclusion of the conference may withhold funds from any award for this purpose.

(d) Payment by Parties. Payment shall be due upon completion of the conference; provided, that the State shall be billed and pay within thirty (30) days of receipt of the billing. Unless otherwise agreed to by the parties or ordered by the Commission, costs of the mediated settlement conference shall be paid by the parties, as follows: one share by plaintiff(s); one share by the workers'

compensation defendant-employer or its insurer, or if more than one employer or carrier is involved, or if there is a dispute between employer(s) or carrier(s), one share by each separately represented entity; one share by participating third-party tort defendants or their carrier, or if there are conflicting interests among them, one share from each such defendant or group of defendants having shared interests; and, one share by the defendant State agency in a State Tort Claims Act case. Parties obligated to pay a share of the costs shall pay equal shares; provided, that an order pursuant to subsection (c) hereof may require one or more of the remaining parties to advance any plaintiff's share ordered in a workers' compensation case.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

(a) The parties may select any person as their mediator by mutual consent, with or without the qualifications in (b); provided, that the Commission may, for good cause, bar any persons from holding themselves out as a mediator of cases within its jurisdiction or from receiving a fee for mediation of such cases.

(b) If parties have agreed or been ordered to mediate, and cannot agree on the selection of a mediator, the Commission shall appoint a mediator from lists of persons who hold current certification from the Administrative Office of the Courts that they are qualified to carry out mandatory mediations in the Superior Courts of the State, and who have filed a declaration with the Commission, on forms provided by it, stating that:

(1) If an attorney, that declarant remains a member in good standing of the North Carolina State Bar;

(2) Agree to accept and perform mediations of disputes before the Commission with reasonable frequency when called upon for the fees and at the rates of payment specified by the Commission;

(3) If the declarant desires to be appointed by the Commission to mediate workers' compensation cases, that he or she has completed N.C. State Bar approved continuing legal education course(s) on workers' compensation law during the previous two (2) years totalling not less than three (3) hours prior to March 15, 1994, and six (6) hours thereafter.

A mediator making such declaration shall immediately notify the Commission when any of the facts declared no longer obtain. The Commission may require a new declaration on a periodic or intermittent basis. The Commission shall

delete from such lists any mediator whose certification from the Administrative Office of the Courts has expired or been revoked.

The Commission may charge an administrative fee to defray the costs of maintaining said lists and referring cases to mediators.

(c) The Commission may maintain and provide to parties separate lists of mediators who have successfully completed mediation training certified by the N.C. Administrative Office of the Courts or sponsored by a Center belonging to the Mediation Network of North Carolina desiring to hold mediations in disputes arising under the Workers' Compensation Act and the State Tort Claims Act, and firms providing the services of such mediators, indicating their qualifications.

RULE 9. WAIVER OF RULES

In the interest of justice, or to comply with the law from time to time as it may be amended or declared, the Commission may waive any requirement of these rules.

RULE 10. MOTIONS

Unless otherwise indicated, motions pursuant to these rules shall be addressed to the Commission's Mediation Coordinator (unless the mediation order provides otherwise) and served on all parties to the claim and/or the mediation. Objections may be filed with the Commission within 10 days after the date of receipt of the motion. Notwithstanding, a motion may be made orally or acted upon in a shorter time for good cause. Motions will be decided without oral argument unless otherwise ordered. Any appeals to the Full Commission from Orders issued pursuant to a mediation motion shall be addressed to the attention of the Mediation Coordinator and decided without oral argument at any time after receipt, unless otherwise ordered.