

1 11 NCAC 23G.0104 is proposed for a amendment under temporary procedures as follows:

2  
3 **11 NCAC 23G.0104 DUTIES OF PARTIES, REPRESENTATIVES, AND ATTORNEYS**

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

- 5 (1) all individual parties;
- 6 (2) in a workers' compensation case, a representative of the employer at the time of injury if:
  - 7 (A) the employer, instead of or in addition to the insurance company or a administrator, has
  - 8 decision-making authority with respect to settlement;
  - 9 (B) the employer is offering the claimant employment and the suitability of that employment
  - 10 is in issue;
  - 11 (C) the employer and the claimant have agreed to simultaneously mediate non-compensation
  - 12 issues arising from the injury; or
  - 13 (D) the Commission orders the employer representative to attend the conference if the
  - 14 representative's **physical** attendance is necessary to resolve matters in dispute in the subject
  - 15 action;
- 16 (3) an officer, employee or agent of any party that is not a natural person or a governmental entity who
- 17 is not such party's outside counsel and who has the authority to decide on behalf of such party
- 18 whether and on what terms to settle the action;
- 19 (4) in a workers' compensation case, an employee or agent of any party that is a governmental entity
- 20 who is not such party's outside counsel or Attorney General's counsel responsible for the case and
- 21 who has the authority to decide on behalf of such party and on what terms to settle the action.
- 22 (5) when the governing law prescribes that the terms of a proposed settlement may be approved only
- 23 by a Board, an employee or agent who is not such party's outside counsel or Attorney General's
- 24 counsel responsible for the case and who has the authority to negotiate on behalf of and to make a
- 25 recommendation to the Board. Because G.S. 143-295 provides the Attorney General with settlement
- 26 authority on behalf of governmental entities and agencies for state tort claims, an employee or agent
- 27 of the named governmental entity or agency is not required to attend the mediated settlement
- 28 conference; the Attorney General shall attempt to make an employee or agent of the named
- 29 governmental entity or agency in a state tort claim available via telecommunication, and mediation
- 30 shall not be delayed due to the absence or unavailability of the employee or agent of the named
- 31 governmental entity or agency.
- 32 (6) The counsels of record; provided, that appearance by counsel does not dispense with or waive the
- 33 required attendance of the parties listed in Subparagraphs (1) through (4);
- 34 (7) a representative of each defendant's primary workers' compensation or liability insurance carrier or
- 35 self-insured that may be obligated to pay all or part of any claim presented in the action. Each carrier
- 36 or self-insured shall be represented at the conference by an officer, employee or agent who is not
- 37 such party's outside counsel and who has the authority to decide on behalf of the carrier or self-

1 insured whether and on what terms to settle the action, or who has been authorized to negotiate on  
2 behalf of such carrier or self-insured and can communicate during the conference with persons who  
3 have such decision making authority; and

4 (8) by order of the Commission, other representatives of parties, employers or carriers, who may be  
5 obligated to pay all or part of any claim presented in the action and who are not required to attend  
6 the conference pursuant to Subparagraphs (1) through (6) of this Rule, if the Commission determines  
7 that the representative's attendance is necessary for purposes of resolving the matters in dispute in  
8 the subject action. Any employer or carrier who may be obligated to pay all or part of any claim  
9 presented in the action and who is not required to ~~physically~~ attend the mediated settlement  
10 conference pursuant to Subparagraphs (1) through (6) of this Rule or by Commission orders, may  
11 attend the conference if the employer or carrier elects to attend. If, during the conference, the  
12 mediator determines that the ~~physical~~ attendance of one or more additional persons is necessary to  
13 resolve the matters in dispute in the subject action, the mediator may recess the conference and  
14 reconvene the conference at a later date and time to allow the additional person or persons to  
15 ~~physically~~ attend.

16 (b) Any party or person required to attend a mediated settlement conference shall ~~physically~~ attend the conference  
17 until an agreement is reduced to writing and signed as provided in Paragraph (e) of this Rule, or until an impasse has  
18 been declared. ~~Any such party or person may have the physical attendance requirement excused or modified by~~  
19 ~~agreement of all parties and persons required to attend the conference and the mediator, or by order of the Commission~~  
20 ~~in the interests of justice upon motion of a party and notice to all parties and persons required to attend the conference.~~  
21 Attendance shall mean physical in-person attendance whenever the mediation rules approved by the North Carolina  
22 Supreme Court that are in effect, either temporarily or permanently, for use in the Superior Court division require  
23 physical in-person attendance. During any time that attendance means physical in-person attendance, any party or  
24 person, including the mediator, may have the physical in-person attendance requirement excused or modified by  
25 agreement of all parties and persons, including the mediator, required to attend the conference, or by order of the  
26 Commission in the interests of justice upon motion of a party and notice to all parties and persons, including the  
27 mediator, required to attend the conference. Attendance shall mean attendance using remote technology whenever the  
28 mediation rules approved by the North Carolina Supreme Court that are in effect, either temporarily or permanently,  
29 for use in the Superior Court division require attendance through the use of remote technology. During any time that  
30 attendance means attendance through the use of remote technology, any party or person, including the mediator, may  
31 have the remote technology attendance requirement excused or modified by a agreement of all parties and persons,  
32 including the mediator, required to attend the conference, or by order of the Commission in the interests of justice  
33 upon motion of a party and notice to all parties and persons, including the mediator, required to attend the conference.  
34 All parties and persons, including the mediator, shall comply with all public health and safety requirements set forth  
35 in the mediation rules approved by the North Carolina Supreme Court that are in effect, either temporarily or  
36 permanently, for use in the Superior Court division.

1 (c) In appropriate cases the Commission or the mediator, with the consent of the parties, may allow a party or  
2 insurance carrier representative who is required to physically attend a mediated settlement conference **in person** under  
3 this Rule to attend the conference by telephone, conference call, speaker telephone or videoconferencing; provided  
4 that, the party or representative so attending shall bear all costs of such telephone calls or videoconferencing, the  
5 mediator may communicate directly with the insurance representative with regard to matters discussed in mediation,  
6 and the mediator may set a subsequent mediated settlement conference at which all parties and representatives shall  
7 physically attend **the mediated settlement conference in person, subject to the requirements and provisions of**  
8 **Paragraph (b) of this Rule.** The failure to properly appear by telephone or videoconferencing in accordance with this  
9 Paragraph shall subject the responsible party(ies) or representative(s) to sanctions pursuant to Rule .0105 of this  
10 Subchapter.

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

16 (e) Finalizing Agreement. If an agreement is reached in the mediated settlement conference, the parties shall reduce  
17 the agreement to writing, specifying all terms of the agreement that bear on the resolution of the dispute before the  
18 Commission, and shall sign the agreement along with their counsel. The parties may use IC Form MSC8, Mediated  
19 Settlement Agreement, or MSC9, Mediated Settlement Agreement – Alternative Form, for this purpose. Execution by  
20 counsel of a mediated settlement agreement for an employer or carrier who does not physically attend the mediated  
21 settlement conference shall be deemed to be in compliance with this Rule and 11 NCAC 23A .0502. By stipulation of  
22 the parties and at the parties' expense, the agreement may be electronically or stenographically recorded. All  
23 agreements for payment of compensation shall be submitted for Commission approval in accordance with 11 NCAC  
24 23A .0501 and .0502.

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

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13

*History Note: Authority G.S. 97-80(a),(c); 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. \_\_\_\_\_.*